01-1899

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April 1, 2002

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Hand Delivered
Ms. Cornelia G. Clark
Clerk of Court
Wisconsin Supreme Court
110 E. Main Street #215
Madison, WI 53701-1688

Re: *Board of Regents v. Wisconsin Personnel Commission*
Brenon v. Wisconsin Personnel Commission
Appeal No. 01-1899

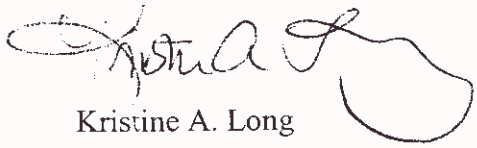
Dear Ms. Clark:

The Wisconsin Supreme Court recently certified this case from the District IV Court of Appeals. Please take notice that the Wisconsin Personnel Commission will not be filing additional briefs in this matter and will rely upon its briefs filed in the Court of Appeals. Enclosed are 17 copies of the brief filed by the Personnel Commission with the Court of Appeals, per the Supreme Court's order accepting certiorari.

It is my understanding that the other parties to this matter, University of Wisconsin Milwaukee, represented by the Department of Justice, and Dale Brenon, represented by Catherine Faught of Gutglass, Erickson, Bonville, Seivel & Falkner, S.C., also plan on relying upon the briefs filed with the Court of Appeals. Accordingly, after you have received letters from counsel for all parties, please schedule this matter for oral argument.

Sincerely,

HURLEY, BURISH & MILLIKEN, S.C.



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01-1899

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner-Respondent,

v

99-CV-2959

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent-Respondent-Co-Appellant,

DALE R. BRENON,

Appellant.

Case No. 01-1899

DALE R. BRENON,

Petitioner-Appellant,

00-CV-661

v

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent-Respondent.

BRIEF OF RESPONDENT-RESPONDENT-CO-APPELLANT STATE OF WISCONSIN PERSONNEL COMMISSION

Appeal from the circuit court for Dane County, Michael Nowakowski, Judge.

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STATEMENT OF ISSUE PRESENTED

1. Did the Wisconsin Personnel Commission erroneously exercise its discretion during the hearing on remedy when it refused to admit the after-acquired evidence of Brenon's unauthorized removal of documents from University of Wisconsin-Milwaukee (UWM), which UWM contended was an independent ground for termination?

   Trial Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Personnel Commission does not request oral argument as the briefs fully present and meet the issues on appeal.

The Personnel Commission requests publication of the decision in this case. Following the United States Supreme Court's decision in ***McKennon v. Nashville Banner Publishing Co.,*** 513 U.S. 352, 362 (1995), no published Wisconsin case has addressed whether after-acquired evidence justifying termination is admissible in proceedings on remedy for a civil service employee who successfully challenged a termination. This is an issue which the Commission and trial courts are likely to address in the future. A published case on this issue would provide guidance for other civil service remedy proceedings.

STATEMENT OF THE CASE

The appeals in this case arise out of the decision by the University of Wisconsin-Milwaukee ("UWM") issued February 9, 1996 to terminate the employment of Sergeant Dale R. Brenon ("Brenon"). UWM terminated Brenon, who had been a police officer with UWM's police force since 1974, following a ten-day suspension. [R13:1308] UWM alleged Brenon committed inappropriate conduct on the job, including the retelling of racially offensive jokes to co-workers. [R13:1308-09]

Brenon made a timely appeal of his suspension and termination to the Wisconsin Personnel Commission ("Commission"). [R13:1044]. Following a hearing on the merits, the Commission held that Brenon's ten day suspension violated due process because UWM failed to afford Brenon a pre-suspension hearing. [R13:831-32] While finding Brenon's later conduct warranted some discipline, the Commission modified the termination to a ten-day suspension. [R13:850] With respect to UWM's decision to terminate Brenon, the Commission concluded that while UWM established just cause for disciplinary action, there was not just cause for termination where UWM failed to present evidence sufficient to establish two of its three principal allegations of misconduct. [R13:847] Accordingly, the Commission modified the termination to a suspension of ten days. [R13:850].[1]

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1 Following the decision on liability, Brenon filed a motion for attorneys' fees and costs. [R13:728]. The Commission denied the request, stating that a meeting between Brenon and his supervisor in December prior to the ten day suspension had "enough of the attributes of a sufficient due process proceeding to support that [UWM] has a reasonable basis in law and fact for contending that the just cause standard had been met in this regard." [R13:714]. With respect to the discharge, the Commission concluded that it was "reasonable for [UWM] to have relied upon the representations by [Brenon's] co-workers to the effect that he was continuing to engage in the type of

The proceedings were bifurcated, so that Brenon's remedy remained to be addressed. [R13:1114]. On April 8, 1998[2], while the proceedings on remedy were pending, UWM filed a replevin action against Brenon to recover UWM documents in Brenon's possession. [R:13: 42] UWM alleges that it found out that Brenon had removed these documents at his deposition on June 24, 1996, conducted during the discovery phase of the disciplinary portion of the appeal. [R13:41].

Brenon moved for reinstatement, which was opposed by UWM. [R13:709] In UWM's submission to the Commission on July 20, 1998 it stated:

> In addition, the State of Wisconsin has a separate legal action pending against Brenon. Because of the circumstances of that litigation, his presence in the workplace would be disruptive and cause irreparable harm to the university. After Brenon was terminated, it was brought to my attention that during his employment, he very likely had copied and removed documents from the workplace containing confidential student and employee information which he had no right to remove. Informal attempts to convince him to return all copies of such documents were unsuccessful. In order to protect the privacy of individuals named in said actions in this regard, the State of Wisconsin has commenced a replevin action in Milwaukee County Circuit Court.
>
> . . . .
>
> *If ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation,*

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behavior cited as the basis for his previous discipline." [Id.] The Commission also concluded that consideration of termination by UWM was appropriate as the next step in the progressive discipline process. Accordingly the Commission denied Brenon's request for costs and fees. [Id].

2 The State originally filed a replevin action in small claims court on July 8, 1997. The small claims action was dismissed on procedural grounds and re-filed in circuit court in April, 1998. [R13:42]

> *possibly resulting in disciplinary action against him*, for unauthorized possession of university property with regard to the records issue. This would unnecessarily complicate all pending matters. In the interests of judicial efficiency the *parties should be permitted to pursue the replevin action and the appeal process, accepting that an order to remit backpay may result*. [Emphasis added.]

[R13:183-84] UWM did not allow Brenon to return to work. [R13:181]

On September 15 and 24, 1998, UWM submitted briefs to the Commission on calculation of back pay [R13:385, 479], and participated in conference with the Commissioner on April 28, 1999 to discuss the format for the remedy proceedings. Both parties agreed to a statement of issues for the upcoming hearing: (1) What is the sum of Appellant's back pay and other credits? (2) What is the sum of the respondent's mitigating damages and setoffs? And (3) What is the total sum of appellant's remedy? [R13: 248] At no time did UWM's counsel raise the issue of after-acquired evidence as a mitigating factor for calculating back pay. [R13:185].

In a memo to Brenon's counsel dated May 14, 1999 regarding possible settlement and what process would be followed if Brenon was restored to his job, UWM's counsel stated:

> After the final decision we also intend to reinstate your client and initiate the discipline process because of his gross violation of the records policies.

[R13:207]

The matter was not settled and proceeded to a hearing on remedy on May 18, 1999. [R13:1114] During the hearing, UWM attempted to elicit evidence regarding the removal of UWM documents by Brenon. [R13:1136] Brenon objected on relevance grounds. [R13:1137]

For the first time in the proceedings, UWM contended that the removal of documents was "after-acquired evidence" relevant to the issue of back pay. [R13:1137-38] It argued that UWM would have terminated Brenon in 1996, following UWM's discovery that Brenon had removed UWM documents from the workplace without authorization, and that this "after-acquired evidence" would have stopped the accrual of back pay as of 1996. [Id.] Commissioner Donald R. Murphy sustained Brenon's objection to the evidence without explanation. [R13:1141-42]

Thereafter UWM objected to the proposed decision and order of Commissioner Murphy, contending that it was error to prevent UWM from presenting "after-acquired evidence" on the issue of back pay. [R13:210] UWM argued that under ***McKennon v. Nashville Banner Publishing Co.,*** 513 U.S.352, 362 (1995), evidence acquired by an employer after an employee is terminated, revealing wrong-doing by the employee prior to termination, goes to remedy; the back pay period should be limited to the date of the unlawful discharge to the date the new information was discovered. [R13:212-13]

In the briefing that followed, Brenon contended that a violation of his due process rights would occur if UWM was allowed to present the after-acquired evidence. [R13:196-205] Brenon noted that the parties had been actively litigating the issues of the case for three years and the questioning at the remedy hearing was the first time that the issue was raised by UWM. [R13:197]

On September 1, 1999, the Commission concluded that the ruling to exclude the after-acquired evidence was proper. [R13:183] While recognizing that UWM's actions informed Brenon that it considered the removal of documents a serious matter, the Commission held that there was no prior notice from UWM that it would be raising after-acquired evidence as an issue in the remedy portion of the case to reduce back pay. Rather, UWM's actions were consistent that instead it

anticipated a new disciplinary action against Brenon if he was ultimately reinstated. [R13:184] The Commission also rejected UWM's contention that Brenon's lack of notice could have been remedied by a continuance. The Commission noted that UWM did not move for a continuance at the hearing, and that due to the long and complex procedural history of the case, further delay was not indicated. [R13:186]

On September 9, 1999 Brenon conceded all issues in the replevin action. [R13:95-96] On September 29, 1999 he returned ten boxes of documents to UWM which were removed during his employment. [R13:96]

On October 22, 1999, UWM moved the Commission for reconsideration of its decision on the after-acquired evidence, citing the new evidence obtained through return of the ten boxes of documents. [R13:34-36] The Commission denied this motion by its final order issued on November 1999. [R13:10-20] The Commission held that although UWM was now aware of ten boxes of documents rather than one, UWM had contended in its earlier briefing that even the one box justified Brenon's termination. Therefore, the newly-discovered boxes did not constitute a material difference in the Commission's decision. Finally, the Commission held that the after-acquired evidence doctrine of ***McKennon*** should not be applied in the case before it, which involved the appeal of a discharge under the civil service code. The Commission analogized this case to ***State ex rel. Tracy v. Henry,*** 219 Wis. 53, 262 N.W. 222 (1935), because ***Tracy*** did not allow what would in effect be retroactive discharge. [***Id.***]

The circuit court, Judge Michael Nowakowski presiding, reversed the decisions of the Commission relative to the back pay issue. Judge Nowakowski held that ***Tracy*** did not address or decide whether the after-acquired evidence doctrine was applicable to remedy proceedings for a wrongly discharged public employee. [R24:23] He contended that ***Tracy*** applied only to defeat reinstatement of a civil service employee

following a subsequent discharge for valid reasons. [R24:23] Judge Nowakowski also rejected the Commission's argument that ***McKennon*** was inapplicable because it involved a private, rather than public, employer, stating that it was a "difference without significance." [R24:24] The court rejected the Commission's justification that unfair surprise supported exclusion of the evidence. While the court deferred to the Commission's finding of fact that Brenon was surprised and would have been prejudiced had the theory of after-acquired evidence be allowed to proceed, the court concluded that the Commission failed to engage in the balancing test of ***Magyar v. WHCLIP***, 211 Wis.2d 296, 303-04, 564 N.W.2d 766 (1997). [R24:28] It held that this case required a determination of whether the surprise was unfair and whether that unfair surprise outweighed the probative value of the evidence. [R24:26-27] The court held that while the Commission "erroneously concluded that the after-acquired evidence was not material or relevant, it failed to note in any way the significance of the evidence on the issue at stake." [R24:27]

The Commission appeals the trial court's decision.

Other facts will be discussed in the argument as necessary.

ARGUMENT

I. STANDARD OF REVIEW

The court of appeals reviews the administrative agency's decision rather than that of the circuit court. ***Currie v. DILHR,*** 210 Wis.2d 380, 386, 565 N.W.2d 253, 256 (Ct.App.1997).

A. Admission Of Evidence Is Within The Discretion Of The Commission

The admission of evidence lies within the sound discretion of the Commission. ***See J.I. Case Co. v. Labor and Industry Review Comm'n,*** 118 Wis.2d 45, 48, 346 N.W.2d 315, 317 (Ct. App. 1984); ***State v. Pepin,*** 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct.App.1982). An appellate court will not reverse a discretionary determination if the record shows that discretion was exercised and the appeals court can perceive a reasonable basis for the decision. ***Prahl v. Brosamle,*** 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct.App.1987).

Generally, appellate courts will look for reasons to sustain discretionary decisions. ***Schauer v. DeNeveu Homeowners Ass'n, Inc.,*** 194 Wis.2d 62, 71, 533 N.W.2d 470, 473 (1995). Decisions may be sustained even though the reasoning may have been erroneous or inadequately expressed. ***Id.*** "Whether the ground assigned by the trial judge . . . is correct is immaterial if, in fact, the ruling is correct and the record reveals a factual underpinning that would support the proper findings." ***Id.***

A reviewing court does not test a lower court's discretionary rulings by some subjective standard, or even by the sense of what might be a "right" or "wrong" decision; the court's ruling will stand unless "no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***State v. Jeske,*** 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct.App.1995).

B. The Personnel Commission's Decisions On Issues of Law Are Entitled To Deference

The legal justification for the exclusion of evidence presents involve applications of a legal standard to a set of facts, which present issues of law. See ***Eastman v. City of Madison,*** 117 Wis.2d 106, 112, 342 N.W.2d 764, 767 (Ct. App. 1983).

When an agency has interpreted a provision of law, the court must review this interpretation according to § 227.57(5), Stats., which states:

> 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 to the agency for further action under a correct interpretation of the provision of law.

Section 227.57(5), Stats. (1997-98). If the court does not find any grounds for setting aside, modifying, or remanding the agency action, it must affirm the agency's decision. Wis. Stat. §227.57(2) (1997-98).

When reviewing questions of law, the court is not bound by an administrative agency's conclusions. ***Kelley Co., Inc. v. Marquardt,*** 172 Wis. 2d 234, 244, 493 N.W. 2d 68 (1992). However, courts have applied three levels of deference to the conclusions of law and statutory interpretation in agency decisions. ***Id.*** First, 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." ***Id.*** Second, 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.*** Third, if the case is clearly one of first impression for the agency and the agency lacks expertise or

experience in determining the question presented, *de novo* review is applied. ***Id.,*** 172 Wis.2d at 245.

In any event, "[a]lthough this court is not bound by an agency's conclusion of law, we hesitate to substitute our judgment for that of the agency on a question of law if the agency's conclusion has a rational basis." ***American Motors Corp. v. LIRC,*** 119 Wis.2d 706, 710, 350 N.W.2d 120, 122 (1984). "While the courts are not bound by the department's interpretation of the statute, the department's interpretation is entitled to considerable weight if the interpretation is reasonable and does not conflict with the legislative purpose, the legislative history, prior court decisions or constitutional prohibitions." ***Robert Hansen Trucking, Inc. v. LIRC,*** 126 Wis.2d 323, 332, 377 N.W.2d 151, 155 (1985).

The Commission is not aware of prior decisions by the Commission addressing the use of after-acquired evidence to reduce damages in the civil service context. However, the Commission does have experience examining due process interests involved in appeals of disciplinary actions and interpreting Supreme Court precedents in this area. ***See McCready v. Dept. of Health and Social Services,*** 85-0216-PC and 85-0217-PC, 12/11/86. Accordingly, a mid-level standard of review is appropriate for those issues of law involved.

II. THE PERSONNEL COMMISSION'S DECISION TO EXCLUDE UWM'S AFTER-ACQUIRED EVIDENCE WAS A PROPER EXERCISE OF DISCRETION

The focus here must be on the functional attributes of what occurred, not the nominal labels which were used. UWM discharged Brenon, effective February 11, 1996, in connection with some inappropriate jokes Brenon told, but following Brenon's appeal to the Personnel Commission, the discharge was modified to a ten-day suspension.

Further proceedings were contemplated regarding an appropriate remedy for Brenon. In the interim, UWM twice advised Brenon that if it were required to restore him to employment, it would commence disciplinary proceedings against him that could or would lead to another discharge, this time for the act of removing documents from the workplace discovered after his termination.

After the Commission decided on February 12, 1998, to overturn and modify the discharge, which it deemed disproportionate with regard to the misconduct involved, this kind of decision normally would have generated an order remanding the matter to UWM with instructions to take action consistent with the decision--i. e., to restore Brenon to his position of employment with back pay from the date of the discharge to the date of the restoration. See §§ 230.43(4), 230.44(4)(c), Stats.[3] However, this did not occur because the

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230.43

(4) RIGHTS OF EMPLOYEE. If an employee has been removed ... from ... any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission ... the employee shall be entitled to compensation therefore from the date of such unlawful removal ... at the rate to which he or she would have been entitled by law but for such unlawful removal . . . Interim earnings or amounts earnable with reasonable diligence by the employee shall operate to reduce back pay

Commission retained jurisdiction over the case to resolve the question of what remedy was appropriate.

Subsequently, at the hearing on remedy held on May 18, 1999, UWM attempted to introduce evidence with regard to the allegedly purloined documents on the theory that Brenon's back pay remedy should be limited from the date of the overturned discharge (February 11, 1996) to the date it learned about the allegedly purloined documents (June 24, 1996) during the deposition of appellant. UWM claims this cutoff in back pay would be appropriate under ***McKennon v. Nashville Banner Pub. Co.,*** 513 U.S. 352 (1995), the equal opportunities case which authorized the use of after-acquired evidence to limit the plaintiff's remedy, since UWM would have discharged Brenon on the latter date had it known about the documents at that time. The Commission sustained an objection to this evidence on a number of grounds: due process, lack of compliance with the civil service code (Subchapter II, Chapter 230, Stats.), and lack of notice and surprise to Brenon.

This Court should affirm the Commission's decision because it was within the Commission's discretion to bar the

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otherwise allowable. Amounts received by the employee as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the employee and immediately paid to the unemployment reserve fund, or, in the case of a welfare payment, to the welfare agency making such payment. The employee shall be entitled to an order of mandamus to enforce the payment or other provisions of such order.

230.44 Appeal Procedures.

(4)(c) After conducting a hearing . . . under this section, the commission . . . shall either affirm, modify or reject the action which is the subject of the appeal. If the commission . . . rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision.

evidence pursuant to due process, civil service requirements and ***State ex rel. Tracy v. Henry,*** 219 Wis. 53, 262 N.W. 222 (1935), and because of the lack of notice and unfair surprise to Brenon if the evidence were admitted.

A. The Commission's Interpretation Of Due Process, Civil Service Requirements And State ex rel Tracy Had A Reasonable Basis, And Thus Supported Its Exercise Of Discretion.

Commissioner Murphy denied UWM's attempt to introduce evidence relating to the documents as relevant to the issue of mitigation.[4] The Commission affirmed this decision, holding,

> To allow this evidence would have unfairly required appellant to have tried to address a significant new issue in this case–in a nutshell, whether he had violated work rules by having improperly removed documents from the workplace, and whether such conduct would have led to his discharge in June 1996–without any prior notice that it would be raised in this proceeding.

[R 13:183] Effectively, the Commission concluded that UWM's attempt to introduce this evidence contemplated a new retroactive "termination" proceeding based on new facts which had not been litigated in the prior hearing.

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4 UWM contended that once it discovered that Brenon had removed these confidential documents from the workplace, it would have terminated Brenon. Therefore UWM would have argued that backpay for Brenon could only extend from the date of discharge to the discovery of the documents (February 11, 1996 through June 24, 1996). [R 13:212-213]

1. Prior Precedent Would Characterize Admission Of The Evidence As A Constructive Discharge Which Would Violate Civil Service and Due Process Requirements

The admission of the after-acquired evidence effectively operates as a second termination of Brenon. Wisconsin civil service law has long recognized the concept of constructive disciplinary transactions--i.e., transactions that nominally do not fit the statutory definition of a particular disciplinary action, but have the force and effect of the statutory action–and requires those constructive discharges comply with the statutes on regular discharges of civil service employees. Admission of the evidence in the proceedings against Brenon would not have complied with the statutory and constitutional requirements for termination of civil service employees.

The principle of constructive termination is illustrated by the supreme court's decision in ***Watkins v. Milwaukee Co. Civil Service Commission,*** 88 Wis. 2d 411, 420, 276 N. W. 2d 775 (1979). In that case, an employe had resigned his position. He argued that his resignation should be considered subject to the procedural requirements of s. 63.10, Stats.,[5] notwithstanding that the transaction on its face was not a discharge, and thus did not fall within the statutory requirements for a discharge process. The court held that the allegedly coerced resignation should be treated as a discharge vis-à-vis s. 63.10, Stats.:

> Petitioner urges the court to construe coerced resignations as a form of discharge, which would invoke the procedural mechanisms of sec. 63.10, Stats. Respondents argue that the provisions of sec. 63.10 apply only where charges are filed and that charges are not required to be filed where, as here, the employee resigned.

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5 This section provides for notice of dismissal to the employe and a hearing before the civil service commission.

> Sec. 63.10, Stats., provides procedures designed to ascertain through an impartial hearing whether the accusations brought against an employee demonstrate his unfitness for employment. The statute reflects the legislature's determination that the employee has a legitimate interest in not being "wrongly deprived of his or her livelihood and not suffering injury to reputation on the basis of charges which might prove unfounded."
>
> Resignation obtained by coercion poses serious possibilities of abuse. "[A] separation by reason of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency." Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system. The strength of this policy is underscored by the language of sec. 63.04, Stats., which provides that "no person shall be . . . removed from the classified service in any such county [which has adopted the civil service system], except in accordance with the provisions of said sections [secs. 63.01 to 63.16, inclusive]."

Watkins, 88 Wis. 2d at 420, 276 N. W. 2d 775 (citations omitted) (brackets and emphasis in original).

The Commission and its predecessor body, the Personnel Board, have long recognized that personnel transactions which have the force and effect of a disciplinary action can be cognizable as such. See, e. g., ***Juech v. Weaver,*** Wis. Pers. Bd., 1/13/72 (a nominal reclassification was considered in legal effect a constructive demotion, where the employer first reassigned all of the employe's supervisory duties and then effected a downward reclassification); ***Mirandilla v. DVA,*** 82-0189-PC, 7/21/83 (reassignment of duties was considered in legal effect a constructive reduction in base pay cognizable under §230.44(1)(c), Stats., where the underlying transaction caused a reduction in the employee's salary and the duties in question were essentially non-existent and always had been a mere ploy respondent had used to augment the employe's salary); ***Jacobsen v. DHSS,*** 91-0220-PC, 10/16/92 (where respondent told appellant he could not return to work before getting counseling and treatment, and that he would have to

utilize accumulated paid leave time until that occurred if he wanted to continue to get paid, the employe was effectively suspended and his appeal was cognizable under §230.44(1)(c), Stats.).

In ***Rodgers v. DOC,*** 98-0094-PC, 1/27/99, the Commission discussed this body of precedent in a case involving an appeal of a nominal written reprimand, which as such was not appealable under s. 230.44(1)(c), Stats. (providing for appeal of "a demotion, layoff, suspension, discharge or reduction in base pay.") The written reprimand included the following:

> This letter shall serve as your notice of a written reprimand equal to and carrying the weight of a one day suspension under the Fair Labor Standards Act (FLSA). Although these work rule violations warrant a one day suspension, as an FLSA exempt employee, you cannot be suspended for less than a full week, (5 work days), increment.
>
> This disciplinary action is a result of your violation of the following Department Work Rules . . .

Rodgers, at p. 2. The Commission held the employee had the right to appeal the letter under § 230.44(1)(c), Stats.:

> The overriding principle that emerges from these and other cases is that it is not dispositive for appeal purposes whether a personnel transaction fits or does not fit within the definition of a particular type of transaction. <u>The Commission must examine the practical effect the transaction has on the employee's employment status, in the context of the employer's intention in effecting the transaction,</u> and the policy factors which underlie the statutory framework of the civil service, to determine whether the transaction partakes more of the nominal category of personnel transaction-e.g., a reprimand-or more of the more serious category-e. g., a suspension.
>
> When an employe is given a disciplinary suspension per se, there are three obvious impacts. First, the employe is relieved of the performance of his or her duties. Second, he or she loses the opportunity to earn wages during the period of the suspension.

> Third, the employe's disciplinary record is blemished, and this record may move the employe "up the ladder" in terms of progressive discipline in connection with any future disciplinary action.
>
> In the instant case, the first and second impacts did not occur, but it is uncontroverted that appellant was subject to the third effect. Respondent could hardly have made this clearer in its letter to appellant:
>
> > This letter shall serve as your notice of a written reprimand equal to and carrying the weight of a one day suspension under the Fair Labor Standards Act (FLSA). Although these work rule violations warrant a one day suspension, as an FLSA exempt employee, you cannot be suspended for less than a full week, (5 work days), increment. (emphasis added)
>
> The Commission has found, based on respondent's explicit acknowledgment in its brief in support of the motion to dismiss, that: "[r]espondent considered the disciplinary letter to be a one-day suspension for purposes of applying progressive discipline. Further violations of a similar nature, accordingly, would be subject to discipline more severe than a one-day suspension." Finding, #4, p. 2, above. Respondent's obvious intention was to discipline appellant, and to do so in a manner that would be as close as possible to a one day suspension without jeopardizing appellant's exempt status under the FLSA. While the discipline imposed resulted in neither any interruption in appellant's performance of his duties nor any interruption in his salary, it constitutes not only a blemish on his disciplinary record that could negatively affect his career in general, but also a blemish that, in the case of further disciplinary action, predictably will result in an increased disciplinary penalty over what he would receive if respondent were not treating the suspension as equivalent to a one-day suspension. Thus the discipline imposed in this case had a significantly more severe disciplinary impact on appellant's employment status than would have been the case with a mere reprimand.

Id., 6-7 (emphasis added; footnote omitted).

In the case sub judice, if UWM were successful in proceeding with its attempt to show that it had sufficient

evidence of misconduct as of June 24, 1996, to have discharged Brenon effective that date, this would have had the same force and effect on Brenon's employment status as a discharge. When UWM tried to proceed in this fashion at the remedy hearing held on May 18, 1999, Brenon's legal status was that the Commission had ruled that his discharge for the initial misconduct (regarding the inappropriate jokes) was improper and should be reduced to a suspension. The only reason he had not been restored to his previous employment, with back pay (minus setoffs) to the date of restoration[6] was that the Commission had retained jurisdiction over his appeal to resolve the question of the amount of the back pay to which he was entitled. Thus he had at that time what would become under s. 230.43(4), Stats., a legally enforceable right to restoration and back pay to the date of the restoration as soon as the Commission made a decision on the amount of his back pay and had entered a final decision and order.

As a restored employee, Brenon could not have been discharged from state service by UWM unless UWM complied with the following requirements:

1) UWM was constitutionally required under the due process clause to provide notice of the impending action and a hearing involving the employee and management prior to the imposition of such an action. ***See Cleveland Board of Education v. Loudermill,*** 470 U. S. 532 (1985); ***Hanson v. Madison Service Corp.,*** 150 Wis. 2d 828, 846, 443 N. W. 2d 315 (Ct. App. 1989). (Discussed, ***supra*** at II.A.2.)

2) Section 230.34(1)(b), Stats., requires that UWM "at the time of any action under this section, furnish to the employee in writing the reasons for the action." Section 230.06(1)(b)Stats., requires that removal of employees from the classified service and the discipline of employees are subject to the requirements

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6 See discussion, ***supra***, p. 22 , et.seq., of the effect of secs. 230.43(4) and 230.44(4)(c), Stats.

of the civil service code. Section 230.15(3), Stats., requires that the removal of employees from the classified service occur as provided by the civil service code. (Discussed, ***supra*** at II.A.3.)

Both of the above requirements would have been circumvented had UWM been allowed to interject at the remedy hearing whether UWM would have discharged Brenon effective June 24, 1996, when it first learned of the alleged purloining of documents. UWM would also avoid the requirement imposed by s. 230.43(4), Stats., of compensating Brenon for the period of time his employment status was that of an improperly discharged ex-employee.

The effect on Brenon of the admission of after-acquired evidence would be the same as if Brenon had been restored, but back pay limited to the period prior to the discovery of the alleged removal of documents, and then discharged. This would occur without either notice of the reasons for the action pursuant to s. 230.34(1)(b), Stats., or notice of the employer's intent to discharge him and an opportunity to be heard by the employer prior to the action taking effect pursuant to ***Loudermill***. Furthermore, this would have same effect on him as a retroactive discharge, which can not be done under the civil service code.

Because the Commission's conclusion was based upon a reasonable interpretation of cases analyzing due process, the civil service code, and the Wisconsin Supreme Court's decision ***State ex rel. Tracy v. Henry,*** 219 Wis.53, 262 N.W. 222 (1935), the evidence was properly excluded.

2. Admission of the Evidence Would Have Violated Constitutional Due Process

The Commission's decision to exclude the evidence due to lack of notice effectively recognized that constitutional due process concerns for public employees precluded the evidence. The United States Supreme Court held in ***Cleveland Bd. of Education v. Loudermill,*** 470 U.S.532 (1985), that due process

requires at least a limited pre-termination hearing prior to the discharge of an employee who is protected by a "just cause" type restriction on termination under the civil service laws.[7]

Loudermill held that "[a]n essential principle of due process is that a deprivation of . . . property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" ***Id.*** at 542. This hearing has two components: (1) an investigation where the employe is allowed to present his or her side of the story in an attempt to clarify the facts, and (2) an opportunity to attempt to influence the decision-maker's exercise of discretionary action prior to the imposition of discipline. ***Id.*** at. 542-3.

While the hearing is required, it need not be elaborate.

> [T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions . . . The tenured public employee is entitled to oral or written notice of the charge against him, an explanation of the employer's evidence, and an opportunity to respond.

Id. at 506.

The Commission held that UWM could not take any disciplinary action without complying with due process; nor could it add additional reasons for discharge after the initial notice of termination, Appellant's ***Loudermill*** hearing and the hearings on the merits before the Commission. [R13:14] The remedy proceeding would become a second termination hearing on new grounds, yet Brenon had not had the opportunity for a pre-termination hearing on this charge before the employer, written notice of the charge or an explanation of the employer's evidence. In ***McKennon*** these issues were not concerns, as the employee was terminated by a private employer not subject to due process requirements.

In its reversal of the Commission's decision, the trial

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7 Wisconsin Civil Service laws allowed Brenon's termination only for "just cause." ***See*** sec. 230.34(1)(a), Stats.

court held that any procedural rights of the employe would be satisfied by consideration of the after-acquired evidence in the proceeding before the Commission:

> It is true that a tenured public employee like Brenon has greater substantive protection from discharge than does an at-will employe like Christine McKennon,[8] but again this difference has no bearing on the rationale for the after-acquired evidence doctrine. Where an original discharge is improper, as it was in ***McKennon*** and was here, the employer, whether public or private, will still have the burden to demonstrate that "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." [footnote and citation omitted] Because of this requirement, civil servants lose no protection when an attempt is made to use the doctrine and at-will employees are provided with a protection to avoid pretextual claims of after-acquired evidence of misconduct.

[R24:25].

The trial court's analysis failed to give deference to the Commission's analysis that ***Loudermill*** requires a pre-termination hearing. The trial court's approach deprives the public employe of the opportunity provided by ***Loudermill*** to attempt to convince the employer not to take the contemplated disciplinary action. ***See Loudermill,*** 470 U. S. at 543 ("some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissal for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect.[citations omitted]).

The Commission's interpretation of ***Loudermill*** is further supported by the Court of Appeals' opinion in ***Hanson v. Madison Service Corporation,*** 150 Wis. 2d 828, 443 N. W. 2d 315 (Ct. App. 1989):

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8 This is a reference to the employe in ***McKennon v. Nashville Banner Pub. Co.,*** 513 U.S. 352 (1995).

> The rights of an employee terminable only for cause, as Hanson was, are considered property rights which may only be abridged pursuant to procedures that are "constitutionally adequate" under the due process clause of the United States Constitution. ***Cleveland Bd. of Education v. Loudermill,*** 470 U. S. 532, 541 (1985). This means that the employee is entitled *to notice and an opportunity to be heard prior to termination* of his or her employment, and the right to post-termination procedures which provide an opportunity to challenge the merits of the discharge. ***Id.*** at 546-48.
>
> * * *
>
> Because employee dismissals may often involve factual disputes, ***Loudermill*** stresses the importance of "some opportunity for the employee to present his [or her] [brackets in original] side of the [story] [brackets in original]"-to present "plausible arguments" on "arguable issues" that "might . . . prevent [] [brackets in original] . . . discharge"-at a point in the process which may represent "the only meaningful opportunity to invoke the discretion of the decision-maker . . ." Id. at 543-44 . . .
>
> But whatever the form and nature of the "hearing," *some opportunity to be heard prior to the discharge is required by Loudermill* and similar cases. And even though Hanson had the right to grieve and seek arbitration at every step along the way to his fifth chargeable accident, it is undisputed that MSC management retained discretion to retain or fire a driver after the fifth accident, and that Hanson had no opportunity to be heard on that decision. Under Loudermill, that is a violation of his pretermination due process rights.

Hanson, 150 Wis. 2d at 836, 846, 443 N.W.2d 315 (emphasis added).

A hearing before this Commission in the context of an appeal of Brenon's original discharge would not give him the opportunity to invoke the discretion of the employer prior to the employer (UWM) finalizing its decision to terminate his employment because of his removal of copies of documents from the workplace. Furthermore, as discussed in the next section, the path sought by UWM does not comply with the

requirements of the civil service code under §§ 230.34(1)(b),[9] 230.06(1)(b),[10] and 230.15(3),[11] Stats.

3. Under ***Tracy v. Henry***, Admission of the Evidence Would Have Violated The Civil Service Code

With regard to the question of compliance with the civil service code, the Commission cited what it believed to be an analogous situation in ***State ex rel Tracy v. Henry,*** 219 Wis. 53, 262 N. W. 2d 222 (1935):

> For the commission to now deny restoration and limit appellant's back pay to the time from the original discharge (February 11, 1996) to the date of the discovery of the missing documents (June 24, 1996) amounts effectively to an unlawful retroactive discharge of the nature involved in Tracy. [Emphasis added.]

[R13:15]. The trial court concluded that the Commission's decision excluding this evidence was based on an improper reading of ***Tracy***, and therefore a mistake of law, and that the Commission's decision constituted an abuse of discretion.

The Commission contends first, that its decision was consistent with Tracy and prior Commission decisions interpreting the effects of constructive discharge, and second, that it also had an independent reasonable basis to have

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9 The appointing authority shall, at the time of any action under this section, furnish the employee in writing the reasons for the action."

10 "An appointing authority shall . . . [a]ppoint persons to or remove persons from the classified service, discipline employees, designate their titles, assign their duties and fix their compensation, all subject to this subchapter and the rules prescribed thereunder."

11 "No person shall be appointed, transferred, removed, reinstated, restored, promoted or reduced in the classified service in any manner or any means, except as provided in this subchapter."

sustained the objection, rooted in UWM's litigation of this matter before the Commission.

In ***Tracy***, the supreme court did not characterize what occurred there as a cutoff in back pay due to the discovery of after-acquired evidence. However, a functional analysis of what occurred there yields an analogy to the instant case that supports the conclusion that UWM's approach here would involve a violation of the civil service code.

In ***Tracy***, the state treasurer attempted to discharge state deputy oil inspectors, without citing any reason. ***Tracy,*** 262 N.W. at 223. The employees filed actions requesting reinstatement to their former positions. ***Id.*** In previous proceedings, the Supreme Court held those discharges illegal. ***See State ex rel. Tracy v. Henry,*** 217 Wis. 46, 258 N.W. 180 (1935) and ***State ex. rel Nelson v. Henry,*** 216 Wis. 80, 256 N.W. 714 (1934).

Following those prior decisions, the state investigated the deputy inspectors as to their honesty, competency, efficiency and ability to perform duties. ***Tracy,*** 262 N.W. at 223. By the time of its answer, the state had completed its investigation of fourteen of the inspectors (referred to in the opinion as "group A"), and contended that there was just cause for discharge of thirteen of the fourteen at the time of their original, illegal discharges, which was stated in letters sent to the employees thirteen to sixteen months following their initial discharges. ***Id.,*** 262 N.W. at 223-24.

The questions presented to the court on appeal were (1) whether these letters constituted legal cause for discharge which would defeat the employees' rights to be reinstated and (2) whether the facts alleged in the letters and a subsequent valid discharge based on those facts could operate retroactively to preclude reinstatement effective as of the time of the initial illegal discharge. ***Tracy,*** 262 N.W. at 225.

The court examined the statutory requirements for an effective discharge, and concluded that even if the subsequent letters constituted effective discharges of deputy oil inspectors,

those discharges could not be effective retroactive to the date of the original, illegal discharge:

> [A]n attempted compliance by furnishing such reasons subsequent to the original illegal discharge *could not become effective as a discharge until after such reasonable time for making an explanation had elapsed and such reasons and explanation had been filed* [12] and, in view of those consequences, it is manifest that a subsequently effective discharge, pursuant to subsequently furnished and filed legal reasons, could not possibly operate retroactively so as to be deemed effective as of the date of the original illegal discharge.

Tracy, 262 N.W. at 225 (emphasis added). The court reinstated the employees, effective retroactive to the date of the initial illegal discharge, through the time and date of the subsequent discharge.[13] ***Tracy,*** 262 N.W. at 226-27.

Like the deputy oil inspectors in ***Tracy,*** Brenon as a state employee was subject to the state civil service statutes (Subch. II, ch. 230, Stats.) and the administrative code, and certain procedures were required by due process to be followed by UWM before Brenon could be terminated. The code provides that termination of an employee may be made "only for just cause." ***See*** § 230.34, Stats.; ***see also*** §§ 230.34(1)(b), 230.06(1)(b), 230.15(3), Stats. As discussed in the preceding section, due process requirement under ***Loudermill*** and its progeny require a pre-termination hearing and other specific procedures. Like ***Tracy,*** any action which would make a termination <u>retroactive</u> would not be in compliance with these procedures.

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12 This was the process required by the civil service statutes at the time.

13 The lower court had held that proper procedure for the employees to challenge the subsequent discharges was to initiate a separate proceeding, and the employees did not appeal that ruling. ***Tracy,*** 262 N.W. at 225. Therefore, the Supreme Court did not address whether the subsequent discharges were valid, and merely considered whether the employees should be reinstated for the period between the initial illegal discharge through the subsequent discharge. ***Id.***

Under the civil service code, no discharge can be effective until the employing agency provides the employee written notice of the action pursuant to s. 230.34(1)(b), Stats. ***Tracy*** directly supports this conclusion. While the civil service code and relevant case law have changed since ***Tracy*** was decided, the framework for disciplinary action remains essentially the same. Prior to taking action to discharge an employee, the employer is still required to provide notice of the charges against the employee and the contemplated discipline, to allow him or her to respond to the charges, and then to provide written notice of the final discharge decision and the reasons therefore. ***See Tracy***, 219 Wis. at 61, 262 N.W. at 225.

The trial court in effect distinguished ***Tracy*** by pointing out that the procedure discountenanced there involved subsequent discharges that had been sought to have been made effective as of the date of the original invalid discharges, while in the instant case, UWM sought to make the subsequent discharge effective not as of the original date of discharge (February 11, 1996), but as of the date of the discovery of evidence of misconduct totally different from the original misconduct (June 24, 1996). The trial court said that

> [T]o apply the after-acquired evidence doctrine to the calculation of Brenon's back pay award would not amount to an "unlawful retroactive discharge" like that in ***Tracy***. In ***Tracy*** what the court found unlawful was the state's effort to make the subsequently discovered valid reasons for discharge retroactive all the way back to the original discharge thereby defeating completely the claim of the employees. That is not what UWM seeks to do here; and if it is successful, that is not the effect that its effort would have.

[R24:24] However, the problem with the employer's actions in both cases is that it attempts to make a discharge effective prior to the date the employer has completed all the requirements for discharge, involving notice of the misconduct and the opportunity for being heard, that legally must precede an effective discharge. While UWM does not seek to go as far back with its discharge as did the employer in ***Tracy***, the legal barriers to its attempted course of action are essentially the same.

Another problem the trial court found with the

Commission's reliance on ***Tracy*** is that "in *Tracy* the state had not been required to restore the employees to their former jobs before discharging them for the after-acquired reasons. The court expressly approved a court order that required no such artificial formalities." [R24:24] Now, it is correct that in ***Tracy*** the employer was not required to physically place the employees back in their jobs before proceeding to discharge them[14] (after first complying with the requirements of the civil service code for discharge). However, in ***Tracy*** the employees were entitled to all the emoluments and incidents of their prior employment up to the point the employer satisfied the legal requirements for discharge:

> As there clearly was no compliance by the defendant in any of the respects prescribed in sec. 16.24(1), Stats., in relation to the petitioners in Group A, up to the time of the alleged discharges, made some thirteen to sixteen months subsequent to the original attempt, the rights of those petitioners to their positions in the state service continued unterminated, as a matter of law, to at least the time of the subsequent discharges. Consequently, by reason of their continuing as state employees until that time, at least, they were certainly entitled to judgment for the issuance of the peremptory writ of mandamus, *to compel the performance by the defendant of all official acts on his part which are necessary to reinstatement, as of the date of their original illegal discharge, as employees in the state civil service, and to enable them to enjoy the rights and emoluments of their positions, including the salary, up to the time of a valid discharge.*

Tracy, 219 Wis. at 61-62 (emphasis added). Thus, although the employees were not physically restored to the possession of their former jobs, they were made whole for the original invalid

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14 This point was specifically addressed in a subsequent related decision, ***State ex rel Tracy v. Levitan,*** 228 Wis. 136, 279 N. W. 620 (1938). The court held that it was not necessary for the employing agency to have restored the employees to the physical possession of their offices in order to implement the second set of discharges, which, unlike the original discharges, complied with the civil service code by providing an adequate statement of the reasons for discharge. The court stated: "The status of an accused person is that of an employee until the effective date of the discharge. . . . The fact that someone else is discharging his duties in the meantime does not affect his status." ***Id.,*** 228 Wis. at 139, 279 N.W. 620.

discharges from the date of the original discharges to the date of the subsequent discharges that complied with the civil service code.

Unlike ***Tracy,*** UWM never implemented a subsequent discharge procedure after it determined there was an independent cause for discharge separate from the cause (or lack thereof) that obtained with regard to the initial discharge. But similarly, while Brenon is not necessarily entitled to the physical possession of his previous position, he is entitled to the rights and emoluments of his position, i.e. compensation for salary and benefits, up to the time of a valid discharge, if one should occur. Because one had not, the Commission properly excluded the evidence.

These concerns of prior notice and just cause are absent in ordinary employment situations in Wisconsin, where employees are at-will and can be fired without notice. ***See Strozinsky v. School Dist. of Brown Deer,*** 2000 WI 97, 237 Wis.2d 19, 38, 614 N.W.2d 443, 452 (2000).

In light of this, the Commission's decision that ***McKennon v. Nashville Banner Publishing Co.,*** 513 U.S. 352 (1995) was not controlling is rational and reasonable. In ***McKennon,*** the employer had the right to terminate at any time, for any reason, as long as it was not a prohibited reason such as age. ***See Strozinsky,*** 237 Wis.2d at 38, 614 N.W.2d at 452. The employer was not required to provide prior notice to the employee, a pre-termination hearing, or apply any other due process or statutory procedure. Therefore, no procedural or constitutional safeguards were compromised. ***McKennon's*** decision to allow the after-acquired evidence did not consider whether allowing such evidence would violate the employee's right to due process.

With a civil service employee, such as Brenon, due process concerns are always present. ***Tracy*** continues to the be the law in Wisconsin and has not been overruled. Accordingly, the Commission had a rational basis to conclude that the analysis of ***Tracy,*** not ***McKennon,*** controlled, and its decision that after-acquired evidence may not be used to limit damages

if due process would be violated should be affirmed.[15]

B. Even If ***McKennon*** Applied To Render The Evidence Relevant, The Commission's Decision That The Evidence Should Be Excluded Due To Unfair Surprise Was Within Its Discretion

If the Commission was correct in its conclusion that it was improper under the civil service code and the due process clause for UWM to have been allowed to raise the "after-acquired evidence" regarding the improper removal of documents, the Commission's decision must be affirmed. However, even if the Commission's conclusions that the use of this evidence contravened the civil service code and the due process clause were erroneous, this does not mean its ruling to exclude the evidence was erroneous, because the Commission states independent reasons for denying UWM's attempt to introduce this evidence--unfair surprise and lack of notice. On appeal to the trial court, it concluded that although the facts supported the Commission's finding of fact that Brenon was surprised and lacked notice, the Commission should have *sua sponte* continued the remedy hearing to allow Brenon the opportunity to prepare to meet this evidence. [R:24:27-28]

The trial court relied on ***Magyar v. Wisconsin Health Care Liability Ins. Plan,*** 211 Wis.2d 296, 564 N.W.2d 766, 769 (1997). In that case, the supreme court held that a trial court could exclude relevant evidence (as opposed to continuing the hearing to allow the opposing party who had been surprised by the evidence), "if the probative value of the evidence is outweighed by, inter alia, unfair surprise." 211 Wis. 3d at 306.

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15 UWM argues that such a conclusion is unreasonable, because it requires formal termination of an employee who already has been terminated and who is no longer employed by the State. Yet, at the time that the issue came up, UWM itself acknowledged the propriety of that course of action in its letter to the Commission, which stated that a subsequent disciplinary hearing would be necessary. [R13:183-84]. Even after the Commission ruled that Brenon's termination violated due process, UWM refused to reinstate Mr. Brenon. It is not unreasonable for the State to be required to comply with due process.

Accordingly, the question becomes whether the unfair surprise outweighed the probative value, keeping in mind that the test is not whether the court would have excluded the evidence, but whether the Commission erroneously exercised its discretion in addressing the issue. ***Magyar,*** 211 Wis.2d at 304, 564 N.W.2d at 769. As the trial court noted in the instant case, slip opinion, p. 28 [R24:28], a reviewing court should look for reasons in the record to sustain a discretionary administrative decision. ***See Magyar,*** 211 Wis.2d at 305, 564 N.W.2d at 769.

There is ample evidence in the record that supports a determination that the unfair surprise outweighed the probative value of the evidence. The remedy hearing was more than three years following the termination of Brenon. The removal of the documents was discovered by UWM within months of Brenon's termination. Yet following the discovery of this evidence, not only did UWM fail to take any further steps to implement termination proceedings based on this after-acquired evidence, its statements to the Commission and Brenon's counsel assured Brenon's counsel that UWM contemplated that additional termination proceedings would be necessary, and that it would not pursue a termination based on the removal of documents until Brenon was returned to work. Brenon's counsel was justified to rely on these statements in developing his litigation strategy over the following months and then years. This litigation strategy could have been vastly different had Brenon known that his potential for back and front pay could be merely a fraction of what was contemplated.[16] This was especially so for the seventeen months between the initial determination of liability in Brenon's favor and the remedy hearing.

As discussed above, pp. 2-3, prior to the remedy hearing on May 18, 1999, UWM had never raised the after-acquired evidence theory as germane to the remedy inquiry. In fact, on July 20, 1998, UWM explicitly took the position that "[i]f ordered to return Brenon to the workplace at this time, UWM

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16 Had the evidence been allowed, Brenon's back pay award could have been under $18,000, rather than the $159,533.64 the Commission awarded in the absence of the after-acquired evidence. [R13:178, 3954]

would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him, for unauthorized possession of university property with regard to the records issue." [R13:183-4] Further, in a memo to Brenon's counsel dated May 14, 1999, just four days before the remedy hearing, UWM stated: "After the final decision we also intend to reinstate your client and initiate the discipline process because of its gross violation of the records policies." [R13:207] In ***Dane Co. Hospital & Home v. LIRC,*** 125 Wis.2d 308, 371 N.W.2d 815 (Ct. App. 1985), the Court of Appeals considered the parties' actions and the interest in expeditiously proceeding in evaluating the lower court's exercise of discretion in deciding whether to grant a continuance: "DILHR did not abuse its discretion in denying a continuance because the need for a continuance arose from the employer's lack of reparation, and the employee's right to compensation should have been decided expeditiously." ***Id.,***125 Wis. 2d at 316-17.

In the instant case, the problem of lack of notice and surprise to Brenon could have been avoided if UWM had raised the after-acquired evidence issue prior to attempting to introduce evidence at the remedy hearing, rather than having taken the position that it would consider such evidence in a separate discharge proceeding following Brenon's restoration to employment.

In its November 19, 1999 ruling on UWM's motion for reconsideration, the Commission characterized UWM's actions concerning the after-acquired evidence as constituting a "waiver." [R24:4]. The trial court dismissed any application of the concept of waiver, pointing out that UWM had not violated either any express scheduling order or "some ambiguous obligation of disclosure." [R24:29-30.] The Commission contends there was ample evidence in the record to support its conclusion that UWM had waived any right to raise the after-acquired evidence at the remedy hearing, and that the trial court erred in holding there was no basis for the conclusion of waiver.

Swedish American National Bank of Minneapolis v. Koebernick, 136 Wis. 473, 117 N.W. 1020 (1908) , discusses the concept of waiver as follows:

> A waiver is the intentional relinquishment of a known right. A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. And a person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it.

Id., 136 Wis. at 479-80 (citations omitted); ***see also Mansfield v. Smith,*** 88 Wis. 2d 575, 592-93, 277 N.W. 2d 740 (1979).

In the instant case, UWM consistently took the position in communications with Brenon that it would raise the issue of the purloined documents in a new and separate discharge proceeding it would initiate if and when it was required to restore Brenon to the position he had occupied when he was discharged in 1996. Respondent further acted consistent with a conclusion of waiver when it failed to raise the document issue in its filings when this case was before the Commission for determination of the amount of back pay during the period when the parties were submitting that part of the case to the Commission on the basis of documents, and before it had been determined to hold an evidentiary hearing on the question of back pay.

Another factor to be considered here is that Brenon acted to his detriment in reliance on respondent's repeated representations that the document issue would be raised by a subsequent discharge after Brenon's restoration. As discussed above, Brenon neither conducted discovery on this issue nor otherwise prepared to respond to this issue at the remedy hearing. ***See, e.g. Von Uhl v. Trempeleau,*** 33 Wis. 2d 32, 37, 146 N.W. 2d 516 (1966):

> The terms "waiver" and "estoppel" are often not distinguished and used interchangeably. "Waiver" is the voluntary and intentional relinquishment of a known right; intent to relinquish the right is an essential element of

> waiver. "Estoppel," on the other hand, consists of the action or nonaction of one party which induces reliance thereon by another, either in the form of action or nonaction, to his detriment. Further, intent to waive may arise as a matter of law from the conduct of the parties, or may be determined as a question of fact where the inference does not conclusively arise as a matter of law.
>
> In the instant case there are no stipulated facts directly indicating that the company intended to relinquish its right to a timely payment. While it may be inferred from the facts that the company intended to waive its rights, this appears more properly to be a case of estoppel because of Von Uhl's claim that he relied on the company's conduct to his detriment. Whether it be waiver or estoppel in this instance, the legal effect is the same. (Citations omitted)

See also Davis v. JD Wilson Co., 1 Wis. 2d 443, 469, 85 N.W. 2d 459 (1957):

> Waiver and estoppel or estoppel *in pais* are closely related; the line of demarcation between them is said to be very slight, since both partake of somewhat the same elements and ask essentially the same relief; and the terms are frequently and loosely used as convertible, especially where waiver is implied, and estoppel arising, from conduct are involved, the dividing line being very shadowy in such cases and it often being often a difficult question to determine just where the doctrine of implied waiver ends and that of estoppel begins. Where the waiver relied on is constructive, or merely implied from the conduct of a party, irrespective of what his actual intention may have been, it is at least questionable if there are not present some of the elements of estoppel. It has been declared on the one hand that estoppel is a species of waiver and, on the other hand, that waiver belongs to the family, and, according to the judicial decisions on the subject, is in the nature, of estoppel. (Citations omitted.)

In the case at bar, the Commission submits that under either heading--waiver or estoppel--UWM acted in a way that is inconsistent with its attempt to raise the issue of the purloined documents at the remedy hearing.

With regard to the Commission's interest in expediting the proceeding, the trial court expressed the opinion that a

continued hearing would not have delayed the final disposition of the case more than "several more months," slip opinion, p. 29. However, in consideration of the fact that the newly discovered evidence involved some 24,000 documents, and that in proceedings before the Commission parties are entitled to "obtain discovery and preserve testimony as provided by ch. 804, Stats.," ***see*** Wis. Adm. Code, PC § 4.03, this estimate might not have been very accurate.

Furthermore, the trial court basically dismissed the Commission's concern about further delay, noting the length of time the Commission already had taken in processing the matter, and commenting that the "impact of delay on the institutional concerns of the Commission was a proper consideration, but the record does not support the view that this was a weighty matter in this case." [R24:29]. This analysis loses sight of the fact that the decision which expressed concern about delays in processing this case was a decision by the full Commission, while the delays primarily had occurred when one Commissioner was handling the case as hearing examiner pursuant to § 227.46(1), Stats. The trial court's decision of this aspect of the case would impede an adjudicative agency from consideration of the delay factor at a later point of the proceeding if there had been earlier delays in processing the case.

CONCLUSION

The Commission appropriately reviewed the evidence and reached conclusions supported by that evidence. The Commission applied the appropriate law. That the parties disagree with various conclusions of the Commission is not grounds for reversal where the Commission's decisions are given weight. Accordingly, this Court reverse the trial court and should affirm the order of the Commission.

Dated this 19 day of October, 2001.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief and appendix in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 10,465 words.

Dated this 19 day of October, 2001.

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COURT OF APPEALS OF WISCONSIN
DISTRICT IV

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner-Respondent,

v

99-CV-295

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent-Respondent-Co-Appellant,

DALE R. BRENON,

Appellant.

Case No. 01-1899

DALE R. BRENON,

Petitioner-Appellant,

00-CV-661

v

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent-Respondent.

APPENDIX OF RESPONDENT-RESPONDENT-CO-APPELLANT STATE OF WISCONSIN PERSONNEL COMMISSION

Appeal from the circuit court for Dane County, Michael Nowakowski, Judge.

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner,

v. Case No. 99 CV 2959

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent.

DALE R. BRENON,

v. Case No. 00 CV 661

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent.

DECISION AND ORDER

In each of these consolidated cases, the petitioner seeks judicial review pursuant to Wis. Stats., ch. 227, of the November 19, 1999, final order of the Wisconsin Personnel Commission (Commission) in the administrative proceeding, Brenon v. University of Wisconsin System, Case No. 96-0016-PC. In that case Petitioner Dale R. Brenon (Brenon) challenged a 10 day suspension without pay and a subsequent termination of his employment with the University of Wisconsin-Milwaukee (UWM) police department under Wis. Stats. § 230.44(1)(c). The Commission rejected Brenon's suspension on due process grounds and then modified the termination to a 10 day suspension without pay. It ordered Brenon to be reinstated with back pay. In determining the amount of back pay, the Commission refused to consider "after-acquired evidence" of Brenon's misconduct while an employee. The Commission also denied

Brenon's various motions for costs and fees under Wis. Stats. § 227.485, ruling that although unsuccessful, UWM was substantially justified in the positions it took.

The Board of Regents, on behalf of UWM (hereafter collectively "UWM") seeks review of the Commission's decisions rejecting its suspension of Brenon, modifying its termination of Brenon to a suspension, and refusing to allow it to introduce after-acquired evidence of misconduct in the remedy proceeding. (Case No. 99 CV 2959). Brenon seeks review of the Commission's decisions denying him attorney fees and costs. (Case No. 00 CV 661)

FACTS

At the outset, it should be noted that UWM in its Petition For Review challenges the Commission's decisions on the suspension and termination (but not on the exclusion of evidence) on the basis that they were not supported by substantial evidence in the record. However, in its Brief, UWM states, "The Board and UWM do not contest the Commission's evidentiary findings." Brief, p. 2. Brenon's Petition For Review makes no challenge to the factual findings of the Commission, and his briefing never mentions the substantial evidence standard and never explicitly challenges any of the Commission's findings of fact. As a result, the facts outlined below, which are largely taken from the Commission's findings, will be deemed undisputed.

Brenon was a permanent, tenured employee of the UWM police department. He was a sergeant, and his immediate supervisor was Lt. Richard Sroka.

In November of 1995 an officer in the UWM police department wrote Lt. Pamela Hodermann of that department that Officer Dale Brenon had told him the following jokes earlier that month:

> What do you get when one million lesbians show up at the million man march? Two million people that don't do dick.

What was the best thing about the million man march? Only four people missed work.

Other officers subsequently informed Lt. Hodermann that Brenon had told them the same or similar jokes.

Lt. Sroka, who was on vacation until December 4, was provided with the reports and directed by UWM Police Chief Philip Clark to "continue the investigation" and get Brenon's side of the story. Sroka then sent Brenon this email on December 5, 1995:

> Dale, I need to meet with you on Friday morning 12/08/95, regarding some recent personnel issues that I have just been made aware of. . . No big deal, won't take up much of your time, but; please wait.

When Brenon and Sroka met, after being told of the complaints regarding the "Million Man March" jokes, Brenon admitted telling some of them and apologized. Sroka then reprimanded Brenon, informed him that such conduct was unsatisfactory and told him to stop it. Brenon agreed and Sroka told him that he believed the matter was closed.

Upon hearing Sroka's report of the meeting with Brenon, Chief Clark directed Sroka to prepare a ten-day suspension letter. Sroka passed this news to Brenon, and Brenon asked to and did meet with Clark to discuss the matter. Clark would not, however, change his directive to Sroka.

Brenon received the ten day suspension letter on December 20. It stated, in pertinent part,

> This disciplinary action is based on your conduct, as related by four officers of this Department, that during the first week of November 1995, you related racially demeaning jokes to them while in the performance of your duties as a police sergeant. Regardless of the motivation for relating such jokes, this conduct exhibits unprofessional behavior, demonstrates a lack of sensitivity and creates a hostile environment within a diverse workplace.

The letter also included a warning of possible discharge for "any further work rule violation."

In late December a female police cadet and a female officer reported that Brenon had harassed them and made sexist and racist jokes and remarks. Brenon was suspended with pay on January 3, 1996, while these allegations were investigated.

On January 12, 1996, in an interview with Chief Clark and the UWM labor relations manager, Brenon admitted making crude remarks but denied telling racist jokes after notification of his suspension. On January 31, 1996, Brenon was notified to report to a pre-disciplinary hearing on February 5, 1996. The subject matter for the hearing was identified as allegations that Brenon made sexually explicit and demeaning comments and jokes to subordinates, allegations of retaliation against subordinates, and continued inappropriate activity subsequent to his suspension.

At the pre-disciplinary hearing Clark informed Brenon of the allegations and stated that disciplinary action under consideration ranged from a thirty-day suspension without pay to termination.

By letter dated February 9, 1996, UWM terminated Brenon's employment. That letter provided in pertinent part:

> On December 19, 1995, you were given a 10 day suspension for telling inappropriate ethnic and racially demeaning jokes to your subordinates during November, 1995 . . . This termination is based on other complaints of your conduct, untruthfulness uncovered in the course of the investigation of those complaints and your retaliation against subordinates who cooperated in those investigations. Specifically, complaints were received that subsequent to your learning of your 10 day suspension, you continued to tell jokes to subordinate officers substituting "Irishman" for other ethnic groups. Additionally, new complaints were received about your making sexually explicit and demeaning comments, telling ethnically and sexually demeaning jokes.
>
> In November of 1995, while talking to Officer Sorrell about his stay in a motel, you made a comment to the effect that Sorrell was too cheap to get two beds and that the three of them (Sorrell, his wife and infant son) probably slept in the same bed. You then made reference to them having sex or a menage a trois. You then said that, "No, it was

> really (Security Officer) George Esler" or words to that effect (Esler, Sorrell and wife having sex) and made noises mimicking as if they were all having sex. This eventually became just Esler masturbating, you would do this "joke" grunting and making masturbating motions in front of both male and female employees. On other occasions, you referred to your penis as "Lucky", describing its size and making comments such as, "I'm going to drain Lucky," to both male and female employees.

Brenon timely appealed both the suspension and the termination contending that neither were based on just cause. At a pre-hearing deposition on June 24, 19996, Brenon was questioned about his practice of copying documents at work and keeping copies of these documents, which were often of a confidential nature, at his home. UWM demanded that Brenon produce these files and return all copies that he did not have specific authorization to remove from the department.

Hearings on Brenon's appeal were held over three days: August 1, 2 and 12, 1996. A proposed decision and order was issued by Commissioner Murphy who acted as examiner over a year later, on October 6, 1997, in which it was proposed that the ten-day suspension without pay be rejected and the termination be modified to a ten-day suspension without pay. This proposed decision and order was adopted by the full Commission on February 12, 1998, with minor modifications. The basis for this decision was that Brenon's due process rights had been violated by UWM's failure to provide him with adequate notice and a pre-disciplinary hearing prior to the suspension. As to the merits of the suspension, the Commission stated that Brenon's actions did warrant some disciplinary action but that a ten-day suspension without pay was excessive and a preferable sanction would have been an oral or written reprimand.

With respect to Brenon's termination, the Commission found that Brenon did engage in crude behavior by simulating masturbation in the presence of other officers but he did not tell racial jokes after his suspension, did not retaliate against other employees and was not untruthful

during the investigation except in denying that he engaged in the crude behavior. The Commission concluded that the discharge was excessive and a ten-day suspension without pay was the more appropriate discipline.

Brenon filed a motion for attorney's fees and costs, initially on November 4, 1997, and then submitted an amended motion on March 9, 1998. In an "Interim Ruling on Application for Fees and Costs" issued June 23, 1998, the Commission denied Brenon's motion for the following reasons: 1) although insufficient, with respect to the suspension Brenon was provided with notice and a limited opportunity to argue for a lesser penalty; and, 2) with respect to the termination, it was reasonable for UWM to rely on representations made by Brenon's co-workers, and termination was the next step in the progressive disciplinary process. Therefore, UWM's legal position satisfied the "substantially justified" standard described in Wis. Stats. § 227.485(3) and Sheely v. DHSS, 150 Wis. 2d 320 (1989).

After these decisions, the question remained as to what remedy was due to Brenon. On July 9, 1998, Brenon filed a motion that he be reinstated to his former job immediately. In a July 20, 1998, letter responding to this motion UWM's attorney included the following:

> In addition, the State of Wisconsin has a separate legal action pending against Brenon. Because of the circumstances of that litigation, his presence in the workplace would be disruptive and cause irreparable harm to the university. After Brenon was terminated, it was brought to my attention that during his employment, he very likely had copied and removed documents from the workplace containing confidential student and employee information which he had no right to remove. Informal attempts to convince him to return all copies of such documents were unsuccessful. In order to protect the privacy of individuals named in said records and mitigate potential liability for UWM because of Brenon's actions in this regard, the State of Wisconsin has commenced a replevin action in Milwaukee County Circuit Court.
>
> Brenon's presence in the workplace would give him access, in the course of fulfilling his job responsibilities, to the same types of confidential materials he has had access to in the past. . . .

> If ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him, for unauthorized possession of university property with regard to the records issue. This would unnecessarily complicate all pending matters. In the interests of judicial efficiency the parties should be permitted to pursue the replevin action and the appeal process, accepting that an order to remit backpay may result. (Cited in Commissission's 9/1/99 Decision, pp. 8-9; Record 6)

The motion was noticed to be heard at the time of a previously scheduled Scheduling Conference on July 28, 1998, but there is no indication in the record of any action taken. In any event, no order for immediate reinstatement was issued.

On July 28, 1998, a letter from Brenon's counsel was sent to Commissioner Murphy regarding the parties' agreement on proceedings on remedy. It summarizes the telephone scheduling conference held that day, stating that the parties had agreed to the following schedule:

> 1. [Brenon] will respond to the written discovery request of UWM by August 7, 1998;
>
> 2. A deposition has been scheduled of [Brenon] for August 28, 1998 at 1:00 p.m.;
>
> 3. UWM shall submit a calculation of [Brenon]'s remedy for back pay and related fringe benefits, etc., by September 15, 1998;
>
> 4. [Brenon]'s objections, if any, to such calculation shall be submitted by Friday, September 18, 1998; and
>
> 5. UWM's reply to [Brenon's] objections shall be made by Friday, September 25, 1998.
>
> Based on the submissions, the Commission shall make a finding as to the remedy. . . . If there are objections or further submissions, the Commission shall make finding on the submissions of the parties.

On September 15, 1998, UWM submitted its calculation of Brenon's remedy regarding back pay, with attached exhibits. While Brenon would have earned $114,628.54 in gross pay for the period from February 11, 1996, to September, 15, 1998, UWM contended that Brenon

did not do enough to mitigate his damages because he applied for jobs that did not match his skills and background and applied for a minimal number of positions. The letter concludes that the total adjusted back pay due to Brenon is $7,271.81. Finally, UWM stated that

> In the event that [UWM's] proposal for its total payment to [Brenon] is refuted or challenged, [UWM] reserves the right to present information about [Brenon's] earnings during the period in question . . ., [Brenon's] efforts to mitigate his damages, and [UWM's] rejection of employment offers during the period in question. [UWM] also reserves the right to update its calculation based on updated earnings information received from [Brenon].

Brenon objected to UWM's calculations of back pay. UWM responded that Brenon had failed to comply in good faith with discovery requests and that there were significant discrepancies between Brenon's reported income and the record of deposits to his bank account. By letter dated January 15, 1999, UWM renewed its request for a hearing (first made on September 24, 1998) on the issue of remedy, stating that "a hearing is imperative in this case because issues of material fact exist regarding wages earned from other sources." That letter goes on, "[t]he income discrepancy is a material issue of fact needed to accurately determine back pay obligations on the part of the State of Wisconsin."

On January 28, 1999, UWM filed a brief in response to Brenon's objections regarding mitigation of damages. Brenon submitted his brief on mitigation on February 4, 1999. UWM's Reply brief followed on February 15, 1999. At the same time, UWM filed a motion requesting that Commissioner Murphy find Brenon in contempt for his "refusal to answer questions completely and honestly under the law during the discovery process." The letter repeats that because of Brenon's noncompliance with discovery, "this necessitates the need for a hearing on the issue of back pay."

At this point, this case had been pending before the Personnel Commission for over three

years. On April 26, 1999, UWM filed a "Motion for *en banc* order compelling final decision of pending issues in Case 96-0016-PC." The motion noted that "[i]ssues relating to back pay and mitigation of damages have been pending since March, 1998," and asks that Commissioner Murphy be ordered to decide the pending issues, or in the alternative, that the Commission *en banc* issue a decision in the case.

A telephone prehearing conference was held on April 28, 1999, and memorialized in a "Conference Report." Under the heading "Issue" it states:

> Remedy.
>
> Sub-issues:
>
> 1. What is the sum of [Brenon's] back pay and other credits.
> 2. What is the sum of [UWM's] mitigation damages and setoffs.
> 3. What is the total sum of [Brenon's] remedy?

The hearing was scheduled for May 18, 1999. On May 13, 1999, the Commission received UWM's Motion in Limine to exclude evidence on grounds of relevance and failure to comport with the best evidence rule. The next day, May 14, 1999, UWM sent Brenon's counsel a written offer of settlement that stated in part:

> We believe this settlement offer is fair considering the amounts that we believe can be proven as setoffs to back pay. Please understand that if we proceed to hearing, after we obtain a final decision we will petition for review. We believe we have strong legal arguments. After the final decision we also intend to reinstate your client and initiate the discipline process because of his gross violation of the records policy. That will likely end in the termination of his employment.

At the beginning of the May 18, 1999, hearing on remedy, UWM called Brenon as a witness and asked him about his practice of making copies of documents while he worked at the UWM police department. After Brenon's attorney objected on the grounds of relevance, a colloquy between the Commissioner and counsel for UWM ensued, during which it became

apparent that UWM wanted to introduce after-acquired evidence of Brenon's misconduct as a basis for establishing an earlier date to cut off liability for back pay. UWM made an offer of proof to the effect that Chief Clark would testify regarding his discovery that Brenon had made and taken unauthorized copies of documents from the department and that such conduct was a serious violation of the records policy and would have resulted in Brenon's termination if the Chief had known about it at the time. Commissioner Murphy sustained the objection without explanation.

Commissioner Murphy's proposed decision and order regarding remedy was issued on June 18, 1999. It was proposed that UWM be ordered to pay $159, 533.64 in back pay, plus additional back pay and interest until Brenon's reinstatement. With respect to the after-acquired evidence, he ruled that it was excluded because "[t]o have ruled otherwise would have been in deprivation of [Brenon's] job property rights without due process of law." This ruling was affirmed by the Commission in its September 1, 1999, interim decision and order.

On October 22, 1999, UWM filed a motion for the Commission to reconsider its interim decisions regarding reinstatement and back pay based on new information, namely copies of approximately 24,000 documents that Brenon had copied and taken from UWM during his employment. This material was turned over by Brenon on September 29, 1999, in compliance with the order of the replevin court in State of Wisconsin v. Dale R. Brenon, Milwaukee County, Case No. 98-CV-2690. UWM also filed a response opposing Brenon's October 1, 1999, motion for fees and costs related to the replevin action and additional discovery.

On November 19, 1999, the Commission issued its "Ruling on Motion for Reconsideration Ruling on Motion for Attorney's Fees Final Order." As in its September 1,

1999, interim order, the Commission held that concerns regarding lack of notice and waiver precluded UWM from raising the issue of the purloined documents at this point in the proceedings. It noted that UWM had known since June 1996 that Brenon had unauthorized documents in his possession and the mere fact that, as a result of the replevin order, the documents had been returned to UWM did not qualify as "newly-discovered" evidence which the Commission would consider now. Second, permitting the introduction of this "after-acquired evidence" as a tool to limit back pay would in effect be an unlawful retroactive discharge under State ex rel. Tracy v. Henry, 219 Wis. 53 (1935). The Commission concluded that UWM's sole remedy regarding Brenon's misconduct was to reinstate him and then pursue termination based on the purloined documents.

On the issue of attorney's fees, the Commission rejected Brenon's claims for fees and costs associated with the replevin action because those fees were not part of the contested case before the Commission. Further, the Commission concluded that UWM had a reasonable basis for discovery requests related to discrepancies in Brenon's financial records, and so Brenon was not entitled to any fees incurred regarding that issue. The Commission's Final Order required UWM to "immediately offer [Brenon] reinstatement to his former position or its equivalent with back pay and benefits from the date of his discharge to the date of his restoration..."

These consolidated petitions for judicial review followed. Additional facts will be noted in the discussion which follows.

ISSUES PRESENTED

1. Could the Commission reasonably reject Brenon's ten-day suspension on due process grounds because of UWM's failure to afford Brenon a pre-suspension hearing?

2. Did the Commission abuse its discretion by modifying the termination of Brenon's employment to a ten-day suspension?

3. Did the Commission abuse its discretion when it refused to consider the after-acquired evidence of Brenon's unauthorized removal of documents from UWM when the Commission heard evidence in order to craft its remedial order?

4. Did the Commission properly deny all of Brenon's motions for attorney's fees on the grounds that although ultimately unsuccessful. UWM was "substantially justified" in its legal positions before the Commission.

In summary, the Court concludes that the answers to these questions are: 1. It could. 2. It did not. 3. It did. 4. It did.

DISCUSSION

1. **Could the Commission reasonably reject Brenon's ten-day suspension on due process grounds because of UWM's failure to afford Brenon a pre-suspension hearing?**

As a public employee, Brenon has a constitutionally protected property interest in his employment and cannot be terminated without due process of law. *See* Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 546 (1985). The Commission's determination that UWM violated Brenon's due process rights when it suspended him is a conclusion of law because it involves the application of a legal standard to a set of facts. Dept. of Revenue v. Exxon Corp., 90 Wis. 2d 700, 713 (1979). When reviewing an administrative agency's conclusions of law, courts routinely employ one of three levels of deference: great weight, due weight or no deference at all. See Jicha v. DILHR, 169 Wis. 2d 284, 290-91 (1992).

Great weight deference is only warranted when:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its specialized knowledge or expertise in forming the interpretation; and (4) the agency's interpretation will provided consistency and uniformity in the application of the statute.

Tannler v. DHSS, 211 Wis. 2d 179, 184 (1997). Due weight deference is applied when "the agency decision is 'very nearly' one of first impression." Id. No deference, or *de novo* review is used for cases of first impression for the agency and the agency lacks expertise. Dept. of Transportation v. Wisconsin Personnel Comm., 176 Wis. 2d 731, 735-36 (1993).

In this case, both Brenon and UWM are silent as to the level of deference to be given to the Commission's conclusion. The Commission advocates that its conclusions of law in rejecting the suspension be reviewed under the due weight standard, presumably because of its experience and expertise in personnel matters, and the authority delegated to it under Wis. Stats. §§ 230.44 and 230.45.

Due weight is the appropriate standard for reviewing the Commission's legal conclusion on the due process issue. Nowhere is it argued that this is an issue of first impression justifying *de novo* review. On the other hand, the Commission has not asserted nor demonstrated that its experience with due process challenges is so extensive as to satisfy the requirements for great weight deference set forth in Tannler. Accordingly, the due weight standard will be applied and the Commission's decision will be upheld if it is reasonable unless the court determines that a more reasonable one is available. UFE Inc. v. LIRC, 201 Wis. 2d 274, 286-87 (1996).

The Commission stresses that its conclusion that Brenon's due process rights were violated is correct because before the meeting with Sroka, Brenon had no notice that the allegations were considered serious or that serious discipline could result. He did not know until the end of that meeting that a 10 day suspension was being considered and thus had no chance

to argue whether such discipline was warranted or appropriate until after Sroka was told by Chief Clark to draft the 10-day suspension letter. Even then due process was not afforded by the meeting between Brenon and Chief Clark because, in the view of the Commission, the Chief had already made up his mind.

The ultimate question of whether sufficient due process was provided requires balancing the employee's interest against that of the employer as set forth in Mathews v. Eldridge, 424 U.S. 319 (1976) and applied in Gilbert v. Homar, 520 U.S. 924 (1997). This test is comprised of three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." Mathews, 424 U.S. at 335. In Gilbert, the Court concluded that a pre-disciplinary hearing that would ordinarily be required was not necessary for a suspension without pay of a police officer charged with a felony. It observed that the government had a significant interest in being able to immediately suspend an employee who occupies a position of high public trust and visibility when felony charges are filed against that employee. Gilbert, 520 U.S. at 932. More importantly, in Gilbert, the fact that there had already been an arrest and that charges had been filed put to rest any concerns regarding the third Mathews factor, the risk of erroneous deprivation and the likely value of any additional procedures. Id. at 933-34. In such cases, it is safe to assume that the employer's decision to suspend the employee is not arbitrary because "an independent third party has determined that there is probable cause to believe the employee committed a serious crime." Id. at 934.

The Commission factually distinguished this case from Gilbert, concluding that where

a suspension results from mere allegations of wrongdoing and there is no independent assessment of probable cause, and still the employee is not given the chance to persuade his employer that the discipline was unwarranted and/or excessive, the evidence supports the conclusion that the due process provided was deficient.

UWM also cites Gilbert for the proposition that due process does not always require notice and a hearing before a tenured employee is suspended. While that clearly is a holding in Gilbert, the implied extension of this argued by UWM that due process never, or at least here, does not and did not require notice and a hearing is unsupported by any case.

UWM also argues that the Commission's findings and conclusions in response to Brenon's motion for fees and costs themselves amount to a conclusion that Brenon was afforded due process with regard to the suspension. UWM ignores that the Commission was acting under two different standards in reaching the two different decisions it did. It was entirely consistent for the Commission, on the one hand, to conclude that Brenon had been denied due process under the Mathews/Gilbert standard and, on the other hand, to conclude that UWM was "substantially justified" under Wis. Stats. § 227.485(3) in taking the position that it had not denied Brenon due process.

Under the due weight standard applicable here, "a court will not overturn a reasonable agency decision . . . unless the court determines that there is a more reasonable interpretation available." UFE Inc. v. LIRC, 201 Wis. 2d 274, 287 (1996). Given the significant factual differences between this case and Gilbert, UWM's argument that the process Brenon received was sufficient and was a more reasonable conclusion than that reached by the Commission is unavailing. Telling racist jokes is simply not commensurate with the felony charges in Gilbert,

and the government's interest in prompt action was not as urgent as that case. Telling inappropriate jokes to co-workers does not present the same risk of undermining the public trust in the way that felony charges against a police officer does. For these reasons the Commission properly distinguished Gilbert and concluded that Brenon was entitled to a meaningful pre-suspension hearing and that the limited process afforded him was insufficient. This conclusion is reasonable and must be upheld.[1]

2. Whether the Commission abused its discretion when it modified the termination of Brenon's employment to a ten-day suspension.

Under Wis. Stats. § 227.57, Scope of Review,

> (8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

UWM asserts that the Commission abused its discretion by modifying Brenon's termination to a ten-day suspension. Like a court, an administrative agency exercises discretion when "it considers the facts of record and reasons its way to a rational, legally sound conclusion." Galang v. Medical Examining Bd., 168 Wis. 2d 695, 700 (Ct. App. 1992). Thus, discretion is "a process of reasoning" in which facts and the applicable law are considered in arriving at "a conclusion based on logic and founded on proper legal standards." Shuput v. Lauer, 109 Wis. 2d 164, 177-78 (1982). If the record establishes that the agency considered the facts of the case and reasoned its way to a conclusion that is both consistent with the

[1]Because the Commission's due process conclusion is sustained, the suspension must be rejected under Wis. Stats. § 230.44(4)(c); and UWM does not argue otherwise. It is, therefore, unnecessary to address the Commission's conclusion that the ten day suspension was excessive.

applicable law and one that a reasonable tribunal could reach, the court will affirm the agency, even if the court would have reached a different conclusion. Galang, 168 Wis. 2d at 700; Wis. Central Ltd. v. Public Service Comm., 170 Wis. 2d 558, 568 (Ct. App. 1992).

Wis. Stat. § 230.44(4)(c) provides as follows:

> After conducting a hearing or arbitration on an appeal under this section, the commission or the arbitrator **shall either affirm, modify or reject the action which is the subject of the appeal.** If the commission or the arbitrator rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service of the decision of the commission or the arbitrator. (emphasis added).

The statute expressly permits the Commission to modify the discipline imposed in a case presented to it for review. Here, the Commission argues that it properly considered the evidence before it and after weighing this evidence concluded that Brenon should have received a ten-day suspension rather than being terminated. The Commission reviewed Brenon's disciplinary history, his relationship with co-workers and the culture of the UWM police department. The Commission concluded that the evidence did establish that Brenon simulated masturbation and later denied doing so. However, the evidence did not fully support the other claims cited by UWM as reasons for terminating Brenon: that he told ethnic jokes after his suspension, that he retaliated against another officer or that he was otherwise untruthful during the investigation. While there was cause for some disciplinary action, the Commission reasoned that termination was excessive and the more appropriate discipline was a ten-day suspension.

UWM asserts that the Commission's decision that the termination suspension was excessive lacks a reasonable basis and therefore constitutes an abuse of the Commission's discretion. UWM submits that Brenon's "history of intemperate remarks and jokes," coupled

with his lying about the simulated masturbation incident demonstrate that the Commission clearly abused its discretion in modifying the termination to a suspension. UWM also takes issue with the Commission's determination that the telling of Irish jokes is not the basis for discipline.

The Commission's decision amply demonstrates that it considered all the grounds presented in support of Brenon's termination, evaluated the relevant evidence, and reasonably concluded that termination was inappropriate. As in all agency reviews, it is not the Court's function to reweigh the evidence or to second guess the agency's credibility determinations. Chilstrom Erecting Corp. v. Dept. of Revenue, 174 Wis. 2d 517 (Ct. App. 1993). Here, given the evidence of the culture at the UWM police department and the Commission's findings that there was insufficient evidence to support three of the four claims against Brenon, there existed sufficient grounds upon which the Commission could reasonably conclude that termination was an excessive discipline in this case. UWM merely emphasizes the significance that should be attached to the one reason for termination that the Commission sustained in connection with Brenon's disciplinary record to argue that discretion was abused. To adopt its reasoning, it would be necessary for this court to assign different weight to the undisputed evidentiary findings made by the Commission. This would be inappropriate for a court reviewing an administrative agency decision. Id. What UWM has failed to do is to identify any flaw in the reasoning process that reflects the exercise of the Commission's discretion. Where, as here, an agency has considered the facts and applied the correct legal standard to reach a reasonable conclusion, that conclusion must be affirmed.

3. **Did the Commission abuse its discretion when it refused to consider the after-acquired evidence of Brenon's unauthorized removal of documents from UWM when the Commission heard evidence in order to craft its remedial order?**

At the May 18, 1999, hearing on remedy, UWM attempted to introduce evidence regarding Brenon's unauthorized taking of documents from the UWM police department. UWM's intention was to argue that under McKennon v. Nashville Banner Pub. Co., 513 U.S. 532 (1995), Brenon's wrongdoing, once known, would have resulted in his termination, and therefore UWM's liability for back pay ended on June 24, 1996, the date that Brenon admitted at his deposition to having copies of UWM documents at his home. Brenon initially objected on relevance grounds. Later he claimed surprise. The Commissioner hearing the evidence sustained the objection without explanation, but he permitted UWM to make an offer of proof which revealed the nature of the evidence it planned to introduce and its significance to the remedy proceeding.

In its September 1, 1999, Interim Decision and Order, the Commission concluded that the ruling to exclude the after-acquired evidence was proper. It reasoned that to allow introduction of this evidence would have been unfair to Brenon because he had received no prior notice that this alleged misconduct in taking documents from the workplace would be an issue. It further cited the fact that UWM had not requested a continuance at the May 18 hearing. Finally, the Commission raised legal concerns about whether the after-acquired evidence could even be properly considered, but it disclaimed these questions as a basis for its decision.

The removed document issue had been pending in the Milwaukee County Circuit Court since at least 1997. Apparently dissatisfied with Brenon's response to the directive first made at his June 24, 1996, deposition that he return all documents he had removed from the

workplace, UWM filed a replevin action in the circuit court. A second replevin action was, for reasons not clearly disclosed by the record, filed in 1998. Brenon vigorously defended against this action. However, in a September 9, 1999, letter, eight days after the Commission's decision, Brenon conceded on all issues in the replevin action; and pursuant to a September 20, 1999, order of the circuit court, Brenon turned over on September 29, 1999, ten boxes containing approximately 24,000 documents that he had taken from UWM during his employment.

On October 22, 1999, UWM filed a motion for reconsideration of the after-acquired evidence ruling based on the new evidence of the ten boxes of documents. On November 19, 1999, the Commission issued its final order in this case by which it denied the motion for reconsideration and also denied Brenon's latest motion for attorney fees and costs. As to the reconsideration motion, the Commission cited two reasons for its decision: (1) it again relied on the lack of notice and pointed out that the actual receipt of the ten boxes was not a material factor since UWM had contended as early as July 20, 1998, it had enough "removed document" evidence to terminate Brenon and (2) it concluded that the after-acquired evidence doctrine is inapplicable to a case involving an appeal of a discharge under the civil service code and that to rule otherwise would effectively contravene the decision in State ex rel. Tracy v. Henry, 219 Wis. 53 (1935). In essence it ruled that the after-acquired evidence was immaterial or irrelevant. UWM challenges both of these reasons.

The decision on whether to exclude evidence is entrusted to the discretion of the presiding official at an evidentiary hearing. State v. Pharr, 115 Wis. 2d 334, 342 (1983). The exercise of that discretion will be affirmed by a reviewing court if the official applies the proper law to

the established facts to reach a reasonable conclusion. Ritt v. Dental Care Associates, S.C., 199 Wis. 2d 48, 72 (Ct. App. 1995). Thus the standard for reviewing the Commission's decision to exclude after-acquired evidence in this case is abuse of discretion. However, the preliminary legal question of whether the doctrine is applicable in a case like this is reviewed *de novo*. This is clearly an issue of first impression for the Commission, and in fact has not been addressed by any reported decision of a Wisconsin court.

The leading case establishing the "after-acquired evidence rule" is McKennon v. Nashville Banner Pub. Co., 513 U.S. 532 (1995). In McKennon, a 62 year old employee sued her employer for age discrimination in violation of the Age Discrimination in Employment Act (ADEA). The employer successfully moved for summary judgment on the grounds that even assuming that it had discriminated against McKennon based on her age, the discovery during her deposition that she had copied and removed confidential financial documents from her employer constituted an independent justification for her termination and therefore no award of back pay based on the ADEA violation was warranted. The Supreme Court unanimously reversed the Sixth Circuit, which had affirmed the trial court, and held that because of the national policies regarding nondiscrimination in the workplace served by the ADEA, even with discovery of after-acquired evidence of employee misconduct, a complete bar on any recovery of back pay by the employee would undermine the policies of the ADEA. However, to balance the interests of the employer and employee, it ruled that any award of back pay in such a situation should cover from the date of the unlawful discharge to the date the subsequent evidence of wrongdoing was discovered. The Supreme Court also stressed that this principle applied only when the employer is able to demonstrate that the employee's after-discovered wrongdoing was so severe as to

warrant termination on that ground alone and that the employer would have in fact terminated the employee on that basis alone.

UWM contends in this case that McKennon should have been followed, and if the Commission had followed it, any award of back pay to Brenon would be limited to the period between his termination in February 1996 and the date it was discovered he had, without authorization, UWM documents in his possession. As to whether there was sufficient notice that Brenon's misconduct would be at issue, UWM argues that as the subject of the hearing was "remedy" and after-acquired evidence operates to limit the remedy available to the discharged employee, there are no additional notice requirements that must be satisfied. It goes on to assert that even in the event that Brenon was surprised by the introduction of this issue, the appropriate response by the Commission would have been to continue the hearing so Brenon could prepare, not to wholly exclude relevant evidence.

As noted earlier, the Commission concluded that it was bound by the Wisconsin Supreme Court's decision in State ex rel. Tracy v. Henry, 219 Wis. 53 (1935) which it read to prevent the use of the after-acquired evidence doctrine in the civil service setting. This legal conclusion is wrong, and because the Commission failed to apply the proper law in making its decision to exclude the evidence offered by UWM, it abused its discretion and the decision must be reversed. State v. Hutnik, 39 Wis. 2d 754, 763 (1968).

In Tracy, state deputy oil inspectors had been discharged without a reason being given, in violation of state statute. While the case was pending, the state conducted an investigation and sent a letter to a number of the oil inspectors indicating that good cause for their termination had existed at the time of their original discharge and specifying those reasons. None of this

group objected to these letters within a reasonable time, which had expired prior to the trial court's action. The Wisconsin supreme court rejected this attempt to discharge the inspectors for valid reasons and make this second discharge retroactive to the date of the illegal discharge. As explained by the court:

> [A]n attempted compliance by furnishing such reasons subsequent to the original illegal discharge could not become effective as a discharge until after such reasonable time for making an explanation had elapsed and such reasons and explanation had been filed and, in view of those consequences, it is manifest that a subsequently effective discharge, pursuant to subsequently furnished and filed legal reasons, could not possible operate retroactively so as to be deemed effective as of the date of the original illegal discharge.

Tracy, 219 Wis. at 61.

The court in Tracy was not addressing or deciding whether the after-acquired evidence doctrine was applicable in determining the proper remedy for the wrongly discharged public employees. It was addressing and did decide whether, as the state contended, a subsequent discharge for valid reasons could be applied retroactively so as to defeat the employee's right to be reinstated. It resolved that issue by concluding it could not. If anything, however, the decision in Tracy is entirely consistent with the decision in McKennon. The court affirmed the trial court's order that required reinstatement and back pay up to the time of reinstatement for all of the inspectors who had not been sent a subsequent discharge letter. But for those who had been sent such a letter, the trial court's order, also affirmed, provided that they receive back pay only up to the "date of the alleged subsequent discharges." 219 Wis. at 58. The legitimate interests of the employer were protected while the wrongful nature of the original discharge was not ignored. The state was not required to reinstate the employees and pay back pay up to the reinstatement only so that it could then terminate them for the subsequently discovered good reasons. The employees, on the other hand, were not deprived of any remedy for their clearly

illegal original discharge even though the state later discovered valid reasons to terminate them which had existed prior to that original discharge.

The Commission in this case explained its exclusion of the after-acquired evidence by reliance on Tracy as follows:

> This case [Tracy] is consistent with the proposition that [UWM] would have the right to proceed to discharge [Brenon] on the basis of the purloined documents, but only after first having restored him with back pay from the date of the original termination to the date of restoration. For the Commission to now deny restoration and limit [Brenon's] back pay to the time from the original discharge (February 11, 1996) to the date of the discovery of the missing documents (June 24, 1996) amounts effectively to an unlawful retroactive discharge of the nature involved in Tracy. (Final Order Decision, 11/19/99 p. 6.)

Both points the Commission draws from Tracy are mistaken. In Tracy the state had not been required to restore the employees to their former jobs before discharging them for the after-acquired reasons. The court expressly approved a court order that required no such artificial formalities. Second, to apply the after-acquired evidence doctrine to the calculation of Brenon's back pay award would not amount to an "unlawful retroactive discharge" like that in Tracy. In Tracy what the court found unlawful was the state's

effort to make the subsequently discovered valid reasons for discharge retroactive all the way back to the original discharge thereby defeating completely the claim of the employees. That is not what UWM seeks to do here; and if it is successful, that is not the effect that its effort would have.

The Commission for the first time on this judicial review contends that this case should be distinguished from McKennon on the basis that the employer there was a private business while here UWM is a public employer. There is no question that this difference is present, but it is a difference without significance. In McKennon the Supreme Court focused on the

equitable nature of the context within which a court operates in constructing a remedy for improper discharge. 513 U.S. at 360. It balanced legitimate interests that both employees and employers have in such circumstances, but none of them arose from the employer's status as a private business. More importantly, the "employer's legitimate concerns" that the Supreme Court was seeking to not ignore, id. at 361, are no different for UWM than they were for Nashville Banner Publishing Company; and the Commission does not argue otherwise. It is true that a tenured public employee like Brenon has greater substantive protection from discharge than does an at-will employee like Christine McKennon, but again this difference has no bearing on the rationale for the after-acquired evidence doctrine. Where an original discharge is improper, as it was in McKennon and was here, the employer, whether public or private, will still have the burden to demonstrate that "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."[2] Id. at 362-63. Because of this requirement, civil servants lose no protection when an attempt is made to use the doctrine and at-will employees are provided with a protection to avoid pretextual claims of after-acquired evidence of misconduct. This most assuredly is no reason why the balanced approach of the after-acquired evidence doctrine should not be applied in calculating back pay in wrongful discharge civil service cases. While no case has confronted the issue in Wisconsin, I predict that if and when that occurs, the appellate courts

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[2]The Commission does not argue that this case should be distinguished from McKennon on the basis that here UWM did not formally discharge Brenon again while he was already discharged and his appeal was still pending while there the employer did so. As the Supreme Court makes clear in the portion of its decision cited in the text, that is not crucial. The burden is not to show that the employee was actually discharged a second time but only that he or she "would have been terminated." The Court made the same practical point earlier in rejecting the requirement that a subsequently discovered wrongdoer be reinstated, "It would be both inequitable and pointless to order the reinstatement of someone the employer *would have terminated*, and *will terminate* in any event and upon lawful grounds." (emphasis added) 513 U.S. at 362.

will conclude that the doctrine is applicable in this context.

Brenon argues that the Commission's decision should be upheld because UWM "cannot show by a preponderance of the evidence that Sgt. Brenon would have been fired." Response Brief, p. 10. This contention is easily addressed. UWM was denied the right to present evidence to establish that Brenon would have been fired. Until it is able to present evidence and the Commission is able to consider it, we will not know whether UWM can or cannot make the required showing. Certainly the offer of proof made at the May 18, 1999, hearing makes out a prima facie case that entitles UWM to go forward.[3]

In addition to concluding that the after-acquired evidence UWM sought to introduce was immaterial or irrelevant, the Commission based its decision to exclude it on the unfair surprise to Brenon of allowing this issue to be raised in the remedy hearing. The Commission and both parties devote considerable effort to arguing whether there was or should have been any surprise to Brenon, i.e., whether he should have been on notice that after-acquired evidence was going to be a theory at issue in the remedy hearing. Whether Brenon was or should have been surprised, and thereby prejudiced, by UWM's use of such evidence is a question of fact. The detailed recitation of the proceedings leading up to the May 18, 1999, hearing in the preceding FACTS section of this decision provide grist for the competing positions taken, but they also provide the basis for this court to conclude that there was substantial evidence in the record to support the Commission's finding that Brenon was in fact surprised and would have been prejudiced and that this finding was not clearly erroneous. That however, does not end the inquiry.

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[3]Brenon's further contention that in order for UWM to meet its burden it must now show that it had previously fired someone for taking university documents to their home without authorization is wholly without merit. The single case Brenon cites for this proposition stands for no such rigid rule.

Our Supreme Court recently held, citing Fredrickson v. Louisville Ladder Co., 52 Wis. 2d 776 (1971), that the "drastic measure" of excluding relevant evidence in the case of surprise "should be avoided by giving the surprised party more time to prepare, if possible." Magyar v. WHCLIP, 211 Wis. 2d 296, 303-04 (1997). The court noted that this principle is based on "the policy of discovering all of the truth," and thus "continuance is usually the more appropriate remedy for surprise; exclusion should be considered only if a continuance would result in a long delay." Id. at 304. The court in Magyar went on to prescribe that a balancing test under Wis. Stats. § 904.03 be undertaken to assess whether the surprise was unfair and, if so, whether that unfair surprise outweighed the probative value of the evidence. Id. Here the Commission failed to engage in any balancing test.

While the Commission erroneously concluded that the after-acquired evidence was not material or relevant, it failed to note in any way the significance of the evidence on the issue at stake. If UWM is able to prove the elements of its claim, the back pay award it owes to Brenon may be as little as $17,514.43 rather than the $159,533.64 the Commission awarded in the absence of the after-acquired evidence. The probative value is obviously quite significant. While this probative value may not have been sufficient to outweigh the unfairness to Brenon of going forward on May 18, 1999, the Commission did not properly consider the "more appropriate remedy" of a continuance. In its September 1, 1999, decision, the Commission, responding to UWM's argument that Brenon should have been granted a continuance rather than excluding the evidence altogether, stated, "[UWM] did not request a continuance at the time when the issue of the after-acquired evidence was before the examiner." p. 11. UWM was not the surprised party. The burden was not on UWM to ask for relief to ameliorate prejudice to

its opponent. More importantly, the duty was on the examiner himself to consider the "more appropriate remedy" of a continuance if the policy of discovering all of the truth were to be served at all. He obviously did not do so, as he simply excluded the evidence without explanation. It is noteworthy that in Magyar the surprised party did not request a continuance.

The Commission as a whole had the opportunity to engage in the balancing assessment that the examiner did not. Before issuing its September 1, 1999, decision, the Commission was expressly asked to continue the remedy hearing. As noted, its response was to attach significance to UWM's failure to request a continuance at the May 18 hearing; but the Commission also stated, "given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated." p. 11. The obvious question is "Why?". The Commission provides no answer. The exercise of discretion requires the use of a demonstrated rational process. Milwaukee Rescue Mission v. Milw. Redevelopment Auth., 161 Wis. 2d 472, 490 (1991). Here the Commission did not exercise discretion; it engaged in its opposite, unexplained decision making. The court in Magyar did not rule that a continuance must always be granted in the case of surprise. It did say that this alternative should be used "if possible" and should be discounted "only if a continuance would result in a long delay." 211 Wis. 2d at 304. The Commission did not explain why a continuance was not possible and made no finding as to how much delay would have resulted, i.e., whether the delay would be "long." Apparently any delay was deemed too long by the Commission. A reviewing court should look for reason in the record to sustain a discretionary decision. Unfortunately the record here provides no such reasons.

The hearing that would be continued was one before an examiner, not before a jury. The

Commission thus had the opportunity to use the evidence that was presented on May 18 to resolve the mitigation questions and all other issues relating to back pay calculations, except for the after-acquired evidence. A continued hearing could have been a single issue, focused proceeding where Brenon would have ample opportunity to respond to UWM's after-acquired evidence. The impact of delay on the institutional concerns of the Commission was a proper consideration, but the record does not support the view that this was a weighty matter in this case. The Commission itself took over eighteen months to issue its decision on "just cause' following the August, 1996, hearing. The Commission thereafter took over fifteen months to conduct a remedy hearing. A delay of several more months to conduct a single issue hearing that would allow the discovery of all of the truth hardly can be seen as harmful to the Commission's institutional concerns for the prompt adjudication of the cases before it. Especially is this so in the face of the substantial probative value of the after-acquired evidence that UWM proposed to introduce.

Finally, the Commission in its November 19, 1999, decision on UWM's motion for reconsideration alluded to a "waiver" issue. It is unclear what requirement of law or Commission rules that UWM supposedly violated by not expressly serving notice prior to May 18, 1999 of its intent to present after-acquired evidence to reduce its liability for back pay.[4] The record does not support the view that this failure was a violation of any express scheduling order in this case. More importantly, even if the course of proceedings imposed on UWM some obligation to notify Brenon of its intent, exclusion of the evidence as a sanction for a failure to comply with a scheduling order is an extreme response reserved for instances where

[4]Again, I sustain the Commission's implicit finding that Brenon was in fact surprised and would thereby have been prejudiced by the use of after-acquired evidence at the May 18 hearing.

noncompliance is "egregious" and without any clear and justifiable excuse. Schneller v. St. Mary's Hospital, 162 Wis. 2d 296, 311 (1991). The Commission did not even purport to impose exclusion of the after-acquired evidence as a sanction for violation of some ambiguous obligation of disclosure. More critically, the Commission did not suggest, much less find, that UWM's violation was "egregious." The record would not support such a finding even if it were made.

In summary, the Commission, in excluding the after-acquired evidence, abused its discretion. It applied an incorrect rule of law and it failed to properly engage in a balancing of interests as required by Magyar. The back pay award decision must be reversed and that matter remanded to the Commission for further evidentiary proceedings where UWM may offer its after-acquired evidence.

4. Did the Commission properly deny all of Brenon's motions for attorney's fees on the grounds that although ultimately unsuccessful, UWM was "substantially justified" in its legal positions before the Commission?

Brenon seeks judicial review of the Commission's decision that he was not entitled to attorney's fees under Wis. Stats. §§ 227.485(3). That statute provides as follows:

> In any contested case in which an individual . . . is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

The Commission's determination that UWM was "substantially justified" in its legal positions is a question of law. Susie Q Fish co. v. Dept. of Revenue, 148 Wis. 2d 862, 868 (Ct. App. 1989). As such, it is entitled to great weight deference because of the Commission's

long-standing interpretation of § 227.485(3), its expertise in evaluating legal arguments in employment appeals, the fact that it has been charged by the legislature with administering the statute, and because the Commission's interpretation will provide uniformity and consistency in the application of the statute. *See* Tannler, 211 Wis. 2d at 184. Moreover, deciding whether or not a legal position is substantially justified involves consideration of the public policies underlying those statutes the Commission is charged with enforcing. *See* Kannenberg v. LIRC, 213 Wis. 2d 373, 385 (Ct. App. 1997). Brenon does not argue otherwise. Therefore, the Court will affirm the Commission's decision if it is reasonable, even if a more reasonable interpretation exists. *See* UFE, Inc., 201 Wis. 2d at 286-87.

The "substantially justified" standard requires the agency to demonstrate the following: 1) a reasonable basis in truth for the facts alleged; 2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. Sheely v. DHSS, 150 Wis. 2d 320, 337-38 (1989). There is no presumption that because a party's legal positions were not successful they were not substantially justified. Id. at 338.

Brenon submits that UWM was not substantially justified in arguing 1) that he received adequate due process before his suspension, 2) that his termination was warranted, 3) that the Commission could not award him costs for the replevin action, and 4) that UWM was entitled to a hearing on remedy. These arguments are without merit and unsupported by the record.

As to his first contention, as found by the Commission, although the due process provided Brenon by UMW was deficient, he did have notice of the charges against him, and was given an opportunity before the suspension was ultimately imposed to discuss the matter with

Chief Clark. Although the Commission correctly concluded that Brenon's situation was distinguishable from the felony charges in Gilbert, that case also recognized that the question of how much due process is required for a suspension as opposed to a termination was an open one: "we have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property." Gilbert, 520 U.S. at 930 (quoting Paratt v. Taylor, 451 U.S. 527, 540 (1981)). The Commission's discussion, in its decision of June 23, 1998, of what process UWM had in fact provided to Brenon and why there was a reasonable basis for it to argue that this process was due process under the circumstances of his case reveals a reasonable conclusion that UWM was substantially justified in taking this position. As a result, the Commission's decision must be sustained.

Brenon argues that the Commission's decision should be reversed for several reasons. To the extent he dwells on the Commission's conclusion in its earlier decision that he had been denied due process in the suspension, he makes the same error that UWM made in relying on the fee award decision to argue its due process challenge. He ignores that the Commission was acting under two different standards in reaching the two different decisions it did. Again, it was entirely consistent for the Commission to conclude, on the one hand, that UWM was "substantially justified" under Wis. Stats. § 227.485(3) in arguing that it had provided Brenon with due process and, on the other hand, to have previously concluded that Brenon had in fact been denied due process in his suspension under the Mathews/Gilbert standard. It is also entirely consistent for this court to sustain these two different decisions under the two different standards for review, "great weight" and "due weight."

To the extent Brenon seems to challenge the factual underpinnings of the Commission's findings regarding the fee award decision, his effort is unavailing for two reasons. First, as noted earlier, Brenon never asserted that the Commission's decision should be reversed because its factual findings were not supported by substantial evidence in the record. He has thus waived such a challenge. Second, the challenge he does lodge is based on his assertions concerning a conspiracy and vendetta within the UWM police department that the Commission did not find to be present or operating in his case. A court reviewing an agency's action assesses whether the findings actually made by the agency are supported by substantial evidence in the record, not whether there is evidence to support a finding that the agency could have made but did not.

As to Brenon's challenge to the Commission's conclusion that UWM was substantially justified in arguing that its termination decision should be sustained, the Commission's decision of June 23, 1998, reveals a reasonable rationale. The Commission pointed out that UWM had relied on the statements of witnesses who were other police officers and the Commission did not find reasons why UWM should have doubted their veracity. The proceedings before the Commission thus revolved around its findings concerning these witnesses' credibility and the weight the Commission would give to various factors such as Brenon's employment history and the culture within the UWM police department. Termination was the next step in the disciplinary hierarchy after suspension, and it was reasonable for UWM to act upon allegations of misconduct by Brenon that were fairly consistent with his past behavior and came from a number of witnesses. While not all allegations were substantiated at the hearing, the Commission still found that there was sufficient evidence of misconduct by Brenon to warrant a suspension. In short, the Commission's conclusion was reasonable and must be affirmed.

Brenon's challenge to the Commission's denial of attorney's fees he incurred in the replevin action in Milwaukee County Circuit Court is patently without merit. The sole authority under which the Commission can award attorney's fees is Wis. Stats. § 227.485. The statute limits an award to fees "incurred in connection with the contested case" before the agency. A replevin action in a separate court is not part of the "contested case." If Brenon wanted to recover fees in that matter, his remedy was to seek fees in the circuit court under Wis. Stats. § 814.245[5], not before the Commission.

Finally, with respect to whether UWM was substantially justified in arguing for a hearing on remedy, the discrepancies in Brenon's bank accounts and reported income are well documented in the record. It is undisputed that UWM was entitled to a setoff of the back pay award for any income that Brenon did earn during the period in question. Requesting further discovery and a hearing to resolve this issue was both prudent and reasonable and, under the stipulation of July 28, 1998, it was expressly anticipated that there would be further submissions and/or objections on the issue of remedy. Finally, given this court's reversal of the Commission's order on back pay, Brenon was not a "prevailing party" in any event.

[5]While the record from the replevin action is not before this court on this ch. 227 review, the portions of it that are part of the record before the Commission cast considerable doubt on whether Brenon had any basis for such a motion. Under § 814.245(3), fees may be awarded only to a "prevailing party." It does not appear that Brenon prevailed in any way in the replevin action.

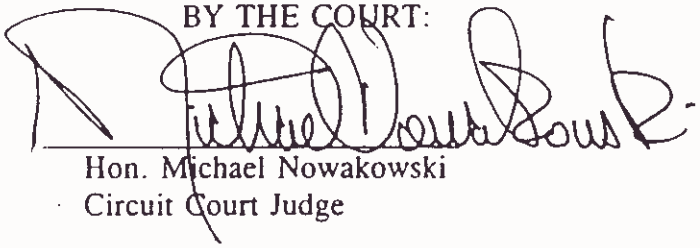
For all of the foregoing reasons,

IT IS ORDERED that the Commission's Interim Decision and Order of February 12, 1998, and June 23, 1998, are affirmed.

IT IS FURTHER ORDERED that the Commission's Interim Decision and Order of September 1, 1999, and that portion of its Final Order of November 19, 1999, denying UWM's motion for reconsideration are reversed and remanded to the Commission for further hearing at which UWM shall be permitted to offer evidence in support of its after-acquired evidence theory. The other aspects of the Commission's Final Order are affirmed.

Dated this 31st day of May, 2001.

BY THE COURT:



Hon. Michael Nowakowski
Circuit Court Judge

STATE OF WISCONSIN

PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

Case No. 96-0016-PC

RULING ON MOTION FOR RECONSIDERATION
RULING ON MOTION FOR ATTORNEY'S FEES
FINAL ORDER

NATURE OF THE CASE

This case is pending before the commission after the entry of an interim decision and order on September 1, 1999, which rejected the respondent's discharge of appellant and addressed issues related to appellant's remedy. The commission retained jurisdiction to resolve any further issues concerning attorney's fees. The appellant filed a motion for attorney's fees. Respondent filed a response to that motion and also a motion to reconsider interim decisions. The Commission now addresses both motions.

MOTION FOR RECONSIDERATION

During the hearing which preceded the September 1, 1999, interim decision and order, respondent sought to question appellant about whether he had purloined documents from the workplace. A relevancy objection was sustained. In the interim decision and order, the commission discussed this ruling as follows:

> During the adverse examination of appellant, respondent asked appellant whether he had a practice of making copies of certain documents and his counsel objected on the basis of relevancy. In response to the objection, respondent stated that it pertained to the issue of mitigation of damages. Respondent further explained that, through this line of questions to appellant and the testimony of another witness, it would show that UWM would have terminated appellant for misconduct in June 1996 if he had still been employed there; and that under the "after acquired evidence" theory, appellant's back pay damages should be cut off

> in June 1996, the date appellant would have been terminated by respondent because of the evidence acquired after the termination in issue.
>
> After a recess, the examiner sustained the objection without explanation. The examiner granted respondent's request to make an offer of proof for the record, which included respondent's exhibit R-22, calculations of respondent's back pay liability based on the after-acquired evidence theory.
>
> The Commission concludes that this ruling of the examiner was proper. To have allowed this evidence would have unfairly required appellant to have tried to address a significant new issue in this case—in a nutshell, whether he had violated work rules by having improperly removed documents from the workplace, and whether such conduct would have led to his discharge in June 1996—without any prior notice that it would be raised in this proceeding. P. 8. (footnote omitted)

The Commission also addressed respondent's alternative argument that the hearing should have been continued to facilitate notice to the appellant of the after-acquired evidence issue and time to prepare:

> As appellant points out in his response to respondent's objections to the proposed decision and order, respondent did not request a continuance at the time when the issue of the after acquired evidence was before the examiner. Also, given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated. There is also a question as to whether it would violate the civil service code to sanction what would be in effect the retroactive addition of reasons for the discharge of the appellant. *See, e. g., Liethen v. WGC,* 93-0095-PC, 10/20/93 (once written notice of reasons for discharge are provided and an employe is discharged on that basis, new charges can not be added as an additional basis for discharge); *Alff v. DOR,* 78-0227-PC, 3/8/79 (respondent could not amend discharge letter to add two charges which were not known to the respondent prior to the discharge letter). However, because the commission concludes that lack of notice precludes litigation of the issue of the missing documents at this point in the remedy process, it will not address the question of whether injecting this issue into this case at this time would violate the civil service code. P. 11.

On October 22, 1999, respondent filed a motion to reconsider the interim decisions on back pay and reinstatement, and brief in support. Respondent asserts that on April 8, 1998, it had filed a replevin action in Milwaukee County Circuit Court seeking

the recovery of documents appellant improperly had removed from the workplace. Respondent further asserts that in connection with this proceeding the documents in question were returned to it on September 29, 1999, and were very voluminous (10 file boxes and approximately 24,000 documents). Earlier, appellant had produced only one file box of documents and had asserted privilege with regard to about 30 other documents when he had been asked to produce "all documents which [he] has removed from the UWM Police Department and are now under his possession or control." Furthermore, in his June 24, 1996, deposition when appellant was asked if he had "boxes and boxes of documents at home from things copied at work," he answered "I don't believe that would be an accurate characterization."

Respondent asserts in its motion that it would have fired appellant on the basis of his having removed these documents—i. e., that the removal of these documents was in itself a ground for dismissal independent of the grounds contained in the charges against appellant that were the subject of this appeal. Respondent further asserts that this newly discovered evidence is a basis for the commission to reverse its order requiring appellant's restoration, and to limit its back pay award to the period of February 11, 1996 (the date of the discharge) to June 24, 1996 (the date when appellant allegedly dissembled during his deposition and did not reveal the true extent of the documents he had taken from the workplace). [1]

In support of its motion, respondent cites *McKennon v. Nashville Banner Publishing Co.*, 513 U. S. 352, 361-62, 66 FEP Cases 1192, 1196-97 (1995), and *Hoell v. LIRC,* 186 Wis. 2d 603, 610, 522 N. W. 2d 234 (Ct. App. 1994).

McKennon is an age discrimination case where the employer learned in the course of discovery that the discharged employe had removed confidential documents concerning the employer's finances from the workplace. The Court found that these

[1] This motion was filed at the same time as respondent's response to appellant's second motion for costs. In light of the multitudinous volume of motions and briefs that have been filed in this case, the extended nature of this proceeding, and the proliferation of attorney's fees, the Commission has determined, after independently having reached the conclusion that this motion for reconsideration should not be granted, not to require appellant to file a brief on the motion.

after-discovered facts were an independent basis for discharge, and that this should affect the issue of remedy:

> We . . . conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.
>
> . . . Once an employer learns about employe wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information even if it is discovered during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a back pay remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information was discovered.

Respondent also cites *Hoell v. LIRC,* 186 Wis. 2d 603, 610, 522 N. W. 2d 234 (Ct. App. 1994), where the Court held that in a mixed motive WFEA case, if the discharge would have taken place in the absence of an unlawful motive, the employe's remedy should be limited to a cease and desist order and attorney's fees.

Respondent contends that both cases stand for the proposition that if the employer can show it would have terminated the employe regardless of the improper reason for termination, reinstatement and back pay are inappropriate. However, *Hoell* and *McKennon* are distinguishable on two bases.

First, in the instant case we have a distinct issue relating to lack of notice and waiver not present in those cases. Here, respondent has known since June 1996 that appellant had removed documents from the workplace, and never raised an after-acquired evidence issue in this proceeding until the hearing on remedy on May 18, 1999. In fact, as discussed in the interim decision, respondent has specifically advised during the course of this proceeding that it intended to raise the issue of the purloined documents in a new disciplinary action after appellant's restoration. The only factual difference between now and June 1996 is that now respondent implies it is aware as a result of newly-discovered evidence that appellant took ten boxes of documents rather

than one. However, respondent earlier had asserted (in a July 20, 1998, letter to the Commission in opposition to appellant's motion for reinstatement) that it had an independent basis for terminating appellant on the basis of the one box of documents that then were known. Respondent at that time stated that "[i]f ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him, for unauthorized possession of university property with regard to the records issue." As also was discussed in the Commission's September 1, 1999, interim decision, respondent reiterated this position in a May 14, 1999, memo. This statement provided notice to appellant at that time that respondent was aware that its recourse with regard to the allegedly purloined documents would be to proceed with a new disciplinary action against appellant after he had first been reinstated—i. e., after the entry of the Commission's final order.

Under these circumstances, the "newly-discovered" evidence—the actual physical return of the file boxes of documents—does not constitute a material difference that should permit respondent to raise the issue of the improperly-removed documents at this stage in these proceedings.

Second, this case involves an appeal of a discharge under the civil service code, not a WFEA discrimination claim. The respondent can not take any disciplinary action against appellant without complying with the requirements of the civil service code and the due process clause. The appointing authority can not add additional reasons for discharge after the facts of the initial notice of termination, appellant's *Loudermill* hearing, and the hearings before the Commission. *See Alff v. DOR,* 78-0227-PC, 3/8/79; *Liethen v. WGC,* 93-0095-PC, 10/20/93. *See also State ex rel Tracy v. Henry,* 219 Wis. 53, 262 N. W. 222 (1935). In the latter case, there had been a judicial determination that certain employes had been illegally discharged under the civil service code because the notice of discharge either had not given any reason for the discharge, or a legally insufficient reason. After this judicial decision, the employer conducted an investigation and concluded there had been adequate, independent grounds for discharge at the time of the original, illegal discharges, and took steps to discharge the employes effec-

tive the date of the original discharges. The Court held that the employes were entitled to have been restored with all back pay going back to the point of their original discharges, and the subsequent attempt at retroactive discharges was illegal. This case is consistent with the proposition that respondent would have the right to proceed to discharge appellant on the basis of the purloined documents, but only after first having restored him with back pay from the date of the original termination to the date of restoration. For the Commission to now deny restoration and limit appellant's back pay to the time from the original discharge (February 11, 1996) to the date of the discovery of the missing documents (June 24, 1996) amounts effectively to an unlawful retroactive discharge of the nature involved in *Tracy*.

RULING ON MOTION FOR ATTORNEY'S FEES

In an interim ruling entered on June 23, 1998, the Commission denied appellant's application pursuant to §227.485, Stats., for fees and costs on the ground that respondent had been substantially justified with respect to its decision to suspend and then discharge appellant. On October 1, 1999, appellant filed another motion for costs. In his current motion for costs, appellant seeks costs with regard to all activity in this case performed since the Commission's June 23, 1998, ruling. He also seeks costs for all activity involved in the replevin action mentioned above.

The Commission will first address the question of fees in connection with the replevin action. Any basis for awarding fees in this matter must be found in §227.485, Stats.[2] That statute authorizes fees with regard only to either a "contested case" or a proceeding for judicial review under §227.52, Stats. The term "contested case" encompasses agency proceedings, §227.01(3), Stats. Clearly, the replevin action is neither an agency proceeding nor a §227.52 judicial review proceeding, and thus there is no basis for an award of fees as to the replevin action. While appellant argues that the

[2] The Commission also has authority to award costs and fees in proceedings in certain kinds of discrimination or retaliation cases. However, the instant case involves an appeal pursuant to §230.44(1)(c), Stats., not a discrimination complaint.

replevin action was undertaken "in connection with the contested case [before the Commission]," the language of §227.485 is explicit and does not cover such ancillary proceedings which may have been undertaken in connection with this contested case before this Commission.[3] *See Duello v. UW-Madison,* 87-0044-PC-ER, 3/9/90; *McCready v. DHSS,* 85-0216-PC, 9/10/87.

In its June 23, 1998, interim ruling on fees and costs, the Commission outlined the standards applicable to an award of fees for proceedings before this agency:

> As the prevailing party, appellant argues that he is entitled to fees and costs pursuant to §§227.485, 814.245, Stats., and PC 5.05, Wis. Adm. Code. Section PC 5.05 (3), Wis. Adm. Code, provides that a motion for fees and costs raised under §227.485, Stats. shall be addressed under the standards and procedures of that statute. Sections 227.485 (3), (5) and (6), Stats., authorize the Commission to determine and award costs using the criteria in §814.245, Stats. Section 814.245 (3) provides:
>
> > If an individual . . . is the prevailing party in an action by a state agency or in any proceeding for judicial review under §227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position.
>
> The Commission must determine then whether respondent's position was "substantially justified." *Sheely v. DHSS*, 150 Wis. 2d 320, 442 N.W.2d 1 (1989). Under *Sheely*, to satisfy the "substantially justified" burden respondent must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. June 23, 1998, ruling, p. 2.

In his brief in support of his motion for costs incurred in this proceeding before the Commission since its June 23, 1998, interim decision denying appellant's first motion for costs, appellant focuses primarily on respondent's litigation of the replevin action. As has just been discussed, costs are not recoverable in this proceeding before this Commission for appellant's litigation expenses incurred in the replevin action. The

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[3] The Commission notes that §814.245, Stats., provides for recovery of costs in judicial proceedings in a manner analogous to §227.485.

only reference appellant makes to respondent's handling of the Commission proceeding itself since June 23, 1998, is the contention that respondent deviated from and had never sought to be relieved from "its stipulation to let [the Commission] decide the back-pay issue based on the briefs filed in the early fall of 1998." Appellant's brief in support of motion for costs, 2. However, the record on this point ultimately does not support appellant's contention.

The stipulation in question is memorialized in a letter from appellant's attorney dated July 28, 1998. The parties agreed on a schedule for appellant to respond to respondent's discovery requests, for appellant's deposition, for respondent to file a calculation of appellant's back pay, and for the parties to file submissions in connection with that calculation on dates in September. The stipulation further provides:

> Based on the submissions, the Commission shall make a finding as to the remedy. If in the interim there are discovery objections, such objections shall be telephoned to you [Commissioner Murphy] for immediate ruling. If there is no objection to UWM's calculation, then the Commission shall adopt that as the remedy in this matter. If there are objections or further submissions, the Commission shall make finding [sic] on the submissions of the parties. Letter dated July 28, 1999, from appellant's counsel to Commissioner Murphy, p. 1.

This stipulation did not rule out further submissions after the September submissions; rather, it provided that if there were further objections or submissions, they would be resolved on the basis of those submissions. The parties submitted their arguments and materials in September. However, a dispute was engendered as respondent subpoenaed appellant's bank records in connection with the question of mitigation. During discovery, appellant had produced a checkbook which showed one deposit of $2000 during the period in question. However, the subpoenaed bank records reflect over $80,000 in deposits during this period. Appellant objected to this on a number of grounds, including improper rebuttal. The parties then filed further briefs and arguments. Two status conferences were held and on January 11, 1999, the parties reached a stipulation reflected in a January 15, 1999, letter from Commissioner Murphy to the parties:

> After further discussion about the issue of remedy and the necessity of a hearing, the parties agreed to the following:
>
> 1) Respondent will provide the Commission and appellant a revised spreadsheet of Brenon's estimated back pay from February 11, 1996 through March 1999.
> 2) Respondent will file a brief in response to appellant's assertions regarding mitigation of damages and the exclusion of earned wages after his termination by respondent, by February 1, 1999.
> 3) Respondent will file a copy of the August 28, 1998, deposition of appellant with the Commission.
> 4) Appellant will file an affidavit as to all earnings in 1998 with appropriate documentation—check stubs—exclusive of the $22,400 reported in his deposition. Also, appellant agreed to provide copies of all tax withholding statements, as they become available to him. Finally, it is anticipated that appellant will supplement this information with documentation of any earnings in 1999 through March 1999. Letter to parties from Commissioner Murphy dated January 15, 1999.

On January 19, 1999, respondent filed a copy of appellant's August 28, 1998, deposition and requested a hearing, arguing that a hearing was necessary to resolve material issues of fact regarding appellant's other income. Respondent contended that appellant had not complied with discovery requirements and that there were major discrepancies between appellant's disclosures in deposition testimony and in document submissions, and the bank records respondent had subpoenaed.

On January 26, 1999, appellant filed a response to this submission, contending, *inter alia,* that respondent had misrepresented the state of discovery, and objecting to a further hearing. After this, further documents and motions were filed and eventually a conference was held on April 28, 1999, at which Commissioner Murphy scheduled a hearing on remedy for May 18, 1999. At that conference, the parties agreed to withdraw all motions and to resolve the outstanding issues at the hearing on remedy.

In the Commission's opinion, respondent had a reasonable basis for its posture in this proceeding. To begin with, as mentioned above, the stipulation reflected in the July 28, 1998, letter from appellant's attorney did not rule out further submissions; it anticipated that possibility. The Commission ultimately agreed with respondent's re-

quest to schedule a hearing after numerous additional submissions raising a number of issues. A party can be relieved from a stipulation on the basis of changed conditions or unforeseen developments. *See 73 Am Jur 2d STIPULATIONS,* §§13-14; *Burmeister v. Vondrachek,* 86 Wis. 2d 650, 664, 273 N. W. 2d 242 (1979). In the instant case, respondent first received appellant's bank records on September 21, 1998.[4] There appear to be discrepancies between the record of deposits thus revealed and what information appellant had provided in discovery up to that point. These discrepancies are relevant to the back pay issue because they relate to respondent's contention that appellant must have hidden sources of income that properly should be considered in the mitigation calculation. Respondent ultimately did not sustain its burden on the issue of mitigation. However, losing a case does not mean that a party was not substantially justified in its position. *See, e. g., Stern v. DHFS,* 212 Wis. 2d 393, 397, 569 N. W. 2d 79 (Ct. App. 1997). Given the apparent discrepancies in appellant's financial records in the amount of about $78,000, respondent had a reasonable basis for proceeding as it did.

AMENDMENT OF SEPTEMBER 1, 1999, DECISION

While neither party raised this point, there is a typographical error in this decision which the Commission herewith corrects. The first page of this decision quotes the stipulated statement of the issues for hearing. This statement of issues is reiterated on page ten. However, the latter entry misstates the second issue. Instead of "What is the sum of respondent's mitigating damages and setoffs," it states "What is the sum of respondent's back pay and other credits?" The Commission will make this correction, insert a revised page in the decision, and send copies to the parties.

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[4] On September 25, 1998, respondent filed, among other things, a request for a hearing before the entire Commission. This was equivalent to a request to be relieved from its stipulation to submit the remedy issue on the basis of written submissions.

FINAL ORDER

1. Respondent's action of discharging appellant is rejected and this matter is remanded to respondent for action in accordance with this decision. Respondent is required to immediately offer appellant reinstatement to his former position or its equivalent with back pay and benefits from the date of his discharge to the date of his restoration, as set forth in this decision, except that the amount of back pay and benefits actually due appellant pursuant to this decision must be recalculated so that it is current as of the date of payment and reflects the appropriate amount of interest.

2. Appellant's motion for costs filed October 1, 1999, is denied.

3. Respondent's motion filed October 22, 1999, to reconsider interim decisions is denied.

4. The Commission's September 1, 1999, decision is amended as set forth above.

Dated: November 19, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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Parties:
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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95

STATE OF WISCONSIN

PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

Case No. 96-0016-PC

INTERIM DECISION AND ORDER

NATURE OF CASE

This matter before the Commission involves an appeal of a suspension without pay and, later, a discharge brought pursuant to §230.44(1)(c), Stats. The Commission entered its decision and order with respect to the merits on February 12, 1998, but retained jurisdiction to consider and work out any remaining remedial entitlements. After a protracted period of time involving many failed attempts to even reach agreement on the amount of appellant's gross back pay, the parties agreed to table all motions and proceed toward resolving the matter by hearing. A hearing on the issue of remedy was held May 18, 1999. The parties agreed to the following subissues: "(1) What is the sum of appellant's back pay and other credits? (2) What is the sum of respondent's mitigating damages and setoffs? and (3) What is the total sum of appellant's remedy?" The parties gave oral arguments at the conclusion of the hearing.

FINDINGS OF FACT

1. By letter dated February 9, 1996, the University of Wisconsin-Milwaukee (UWM) terminated the employment of Dale Brenon with them, effective February 11, 1996. Just prior to that, on January 22, 1996, Brenon had been suspended by UWM for ten days without pay.

2. Brenon began employment at UWM in October 1974 as a police cadet. At the time of his termination, Brenon was serving with permanent status in class as a police sergeant.

3. Brenon appealed the actions taken against him by UWM to the Personnel Commission. The Commission rejected the suspension and modified respondent's (UWM's) decision terminating Brenon to ten days without pay in an Interim Decision and Order issued February 12, 1998.

4. The respondent did not reinstate appellant to his former position in accordance with the Commission order nor has it offered appellant any position since his termination in February 1996.

5. After his employment with UWM was terminated, appellant applied for the following positions in 1996: American Family Insurance Group – April 10, 1996; a driver position at the Blood Center of Southwest Wisconsin – April 24, 1996; Alpha Omega Security (where he was hired in July 1996); Director of Security, regional shopping mall, Denver, CO – October 10, 1996; security position, U.S. facility, Marshall Islands – October 18, 1996.

6. In July 1997 appellant applied for a civil service investigator position with Milwaukee County. Appellant received the following response: "Milwaukee County Civil Service Rule II, Section 7(2) provides that the Director of Human Resources may refuse to examine an appellant who: (d) has been dismissed for good cause from the public services. We are refusing to examine you because you were terminated for cause from the University of Wisconsin-Milwaukee."

7. Appellant appealed Milwaukee County's refusal to examine him to its Civil Services Commission. After a hearing in October 1997, the Commission sustained the refusal to examine appellant and referred the matter back to the Human Resources director for "appropriate action" to dispose of the matter.

8. In November 1997, appellant applied for a Communications Dispatcher position at North Shore Public Safety Communications Center, Whitefish Bay, WI. By

letter dated February 2, 1998, appellant was advised that his name was not included in the list of eligible candidates.

9. Since April 1999, appellant has worked for Dominican Management Services, Plymouth, MN, as a security agent at the apartment where he resides.

10. Between January 1996 and December 31, 1998, appellant's yearly income was $9,000 to $12,000.

11. During the period in question, appellant did not visit a state job service office or seek unemployment benefits, but he did attempt to obtain work through an employment agency.

12. Appellant's back pay without setoffs, between February 11, 1996, to May 1999, is $190,272.34. This total sum includes a quarterly 12 percent interest rate computation.[1] In addition, appellant has a credit of $391.70 for June and July 1999 health insurance premiums.

13. With setoffs, based on income tax returns and earning statements, appellant's back pay totals $159,533.64 (Resp. Exh. 21, 26, 27 and 28).

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden to show that appellant failed to exercise reasonable diligence to mitigate his damages, and that there was a reasonable likelihood that appellant might have found comparable work by exercising reasonable diligence.

3. Respondent has failed to sustain this burden.

---

[1] The parties stipulated to respondent's exhibit R-20, a spreadsheet showing appellant's estimated back pay without setoffs, computed quarterly, between February 11, 1996, and May 22, 1999.

OPINION

At the start of the hearing on May 18, 1999, the parties stipulated to appellant's estimated back pay without setoffs through May 22, 1999 (Resp. Exh., R-20). Appellant never disputed this calculation of back pay, except to the extent that appellant had prepaid health insurance premiums for the months of June and July 1999 – a sum of $195.85 per month; and this was acknowledged by respondent. So the remaining legal issue concerns mitigating damages and setoffs.

The statutory basis for awarding relief in cases such as this, where an employe has been removed from his position in violation of the state classified service law, is provided in §230.43(4), Stats.:

> If an employe has been removed...from...employment in contravention, or violation of this subchapter, and has been restored to such...employment by order of the commission..., the employe shall be entitled to compensation therefore from the date of such unlawful removal.... *Interim earnings or amounts earnable with reasonable diligence shall operate to reduce back pay otherwise allowable....* The employe shall be entitled to an order of mandamus to enforce the payment on other provisions of such order. (Emphasis added.)

Very little guidance is provided in case law in regard to the proper interpretation or application of this statutory language. In *State ex rel. Schilling and Klingler v. Baird*, 65 Wis. 2d 394, 398-99, 22 N.W.2d 666 (1974), a case involving the suspension of two county deputy sheriffs, the court stated:

> This court has held that the burden of establishing the lack of reasonable and diligent efforts by the employees to seek other employment is on the employer. *Schiller v. Keuffel & Esser Co., supra*, page 553; *Barker v. Knickerbocker Life Ins. Co.* (1869), 24 Wis. 630, 638. Thus the question of whether such opportunities exist is primarily a question of fact and as such relates not to the existence of a legal duty on the part of Klinger and Schilling, but to the sufficiency of the evidence proving a violation of that duty. . . .

This court stated the rule in *Barker v. Knickerbocker Life Ins. Co., supra*, page 638, as follows:

> "...The rule in such cases is that although damages may be so reduced, yet the burden is on the defendant to show affirmatively that the plaintiff might have had employment and compensation elsewhere..."

In *Warren v. DHSS*, 92-0720-PC, 92-0234-PC-ER, 5/14/96, the Commission concluded that the mitigation of damages language in §230.43, Stats., paralleled language set forth in the Wisconsin Fair Employment Act (WFEA) in §111.39(4), Stats. Also, the "reasonable diligence" requirement to mitigate damages has been applied in deciding back pay issues in non-public employe and Family and Medical Leave Act (FMLA) cases, and in Title VII cases. *Marten Transport, Ltd. v. DILHR*, 171 Wis. 2d 147, 491 N.W.2d 96 (1992), *Kelley Co. Inc. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.68 (1992), *Hutchison v. Amateur Elect. Supp., Inc. et al.*, 66 FEP Cases 1275 (7th Cir. 1994).

In *Hutchison v. AES, supra*, the court said that once a plaintiff has established the amount of damages resulting from the employer's conduct, the burden of going forward shifts to the defendant to show the plaintiff failed to mitigate damages or that the damages were, in fact, less than the plaintiff asserts; and that "[t]o establish the affirmative defense of a plaintiff's failure to mitigate damages, the defendant must show that: (1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence (citation omitted)." With these cases as guidelines, we address the issue of mitigation of damages and setoffs, since appellant's gross back pay is not in dispute.

I. Mitigation of Damages

First, respondent contends that appellant failed to seek a job as a law enforcement officer and that appellant's back pay should be reduced by the amount he could

have earned as a law enforcement officer during the period of time in issue – some forty thousand dollars per year (Resp. Exh. 23).[2] Respondent's expert witness in the field of Employment and Hiring Standards (for Wisconsin law enforcement positions) testified about jobs posted in a monthly Department of Justice (DOJ) Law Enforcement Bulletin (Resp. Exh. 16); and that he believed appellant "could have been a competitive applicant [for such positions] in the sense that he was an experienced officer." Respondent argues that appellant did not call or visit the State Job Service office where these bulletins were available. The Commission does not find this argument and this testimony provided by the expert witness persuasive for the following reasons.

The expert witness testified that between February 1996 and the present there were a high number of qualified applicants for any given position. Further, the expert witness testified that appellant lost his police officer certification when terminated by UWM and that the DOJ Training and Standards Bureau would be required to notify any employer that appellant would need 120 hours of training for certification as a law enforcement officer.

Also, respondent's expert witness testified that, other than the Board standards, he did not know what qualifying rules, county or city, impact on the positions listed in the bulletin and did not know if appellant was eligible for any of them. While appellant did not go to the State Job Service office, he did register at an employment agency, circulate his resume, and look for positions noticed in newspapers. In addition, appellant's rejection by Milwaukee County (Finding of Fact 7) made it plain he was not apt to be a successful candidate for a law enforcement position.

Finally, the Commission issued a decision in February 1998, affirming an October 1997 proposed decision and order to reinstate appellant, but respondent elected not to abide it; and to the present date, respondent has not offered appellant any position in its coordinate responsibility to mitigate damages. Based on the evidence presented and

---

[2] The $40,000/year amount was based on information provided to the author of R-23 by respondent's UWM Legal Services office.

for reasons stated, the Commission concludes that respondent failed to establish appellant violated his duty to mitigate damages.

Alternatively, respondent argues that its damages should be reduced by the amount appellant earned during the period in issue. Based on this calculation (Resp. Exh. 21, 26, 27 and 28), appellant's back pay with setoff of his earnings from February 11, 1996, to May 22, 1999, is $159,533.64 (Finding of Fact 13). The Commission agrees. One of the purposes of back pay is to make the individual victim of an unlawful employment action whole by putting the victim in nearly the same financial position had the unlawful employment action not occurred. Appellant argues that he could have earned this income even if he had been employed by respondent, but he offered no evidence that prior to termination he did work outside his regular job at UWM.

Respondent also argues that appellant's back pay should be reduced with setoffs totaling $110,332.80, as disclosed in appellant's bank statements as deposits during the period in issue. In support, respondent presented a spreadsheet (Resp. Exh. 24) with setoffs (column H) based on appellant's 1996-1998 bank statements (Resp. Exh. 15). The spreadsheet was prepared and explained in testimony by a UWM financial and personnel division administrator. Respondent presented no other evidence to substantiate this claimed setoff. When questioned about these bank statements, appellant testified that the bank deposits included funds obtained from multiple monthly credit card advances and loans from relatives. Appellant testified that he kept his accounts current by implementing the "robbing Peter to pay Paul" principle – covering one credit card advance by obtaining another one. Appellant also testified that he reported all earned income on his income tax return forms. Respondent's only rebuttal is its assertion that appellant's testimony was a falsification. Clearly the evidence presented failed to establish respondent's defense of bank deposit setoffs.

II. Matters of Procedure

During the adverse examination of appellant, respondent asked appellant whether he had a practice of making copies of certain documents and his counsel objected on the basis of relevancy. In response to the objection, respondent stated that it pertained to the issue of mitigation of damages. Respondent further explained that, through this line of questions to appellant and the testimony of another witness, it would show that UWM would have terminated appellant for misconduct in June 1996 if he had still been employed there; and that under the "after acquired evidence" theory, appellant's back pay damages should be cut off in June 1996, the date appellant would have been terminated by respondent because of the evidence acquired after the termination in issue.

After a recess, the examiner sustained the objection without explanation. The examiner granted respondent's request to make an offer of proof for the record, which included respondent's exhibit R-22, calculations of respondent's back pay liability based on the after-acquired evidence theory.

The Commission concludes that this ruling of the examiner was proper.[3] To have allowed this evidence would have unfairly required appellant to have tried to address a significant new issue in this case—in a nutshell, whether he had violated work rules by having improperly removed documents from the workplace, and whether such conduct would have led to his discharge in June 1996—without any prior notice that it would be raised in this proceeding.

Respondent argues that appellant should have been on notice because he had been questioned on the subject during a June 1996 deposition, and respondent's attorney had mentioned this in a July 20, 1998, letter to the Commission in opposition to appellant's motion for reinstatement. This letter includes the following:

> In addition, the State of Wisconsin has a separate legal action pending against Brenon. Because of the circumstances of that litigation, his presence in the workplace would be disruptive and cause irreparable harm to

[3] The following discussion is added to explain the rationale for the examiner's ruling and to address respondent's objection to this ruling in the proposed decision and order.

> the university. After Brenon was terminated, it was brought to my attention that during his employment, he very likely had copied and removed documents from the workplace containing confidential student and employee information which he had no right to remove. Informal attempts to convince him to return all copies of such documents were unsuccessful. In order to protect the privacy of individuals named in said records and mitigate potential liability for UWM because of Brenon's actions in this regard, the State of Wisconsin has commenced a replevin action in Milwaukee County Circuit Court.
>
> Brenon's presence in the workplace would give him access, in the course of fulfilling his job responsibilities, to the same types of confidential materials he has had access to in the past. . . .
>
> *If ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him,* for unauthorized possession of university property with regard to the records issue. This would unnecessarily complicate all pending matters. In the interests of judicial efficiency the parties should be permitted to pursue the replevin action *and* the appeal process, accepting that an order to remit backpay may result. (emphasis added)

The commission does not agree that the foregoing notified appellant that the issue of after-acquired evidence (concerning purloined documents) would be litigated as part of the damages phase of this case. Rather, this suggests that the document issue would continue to be pursued in respondent's separate replevin action, and, if appellant were restored to his employment pursuant to the commission's decision, would be raised by a new disciplinary action against appellant. Similarly, while, as respondent contends, the questioning of appellant concerning the documents during appellant's June 1996 deposition, and the filing of the replevin action, should have put appellant on notice that respondent took the document issue seriously, these factors would not have put appellant on notice that the issue would be raised in the context of the damages phase of this case. This conclusion is further supported by the procedural history of this case. Respondent did not raise the after acquired evidence issue during either the second discovery phase of this proceeding relating to remedy, or when the parties agreed to submit the issue of remedy on briefs to the hearing examiner. This briefing process was

complicated by a series of motions and document submissions, and the parties agreed to table all pending motions and resolve the remedy issue by a hearing before the hearing examiner. The parties agreed to the following statement of issues for hearing: "(1) What is the sum of appellant's back pay and other credits? (2) What is the sum of respondent's mitigating damages and setoffs? (3) What is the total sum of appellant's remedy?" Again, there was no mention of after acquired evidence, and appellant was justified in anticipating that the issue of the purloined documents would be addressed in the pending replevin action and/or a new disciplinary action following appellant's restoration to his former job. Finally, appellant points to respondent's statement in a May 14, 1999, memo and settlement offer about what process would be followed if appellant were to be restored as a result of the commission's decision on the merits: "After the final decision we also intend to reinstate your client and initiate the discipline process because of his gross violation of the records policies." (Attachment to appellant's response to respondent's objection to proposed decision and order.) This statement is inconsistent with the notion that appellant should have been aware that the records issue would be raised in the hearing on damages. Respondent objects to the consideration of this document, citing §904.08, Stats.:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

This section leads to the result that "[e]vidence of offers to settle and related statements during the negotiations may be admitted if offered to prove any relevant proposition *other* than the validity of the disputed claim or its amount." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE 152 (1991) (emphasis added) Appellant is not offering this statement to prove the validity or amount of his claim, but rather to prove that he was

not on notice that respondent intended to raise the issue of purloined documents during the damages hearing. Therefore, it is admissible. In any event, even if this statement were not considered, there is sufficient other evidence to support appellant's notice argument, as discussed above.

Respondent also contends that even if the hearing examiner's ruling on the after acquired evidence had been proper, the examiner should at least have continued the hearing to obviate the problem of notice to the appellant by giving him time to prepare to respond to the missing documents issue. As appellant points out in his response to respondent's objections to the proposed decision and order, respondent did not request a continuance at the time when the issue of the after acquired evidence was before the examiner. Also, given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated. There is also a question as to whether it would violate the civil service code to sanction what would be in effect the retroactive addition of reasons for the discharge of the appellant. *See, e. g., Liethen v. WGC,* 93-0095-PC, 10/20/93 (once written notice of reasons for discharge are provided and an employe is discharged on that basis, new charges can not be added as an additional basis for discharge); *Alff v. DOR,* 78-0227-PC, 3/8/79 (respondent could not amend discharge letter to add two charges which were not known to the respondent prior to the discharge letter). However, because the commission concludes that lack of notice precludes litigation of the issue of the missing documents at this point in the remedy process, it will not address the question of whether injecting this issue into this case at this time would violate the civil service code.

Respondent also argues it had an inadequate opportunity for discovery during the remedy stage of this proceeding. At the prehearing conference held on April 28, 1999, the parties agreed to table all motions and to resolve the outstanding issues at a hearing on remedy, which was held on May 18, 1999. To the extent respondent had any outstanding issues on discovery at that time, it waived them by agreeing to proceed in this fashion.

ORDER

Respondent's action of discharging appellant is rejected and this matter is remanded to respondent for action in accordance with this decision. Respondent is required to immediately offer appellant reinstatement to his former position or its equivalent.

The amount of back pay and benefits actually due appellant pursuant to this decision must be recalculated so that it is current as of the date of payment, thereby reflecting the appropriate amount of interest.

Dated: September, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

DRM:rcr:960016Adec5.2

Parties:
Dale Brenon
8250 North 46th Street Apt. 122
Brown Deer, WI 53223

Katharine Lyall, President
UW-System
1720 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

1 MS. BOYLAN: Okay.

2 BY MS. BOYLAN:

3 Q If you would go to page 198 in that deposition,

4 line 3. "In response to our interrogatories, you

5 refused to describe efforts to secure employment

6 since you learned you would be discharged. I'm

7 now asking you to answer that and describe those

8 efforts." Now --

9 MR. ERICKSON: Well, I'm going to

10 object unless she reads in the answer. The

11 question's irrelevant.

12 MS. BOYLAN: It's the discussion that

13 follows that we just talked about.

14 MR. ERICKSON: So are you moving

15 that -- If she's moving that entire colloquy in,

16 I don't object, but if you're reading a question

17 out of context --

18 MS. BOYLAN: Sure. Sure. I would be

19 moving in page 198, 199 and 200.

20 MR. ERICKSON: No objection.

21 BY MS. BOYLAN:

22 Q Now, when you worked as a sergeant at UW-M, you

23 had a practice of making copies of documents that

24 came across your desk, didn't you?

25 MR. ERICKSON: Objection, relevance.

1 MS. BOYLAN: It goes to credibility
2 and also to remedy in mitigation.
3 COMMISSIONER MURPHY: Credibility?
4 MS. BOYLAN: Yes.
5 MR. ERICKSON: I'd like to be heard on
6 this. There's an action pending in circuit court
7 with respect to return of certain records to UW-M
8 that we attempted to have handled by this
9 commission.
10 COMMISSIONER MURPHY: What's the
11 question again?
12 MS. BOYLAN: When you worked as a
13 sergeant --
14 COMMISSIONER MURPHY: No. No. She
15 can read it.
16 (The last question was read.)
17 COMMISSIONER MURPHY: What's the
18 relevance of that in terms of remedy?
19 MS. BOYLAN: It goes to remedy in
20 terms of the mitigation of damages. We are going
21 to show through proof of this witness and another
22 witness that this man would have been terminated
23 prior to -- well, around the time of his June
24 deposition, 1996, for misconduct.
25 COMMISSIONER MURPHY: I'm not going to

1 allow that. The point is --

2 MS. BOYLAN: He would have been

3 terminated for misconducts, other wrongdoing that

4 was after acquired evidence that we obtained after

5 his termination.

6 And after acquired evidence theory is

7 a theory that has been accepted by the U.S.

8 Supreme Court.

9 COMMISSIONER MURPHY: Let me just hear

10 from you, Mr. Erickson, on this. You've kind of

11 lost me with this completely. The issue here has

12 to do with remedy at the point when he was in fact

13 terminated. I don't quite understand what you're

14 talking about that he -- suggesting that he would

15 have been terminated at some other point as

16 opposed to when he was.

17 MS. BOYLAN: We are talking in this

18 hearing about damages, correct, about remedy and

19 back pay?

20 COMMISSIONER MURPHY: Absolutely.

21 MS. BOYLAN: We are saying that the

22 back pay liability should be cut off at an earlier

time than today. It should be cut off in June of

'96 rather than May of '99. That's what our

argument is.

1 MR. ERICKSON: The after acquired
2 evidence theory deals with a case in chief where
3 an employee is discharged, and then prior to a
4 hearing --
5 COMMISSIONER MURPHY: Let's --
6 MR. ERICKSON: -- they come up with
7 other reasons for discharging the person. But
8 we've had a hearing on the merits of the discharge
9 and a favorable finding, and we're just here to
10 talk about back pay.
11 COMMISSIONER MURPHY: Fine. All
12 right.
13 MS. BOYLAN: Can I respond to that?
14 Because he's wrong.
15 COMMISSIONER MURPHY: Well --
16 MS. BOYLAN: The after acquired
17 evidence goes only to damages. It doesn't go to
18 the merits.
19 COMMISSIONER MURPHY: Let me just --
20 MS. BOYLAN: I would like to respond
21 to that argument because it's wrong. After
22 acquired evidence theory goes to the damages, not
to the merits of a discharge because it's
different.
MR. ERICKSON: So we're going to have

1 another hearing on the merits today?

2 MS. BOYLAN: No, we're not going to

3 have a hearing on the merits.

4 COMMISSIONER MURPHY: All right. I'm

5 going to withdraw my sustaining objection on

6 that. I'm going to allow testimony here. We are

7 not going to get into having our arguments now.

8 What I want is evidence, and so we will continue.

9 MR. ERICKSON: I do object to

10 proceeding on any other theory given that this

11 matter is currently before Judge Mueller in

12 circuit court, University of Wisconsin Milwaukee

13 versus Dale Brenon. It's being held in a

14 completely different venue.

15 Mr. Brenon has -- Sergeant Brenon has

16 never been charged with misconduct over some issue

17 relating to this, and to try and ambush us at this

18 late date on something of this magnitude is really

19 unfair, and it's not in your notice of the

20 hearing.

21 MS. BOYLAN: It's part of the remedy.

22 There was no ambush. We have put the Appellant on

23 notice in correspondence.

24 COMMISSIONER MURPHY: I need to hear

25 again exactly -- What is it that you're trying to

1 prove now or show now that --

2 MS. BOYLAN: After Mr. Brenon was

3 discharged, the chief -- his supervisor discovered

4 misconduct that if he had still been employed, he

5 would have dismissed him for. That is the after

6 acquired evidence, the misconduct. We --

7 According to the U.S. Supreme Court --

8 COMMISSIONER MURPHY: I understand you

9 now. I understand. I'm going to take a short

10 break.

11 (A recess was taken.)

12 COMMISSIONER MURPHY: We're back on

13 the record, and it's my understanding that this --

14 Again my understanding is that this testimony is

15 to attempt to show that -- a particular cutoff

16 date in terms of back pay; is that correct? Or

17 that -- ceasing of liability at a certain point in

18 time?

19 MS. BOYLAN: Yes. It's to lay a

20 foundation for that. And our witness this

21 afternoon, Chief Clark, will testify to the other

22 element that he would -- the misconduct that he

23 would have --

24 COMMISSIONER MURPHY: I'm going to

25 sustain that objection. I'm not going to allow

1 that --

2 MS. BOYLAN: I would like to make an

3 offer of proof for the record.

4 COMMISSIONER MURPHY: You may do

5 that.

6 MS. BOYLAN: The questions that we

7 would have asked this witness would have been

8 verified by answers he gave in his deposition in

9 June -- June 24, 1996 in which he was asked about

10 records he had removed from The University of

11 Wisconsin-Milwaukee that were produced in -- by

12 him in discovery in the case on the merits.

13 Records that he was not entitled to

14 have at home -- He took it home. He made copies

15 of confidential records of investigative files.

16 That was first discovered in his response to our

17 request for production of documents.

18 Chief Clark when he saw these

19 responses was upset that these records had been

20 removed from the campus, and he called Hector de

21 la Mora in our office to get legal advice, and

22 Hector de la Mora contacted the Attorney General's

23 office. The Attorney General's office filed a

24 civil lawsuit, a replevin action to get documents

25 returned from Brenon which has not occurred to

1 this date. The trial is upcoming.
2 However the chief felt this was so
3 serious that he would have terminated Brenon had
4 Brenon -- had he discovered this misconduct before
5 Brenon was discharged. I would like to also argue
6 that this evidence is admissible in the damages
7 portion --
8 COMMISSIONER MURPHY: I thought you
9 were just -- Excuse me.
10 MS. BOYLAN: I'm giving an offer of
11 proof because --
12 COMMISSIONER MURPHY: I understand.
13 You said offer of proof, but you didn't say you
14 were going to make an argument. I thought you
15 were going to make -- you were going to provide
16 offer of proof. Isn't that a little bit different
17 than making an argument?
18 MS. BOYLAN: Brenon's deposition
19 that's R-1 --
20 COMMISSIONER MURPHY: So just to
21 clarify simply, I thought you were going to
22 provide offer of proof and not provide argument
23 because we've already ruled on the objection.
24 I've sustained that so --
25 MS. BOYLAN: So it's for the appeal

1 court to decide what the law is on this matter.
2 Okay.
3 COMMISSIONER MURPHY: Well --
4 MS. BOYLAN: Anyway Brenon's
5 deposition that's R-1 verifies that he admitted
6 removing documents without authorization. And the
7 chief's testimony would have verified that he
8 would have terminated him had he known about that
9 prior to termination. That it was a serious
10 offense.
11 COMMISSIONER MURPHY: And that's the
12 extent of the testimony that was going to be
13 provided by Chief Clark today? Simply that he
14 would have done that?
15 MS. BOYLAN: Well, he would have given
16 examples of the types of records that were removed
17 that he would have felt were serious security
18 breaches, and he would have also said that it
19 would have been the next step in progressive
20 discipline.
21 Since the commission's decision was to
22 change the termination to a 10-day suspension, a
23 termination would have been the next step he would
24 have taken. He would have proven the misconduct
25 that we're required to prove under the U.S.

1 Supreme Court case.

2 COMMISSIONER MURPHY: I just want to

3 be clear in that you would be at this particular

4 point in our proceeding attempting to then prove

5 that he would have been discharged at that time?

6 MS. BOYLAN: Yes. In June --

7 COMMISSIONER MURPHY: You would

8 have -- Just a moment so you're clear. And that

9 in fact he would have been presenting -- It was

10 your intent to present evidence to show just cause

11 for terminating the Appellant at that time? Is

12 that -- Was that your intent today?

13 MS. BOYLAN: To show that misconduct

14 had occurred, that Brenon had admitted to that

15 misconduct.

16 COMMISSIONER MURPHY: But my question

17 was just cause. That was the question.

18 MS. BOYLAN: Yes. There was

19 sufficient --

20 COMMISSIONER MURPHY: You intended

21 to --

22 MS. BOYLAN: -- cause for

23 termination. Yes. And we would have --

24 COMMISSIONER MURPHY: And that was

25 your intent is present evidence of that kind

1 today?

2 MS. BOYLAN: Yes. And that has been

3 accepted in the past by The Personnel Commission

4 as part of a damages or remedy phase.

5 COMMISSIONER MURPHY: Well, that's

6 argument. I just want you to just answer my

7 question.

8 MS. BOYLAN: We would have also

9 introduced our Exhibit R-22 to show where the --

10 how much the damages should have been under that

11 theory which is $17,514.43 to cut off the

12 liability as of June 24, 1996 because that is the

13 date that Brenon was confronted with the evidence

14 at his deposition, and he admitted the

15 misconduct.

16 Ron Umhoefer would have testified --

17 He was the one that compiled these calculations

18 from -- using the basic gross damages under R-20

19 but then cutting them off as of that date of June

20 24, 1996.

21 COMMISSIONER MURPHY: Does that

22 complete your offer of proof?

23 MS. BOYLAN: Yes.

24 COMMISSIONER MURPHY: All right. Any

25 response to this?

1 MR. ERICKSON: I don't know if you
2 want me to argue it.
3 COMMISSIONER MURPHY: I'm not sure
4 this argument -- I suppose there is no response
5 to an offer of proof. So -- All right. We may
6 proceed then.
7 BY MS. BOYLAN:
8 Q You never visited a Wisconsin Job Service office,
9 did you?
10 A Since my termination?
11 Q Yes.
12 A No.
13 Q Have you taken out any loans since your employment
14 at UW-M?
15 A Well, that would depend on your definition of a
16 loan.
17 Q A loan. Borrowing money.
18 A Credit card advances, yes. Loans from family,
19 yes.
20 Q In what amounts?
21 A Various.
22 Q Please describe them.
23 A I can't tell you the exact figures. I could tell
24 you that --
25 Q What is the maximum amount you took out a loan

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * * * * * * * * * * * * *

JAMES McCREADY,
RONALD PAUL,

Appellants,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 85-0216-PC
85-0217-PC

* * * * * * * * * * * * * * * *

DECISION AND ORDER ON APPELLANTS' MOTIONS FOR SUMMARY JUDGMENT

NATURE OF THE CASE

These are appeals pursuant to §230.44(1)(c), Stats., of discharges that have been consolidated for hearing purposes pursuant to stipulation. The parties further agreed that before proceeding to a plenary hearing on the merits, they would submit for decision on motions for summary judgment and stipulations of fact the issue of whether the appellants were denied their procedural due process rights in connection with pre-termination proceedings. The parties have submitted briefs with respect to said motions. In accordance with the parties' stipulation, the Commission adopts as and for its findings of fact with respect to the motions for summary judgment the parties' stipulations of fact which are attached hereto and incorporated by reference as if fully set forth.

DECISION

The appellants' motions for summary judgment involve the issue of whether appellants' rights to procedural due process of law were violated by the manner in which the respondent handled pretermination proceedings.

The civil service code itself (Subchapter II, chapter 230, Stats., and rules promulgated thereunder) does not provide for any hearing procedure prior to discharge, although discharge can only be for "just cause," §230.34(1)(a), Stats.; and §230.44(1)(c), Stats., provides for a post-termination appeal to and hearing before this Commission, where the employer has the burden of demonstrating "just cause" for the discharge.[1] Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971). For many years, a pretermination hearing has not been considered constitutionally required. Bender et al v. DHSS, 81-382, 383, 384-PC (3/19/82).

In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the Supreme Court held that due process requires at least a limited pretermination hearing prior to the discharge of an employe who is protected by a "just cause" type restriction on termination under the civil service law.

Therefore, it is clear that the appellants were entitled under the due process clause to a pre-termination hearing. As to the nature of the hearing required, the Court held in Loudermill as follows:

> ... the pretermination 'hearing,' though necessary, need not be elaborate. We have pointed out '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of subsequent proceedings.'... In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action.... Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.
>
> ... Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action....

---

[1] The Commission does not reach the question of which party has the burden of proof on the procedural due process issue because this matter has been submitted on fact stipulations and the Commission would reach the same result regardless of how this burden was allocated.

> The essential requirements of due process, and all that respondents seek or the court of appeals required, are notice and an opportunity to respond.
>
> The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.... 84 L.Ed. 2d at 506.

Before addressing the adequacy of the specific points concerning the instant pretermination hearings, it is necessary to consider the question of whether the respondent was required as a matter of constitutional due process to have followed all the pre-termination procedures set forth in the DHSS Supervisor's Manual. There is some authority for the proposition that the due process clause does require that the state follow its own procedures regardless of whether they would be required by the due process clause alone.

In Arnett v. Kennedy, 416 U.S. 134, 163, 94 S. Ct. 1633, 1649, 40 L.Ed. 2d 15 (1974), the Court held as follows:

> In sum, we hold that the Lloyd-LaFollette Act, in at once conferring upon nonprobationary federal employes the right not to be discharged except for 'cause' and prescribing the procedural means by which that right was to be protected, did not create an expectancy of job retention in those employes requiring procedural protection under the Due Process Clause beyond that afforded here by the statute and related agency regulations.... (emphasis added)

The underscored language could be interpreted to mean that whatever procedures local government provides in connection with a statutorily-provided property right constitute not only the maximum requisite procedural protections under the due process clause, but also the minimum.

In Wolfe-Lillie v. Kenosha Co. Sheriff, 504 F. Supp. 1, 4 (E.D. Wis. 1980), vac. other grounds, Wolfe-Lillie v. Lanquist, 699 F. 2d 864 (7th Cir. 1983), the Court held:

> Where the State has established a procedure which comports with due process, state and local officials are bound to follow those procedures. Arnett v. Kennedy, 416 U.S. 134, 94. S. Ct. 1633, 40 L. Ed. 2d 15 (1984).

In Intl. Assn. of Firefighters v. City of Sylacaugya, 436 F. Supp. 482, 490 (N.D. Ala. 1977), the Court held: "A further procedural due process violation is found in defendant Civil Service Board's failure to follow its own rules...."

However, it is questionable whether any vitality which may have inhered in this approach remains following the Supreme Court decision in Cleveland Bd. of Educ. v. Loudermill, supra. While the lead opinion in Arnett v. Kennedy, supra, held that no more process was due the individual than that which was provided by the legislature when it established the substantive entitlement or property interest, Loudermill may be said to have "uncoupled" the requirements of the due process clause and the procedures set forth in the state law that provides the property interest:

> ... the Due Process Clause requires that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property' cannot be defined by the procedures provided for its deprivation anymore than can life or liberty....
>
> In short, once it is determined that the Due Process Clause applies, 'the question remains what process is due.' Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). The answer to that question is not to be found in the Ohio statute. 84 L. Ed. 2d at 503.

This holding was applied in D'Acquisto v. Washington, 640 F. Supp. 594, 619 (N.D. Ill. 1986), as follows:

> ... State law controls only the substance of property interests, not their procedure, and 'property' is not defined by the procedures for its deprivation.... The question of delay before a hearing is granted, of the timing of the opportunity to be heard, is just as much a procedure governed by constitutional standards as is the quality of the opportunity.... It cannot be avoided by an attempt to characterize it as part of the state law defining property....

Also, see Levitt v. U. of Texas - El Paso, 759 F. 2d 1224, 1230 (5th Cir. 1985):

> ... There is not a violation of due process every time a university or other government entity violates its own rules. Such action may constitute a breach of contract or violation of state law, but unless the conduct trespasses on federal constitutional safeguards, there is no constitutional deprivation. Garrett v. Matthews, 625 F. 2d 658, 660 (5th Cir. 1980) ('Even if [a] university depart[s] from its own regulations, not every violation by an agency of [its own] rules rises to the level of a due process claim.') Accord, United States v. Caceres, 440 U.S. 741, 99 S. Ct. 1465, 59 L. Ed. 2d 733 (1979).
>
> The additions to the 'constitutional minimum' we referred to in Ferguson arise only when the procedures promised are denied in such a manner that the constitutional minimum is itself denied or an independent constitutional deprivation is effected.

Accord, Goodisman v. Lytle, 724 F. 2d 818, 820-21, (9th Cir. 1984); Wells v. Dallas Independent School Dist., 793 F. 2d 679, 682 (5th Cir. 1986); Williams v. Seattle, 607 F. Supp. 714, 719-720 (W.D. Wash. 1985); Danielson v. City of Seattle, 45 Wash. App. 235, 724 P. 2d 1115, 1120 (Wash. App. 1986).

In the Commission's view, the Supreme Court's "uncoupling" of the procedural due process requirements and the procedures provided by state law in Loudermill removes any basis for a conclusion that because the state has provided certain pre-disciplinary procedures by its own regulations, that per se those procedures are required as a matter of constitutional due process.

However, this does not mean the provisions of the Supervisors' Manual have no relevance to this matter. The cases applying the due process clause stress the point that the determination of what specific procedures are due is a flexible exercise and in each case depends on the particular circumstances and the interests involved, both the interests of the employe and the employer. In light of this, the Commission would give some weight to the fact that this particular employer had made a formal determination that certain procedures are necessary elements under the due process clause

before discipline can be imposed on its employes, not in the sense, as set forth in Arnett v. Kennedy, that these elements are legislatively-engrafted constitutional minima, but in the sense that they are part of the overall circumstances and reflect to a certain extent the employer's assessment of its own interests and what procedures it can and should afford its employes.

Another factor that must be kept in mind in evaluating the adequacy under the due process clause of the specific procedures involved in the instant matter is that in Loudermill the Court held that the nature of the procedures required in a pretermination hearing must be evaluated in connection with the extent of the post-termination appeal procedures that are available. Many of the cases cited by the appellants are of limited applicability because they address the procedures that are required in a single, plenary hearing, rather than in a preliminary hearing followed by a full post-termination appeal hearing such as is available here.

No. 85-0217-PC (PAUL)

The particular aspects of the process Mr. Paul alleges deprived him of due process are summarized in his brief in support of his motion for summary judgment at p. 9 as follows:

> ... The appellant was denied his express right to have a representative present at the pre-disciplinary hearing. Stip., ¶ 9. The appellant was not notified prior to or during his pre-disciplinary hearing which work rules he had allegedly violated. Stip. ¶¶ 10, 11. The employer never notified the appellant that discharge was contemplated and in fact, misled the appellant as to the scope of the discipline under consideration. Stip., ¶¶ 6, 7, 10....

The Commission will discuss these individually.

The stipulation does not support a conclusion that Mr. Paul was denied whatever right he had to have a representative present. While management

never expressly told him he was entitled to representation, it certainly can be implied he was aware of this right by virtue of his status as a member of management, and because he requested immediately prior to hearing that Mr. McCready represent him. This was denied because Mr. McCready also was subject to discipline with respect to the same incident in which Mr Paul had been involved. Although management never told Mr. Paul why his request to have Mr. McCready as his representative was denied, it simply does not follow that Mr. Paul was denied any right to representation by this scenario. Given Mr. Paul's status in management, the Commission cannot infer from these circumstances and this record that Mr. Paul inferred from these circumstances that any right to representation, as opposed to his request to have Mr. McCready as his specific representative, was denied or, that the institution would not have granted a request to have someone other than Mr. McCready represent him.

The question of the adequacy of the notice of the charges must be considered in the context of all the circumstances involved in the prehearing process. In some cases, due process might not require, as appellant contends, notice of the specific work rule infractions that were suspected.

For example, if an employe were discovered leaving the institution with a DOC tool box concealed under his jacket, and subsequently informed that he would have a predisciplinary hearing concerning these alleged facts, it probably would add little to the notice of charges to cite a violation of a work rule against stealing.

However, in this case, appellant was never given notice of what aspects of the October 14th incident were considered problematical by management. The notice of discharge cites a number of work rule violations that involve various conceptual bases for disciplinary action -- disorderly

or illegal conduct, including horseplay; unauthorized possession of weapons; violation of safety procedures, directions, and requirements; disobedience, negligence, or refusal to carry out written or verbal assignments, directions or instructions; failure to provide accurate and complete information when required; and unauthorized use of state-owned property, equipment or supplies.

Given this range of management concerns about the incident, it cannot be inferred that the appellant would have been aware of what charges were being considered by the notice he received that there would be a predisciplinary hearing concerning the October 14th incident, or even by what transpired at the hearing. This lack of specific notice obviously was compounded by management's inability or unwillingness to cite any work rule infractions when queried during the predisciplinary hearing, and by their specific denial, when queried, that appellant was being charged with a violation of any work rule requiring that a report be filed upon discharge of a firearm, although this was one of the charges recited in the notice of discharge. Appellant also had no way of knowing, either by the preliminary notice or by what transpired at the hearing, that he would be charged with unauthorized use and procurement of material.

In Loudermill the Court held:

> ... The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement... The tenured public employe is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.... 84 L.Ed. 2d at 506.

Given the entirety of the process followed here, it must be concluded that appellant did not receive adequate notice of the charges against him or an adequate explanation of the employer's evidence as it related to those

charges, and that this contributed to him not having an adequate opportunity to present his side of the story as to the charges.

Another deficiency in the pretermination notice is the inaccurate information concerning the degree of possible discipline. Mr. Paul told management prior to the predisciplinary hearing that if serious discipline were contemplated he would retain counsel. Mr. Luhm responded that:

> ... the Director of the Bureau of Adult Institutions, Darrell A. Kolb, had told Luhm that the incident would most likely result in an oral reprimand but, if pushed, Kolb would agree to a written letter of reprimand, at most. Stipulation, p. 2, ¶7.

Again, management not only failed to inform appellant as to what was involved, but also misled him to believe that no serious discipline was being considered. He obviously was substantially deprived of his "... opportunity to present reasons... why proposed action should not be taken...," id., when he did not know what the proposed action was, and indeed was laboring under the misperception that no serious disciplinary action was being considered. An employe who knows he or she is facing possible discharge may well marshal entirely different arguments and prepare differently for the predisciplinary hearing, including the decision on whether to retain counsel, than would be the case if the employe believes he or she is facing only a possible reprimand.

Based on all of the foregoing, the Commission concludes Mr. Paul was denied his right to procedural due process of law in connection with the pretermination process.

No. 85-0216-PC (McCREADY)

With respect to Mr. McCready's predisciplinary proceeding, management followed much the same process, although there were some differences in the circumstances.

Mr. McCready did not make any inquiry into the degree of disciplinary action being contemplated, so although respondent never informed him in advance that discharge was possible, it never misled him to think that no more than a reprimand was being considered, as occurred with Mr. Paul.

At the predisciplinary hearing, Mr. McCready was never told what specific alleged work rule violations were involved, although unlike the situation with respect to Mr. Paul, he never inquired whether he was being charged with failure to have filed a written report, and accordingly, this was never denied by management.

The Commission's conclusions as to denial of representation are the same as with respect to Mr. Paul -- i.e., there was no denial of any right to representation.

With respect to the issues concerning the adequacy of the notice of the charges and the notice of the degree of discipline contemplated, Mr. McCready's case involves less exacerbated circumstances than Mr. Paul's situation and is a good deal closer case as to the overall question of whether his right to procedural due process was violated. However, the Commission believes that the pretermination procedures afforded Mr. McCready also were inadequate.

Even though he was not misled as to the degree of discipline being contemplated, it still is significant that he was not told that he might be discharged. In the absence of some indication in the record to the contrary, it must be assumed that having such information would be important to an employe in deciding how to prepare for a predisciplinary hearing and

how to respond to the charges. For example, an employe might be willing to simply concede substantive misconduct in a case where no serious discipline appears likely. However, if an employe realizes that discharge is a possibility, he or she may be less likely to admit misconduct and more likely to stress extenuating circumstances and to present a rationale why that degree of discipline is unwarranted. Furthermore, the employe would be more likely to retain counsel if he or she is aware of the possibility of discharge. This discussion is in keeping with the Court's stress in Loudermill on the necessity of giving the employe an opportunity to present reasons "why proposed action should not be taken...." 84 L. Ed. 2d at 506.

However, in this case, the Commission does not need to decide whether the absence of notice that discharge was possible constituted a violation of due process, because, according to the stipulation, McCready received no notice that any discipline was contemplated as a result of the October 14, 1985, incident. It can be argued that he should have been aware discipline was being considered because he had been suspended with pay. However, the Supervisors' Manual explicitly states at ¶264.2 B that at the pre-disciplinary hearing management "presents the findings of management's investigation and tentative conclusion that disciplinary action is warranted." (emphasis added) This never occurred in this case, and this omission of this minimal requirement violated McCready's rights to due process of law.

As to the notice of the charges against him, Mr. McCready was never apprised of the full range of management's concerns about the incident, as reflected in the notice of discharge, either by way of preliminary notice or at the predisciplinary hearing, and it cannot be inferred on this record that he had actual or imputed knowledge thereof. Mr. McCready's discharge

was based in part on a number of charges that were never aired prior to the termination.

Therefore, the Commission also concludes with respect to Mr. McCready that he was denied his right to procedural due process of law in connection with the pretermination process.

FURTHER PROCEEDINGS

There does not appear to be any dispute that if the Commission concludes the appellants were denied their right to due process in connection with the pre-disciplinary proceedings, they would be entitled to prevail on these appeals and be reinstated with back pay and benefits. The Commission will order that result,[2] but will retain jurisdiction to deal with any issues that may be present as to the specifics of the remedy and as to appellants' motions for costs pursuant to §227.485, Stats., which were filed with their reply briefs in support of their motions for summary judgment.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §230.44(1)(c), Stats.

2. These matters are appropriate for summary judgment pursuant to the stipulation of the parties, and based on the fact stipulations on file herein.

3. The appellants were denied due process of law by the process followed by respondent prior to their discharge.

4. The appellants are entitled to be reinstated with back pay and benefits, less mitigation.

---

[2] This decision does not address the substantive merits underlying the discharges, but only the procedural aspects of this matter.

ORDER

1. The appellants' motions for summary judgment are granted.

2. The respondent's actions discharging appellants are rejected and these matters are remanded to respondent for action in accordance with this decision.

3. The Commission retains jurisdiction over these matters in order to deal with any disputes as to remedy and to dispose of appellants' motions for costs pursuant to §227.485, Stats. Counsel are directed to consult to determine if there are any disputes as to those questions that cannot be resolved, and to report to the Commission within 10 working days of the date of service of this order as to the results of such consultations. The Commission will then decide on the nature of any further proceedings that may be required.

Dated: May 28, 1987 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Chairperson

Donald R. Murphy
DONALD R. MURPHY, Commissioner

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

AJT:jmf
JMF02/3

Attachments

Parties:

James McCready
Route 1, Box 157
Eden, WI 53019

Ronald L. Paul
Route 1
Fox Lake, WI 53933

Tim Cullen
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707

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DEC 18 1986

Personnel
Commission

STATE OF WISCONSIN
PERSONNEL COMMISSION

JAMES McCREADY,

Appellant,

v.

Case No. 85-0216-PC

SECRETARY, Department of
Health and Social Services,

Respondent.

STIPULATION OF FACTS

THE PARTIES HERETO by their respective attorneys hereby stipulate that the following shall be considered as established facts for purposes of the Appellant's to be filed motion for summary judgment based upon a denial of due process at the pre-disciplinary hearing held on October 30, 1986.

1. James McCready, born February 18, 1946, was first employed by the Wisconsin Department of Health and Social Services in July, 1981, at the Waupun Correctional Institute. On march, 1982, he transferred to the Kettle Moraine Correctional Institute.

2. In September of 1983, Complainant's position was that of Sergeant, Officer III. In December of 1984, he was promoted to Office V (Lieutenant) which position he occupied on October 14, 1985, the date in question. The Officer V position is supervisory. As a supervisor, James McCready was familiar with the provisions of Chapter 264 (Exhibit D).

3. On October 14, 1985, James McCready was serving a promotional probationary period.

4. An alleged incident occurred on October 14, 1985, in the sallyport of the Kettle Moraine Correctional Institute which incident is the subject of these proceedings.

5. From October 14, 1985, through October 22, 1985, James McCready continued in his normal activities and employ at Kettle Moraine Correctional Institute.

6. On October 23, 1985, on Mr. McCready's scheduled day off, he received a telephone call from Mr. John Luhm stating that he was suspended indefinitely with pay as the result of the October 14, 1985 incident.

7. Between October 23, 1985, and October 30, 1985, James McCready received a telephone call at his home from Catherine Mlsna stating that his presence was requested at a meeting to be held on October 30, 1985, at 9:00 a.m. He was informed that the meeting would be a pre-disciplinary hearing.

8. On the morning of October 30, 1985, immediately prior to the scheduled 9:00 a.m. meeting, James McCready told Catherine Mlsna that he wanted Captain Ron Paul as his designated representative. James McCready was not allowed to have Ronald Paul as his representative at the meeting, because both of them were subject to discipline for their actions at the same sallyport incident. James McCready was not told the reason for not permitting Ronald Paul as his representative at the meeting.

9. Neither during nor immediately prior to the meeting was James McCready told what work rules, if any, may have been violated as the result of the alleged incident of October 14, 1985, nor was he informed that a tentative decision had been reached that any discipline was warranted as a result of the alleged incident.

10. During the course of the meeting on October 30, 1985, James McCready was questioned by Catherine Mlsna as to how he came in possession of the training rounds used during an ERU exercise on October 14, 1985. James McCready explained that they had been received in a trade for a baton. At no time during the course of the meeting of October 30, 1985, was James McCready ever told that acquisition or possession of the training rounds violated any work rule. Also, James McCready was never informed that he had unauthorized possession of a weapon; nor was he told that he had disobeyed or refused to carry out written or verbal assignments, directions or instructions; nor was he told that he had failed to provide accurate and complete information after being requested to do so.

11. Attached hereto as Exhibit A is the report of Catherine Mlsna regarding the meeting held on October 30, 1985.

12. It was not until James McCready received a letter of termination dated November 8, 1985, that he was ever apprised of any work rules that had been violated a result of the October 14, 1985, alleged incident or that other conduct never addressed at the meeting of October 30, 1985, also comprised reasons for his termination from employment. A copy of the letter of termination is attached hereto as Exhibit B.

13. During James McCready's unemployment compensation hearing, Catherine Mlsna testified that the purpose of the October 30, 1985, meeting was to investigate what occurred on the evening of October 14, 1985, from Mr. McCready's standpoint. She further confirmed that no notice of violation of any work rules was ever imparted to Mr. McCready. A copy of that portion of her testimony is attached hereto as Exhibit C.

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14. Attached hereto as Exhibit D are the written procedures set forth in Chapter 264 of the Department of Health and Social Services Supervisor Manual regarding employee discipline which rules were in effect during 1985.

Dated this 11 day of December, 1986.

Bryan D. Woods
Attorney for James McCready

Kathryn R. Anderson
Attorney for the Department of Health and Social Services.

STATE OF WISCONSIN

BEFORE THE PERSONNEL BOARD

Melroy Juech, Appellant,	)	
vs.	)	MEMORANDUM DECISION
John Weaver, President University of Wisconsin, Respondent.	)	
#450	)	

Appellant on July 1, 1970 became a permanent employe in the classified service of the state as Maintenance Operations Foreman at the Washington County Campus of the University of Wisconsin. Prior to that date he had acted in a similar capacity on the campus as a Washington County employe under a system of a shared operation between the County and the University. As of July 1, 1970 the University completely took over the center.

Maintenance Operations Foreman was at all times in question in salary range 3-09.

As Maintenance Operations Foreman, Appellant had rather broad duties. He was not only supervisor of mechanical and maintenance work, but as well was supervisor of the custodial crew.

It is alleged that the University administration had always had some difficulty with Appellant in that he would not follow orders and set his own work priorities. This is alleged to have become more aggravated after the full university take over on July 1, 1970.

On or about January 1, 1971, Appellant was relieved of all supervisory duties and was assigned duties of a Maintenance Mechanic. Apparently Appellant agreed to this change, but on the representation that the local administration would have his position reclassified to Maintenance Mechanic 2, which is in salary range 3-10. There was no change in Appellant's classification when his duties were changed on January 1, 1971.

On February 26, 1971, the local administration did petition the University's Central Personnel Office for a change in Appellant's classification to Maintenance Mechanic 2.

In April of 1971, Central Personnel audited the position and concluded that Maintenance Mechanic 2 was not appropriate and that the appropriate classification would be Maintenance Mechanic 1, which is in salary range 3-07. This is two ranges below Maintenance Operations Foreman and three ranges below Maintenance Mechanic 3.

The testimony of G. Thomas Bull, Director of Employment Relations in Central Administration of the University of Wisconsin System best explains what happened thereafter. Record, pages 13, 14.

Q. Did your office initiate the requirement that then some reclassification go through in terms of Mr. Juech in effect downgrading him?

A. Well, our response to this general problem at approximately the same time, I don't recall the exact date, April or May of '71, was to visit the Washington County Campus and discuss with the administration the situation revolving around this classification request. Our indication at that time was that, that rather than this reclassification request being appropriate it would seem to us the administration would have one of two choices. One was to reorganize the operations of the campus from the maintenance point of view and create a full time mechanic, and also create a supervisor in the custodial unit which would have entailed the layoff of the operations position as being abolished. That was possible, of course, with the incumbent being offered the opportunity to bump into the mechanic's job. Or the other alternative, which was to take away the supervisory duties for cause and operate under an involuntary demotion procedure.

Q. From the letter written June 4, then the campus took the second course of action which was to reclassify him?

Chairman Shiels: Second course of action he described was involuntary demotion?

Mr. Wagner: Right.

Q. Even though they called it reclassification, would you construe this as the involuntary demotion?

A. That's the way, that's the way I would have construed it, yes.

The letter of June 4, 1971, Board's Exhibit 1, to Appellant from Ronald Moss, Assistant to the Dean, reads:

> "On July 1, 1971 you will be reclassified as a full-time "Maintenance Mechanic I" on the Washington County Campus. This reclassification is the result of the reorganization of the maintenance personnel on the campus.
>
> In this new classification you will be responsible for maintaining in good operating condition and repairing, insofar as possible, all mechanical equipment, the plumbing facilities, electrical system, and all necessary building repairs. A photocopy of the "Position Description Form" is enclosed to give you a more detailed description of the Maintenance Mechanic I position. You will receive the "employe copy" of the form after the necessary paper work has been completed.
>
> I will discuss with you the list of duties outlined so that you will have an opportunity to ask any questions you might have concerning your responsibilities. Or, if you know you do not want to accept the new position, you may appeal the action to the PERSONNEL BOARD within ten days of the effective date.
>
> If you have any questions whatsoever on the reclassification, do not hesitate to ask."

While all of the discussion between the parties was of "reclassification", what the Respondent really had in mind and did was to "demote" the Appellant in both pay and position.

This appeal is in fact an appeal from a demotion and not an appeal from a reclassification. s. 16.24(1)(a) Wis. Stats. governs the demotion of a classified employe:

> "No permanent subordinate or employe in the classified service who has been appointed under ss. 16.01 to 16.32 or the rules made pursuant thereto shall be removed, suspended without pay, discharged, or reduced in pay or position except for just cause which shall not be religious or political. No suspension without pay shall be effective for more than thirty days. In all such cases the appointing officer shall, at the time of such action, furnish to the subordinate in writing his reasons for the same. The reasons for such action shall be filed in writing with the director within five days of the effective date thereof. . . ."
> (Underlining is ours)

The letter of June 4 set out above is the action of demotion (reduction in pay or position). It contains nothing that could be interpreted as a reason for the action, except "reorganization of maintenance personnel". This reorganization did not take place; it was the alternative that was not taken to the demotion of the Appellant. Even had there been such reorganization, an employe may not be involuntarily demoted or reduced in pay or position in lieu of layoff. See Szech Matter, Thomas Matter, Case No. 381 and Attorney General's Opinion, dated 2-5-65.

There is no evidence that any "reasons" were filed in writing with the Director as required by statute.

Respondent argues that there was no purpose to be served by assigning "reasons" at the time of the demotion action, for the friction between the parties was an on-going affair and Appellant was aware of why the action was taken.

This all may be true, but this Board is committed to the proposition that the wording of statutes so far as they relate to concerns of the Board are mandatory and not directive. If any disciplinary action contemplated by s. 16.24(1)(a) is to be effective as such, the mandate of the statute must be complied with.

As the reasons for the action of demotion were not given to Appellant in writing at the time of the action, to-wit: June 4, 1971, that action was of no effect.

Consequently, Appellant is now and has been a Maintenance Operations Foreman in salary range 3-09 and is entitled to have received and to receive the compensation accorded to that classification.

So far as is necessary, Appellant is reinstated as a Maintenance Operations Foreman as of July 1, 1971, having been unlawfully demoted.

Dated: January 13, ~~1971~~ 1972.

STATE PERSONNEL BOARD

BY [signature]

STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * *

RODOLFO J. MIRANDILLA,

Appellant,

v.

Secretary, DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Case No. 82-189-PC

* * * * * * * * * * * * * * * *

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., with respect to the removal of the appellant's supplemental pay for supervisory/administrative responsibility. At the prehearing conference, the parties agreed to the following statement of issues:

1. Whether the Commission has subject matter jurisdiction. Sub-issue: Whether the transaction in question is legally a demotion or reduction in pay that would be cognizable under §230.44(1)(c), Stats.

2. If so, whether there was just cause for the action taken.

The conference report reflected that "The parties agreed to defer a decision on the jurisdictional issue until after the hearing." At the hearing, the respondent raised an additional jurisdictional objection based on untimely filing of the appeal.

The respondent submitted, with a post hearing brief on April 21, 1983, a copy of Section D of the State of Wisconsin Compensation Plan for 1979-1981, of which the Commission takes official notice.

FINDINGS OF FACT

1. In 1980 the appellant was employed as a physician in Red Lake Falls, Minnesota, where he was guaranteed a minimum annual income of $60,000.00 by the St. John's Hospital Corporation and Red Lake County Health Planning Council.

2. In 1980, the Wisconsin Veterans Home, King, Wisconsin (hereinafter referred to as the home), a unit of the Department of Veterans Affairs, advertised an opening for a staff physician, with a starting annual salary advertised to $63,000.

3. The appellant submitted an application for this vacancy on or shortly after April 15, 1980.

4. By letter of May 5, 1980, Mr. Peters, personnel manager at the home, indicated to the appellant as follows:

> Based on the preliminary information received from you, we could offer you a starting salary of $56,300. This would increase to $60,250 on July 1, and to $61,350 upon completion of a six month probationary period. Additional salary is also available if you are board certified or have residency training in a specialty related to the care of our residents.

5. Thereafter, the appellant indicated that he would not accept the job at less than his Minnesota minimum income--i.e., $60,000 per year.

6. In order to raise the salary to a level acceptable to the appellant, the institution management decided to create the title of assistant medical director for the position in question and to add to the aforesaid salary of $56,300 per annum a supplemental supervisory pay addition.

7. The function of the assistant medical directorship, as conceived and ultimately implemented by management, was to fill in for the medical director in his or her absence.

8. The aforesaid function of filling in for the medical director had been divided among the staff physicians prior to the designation of the appellant as assistant medical director.

9. Mr. Peters then told the appellant that if he would provide proof of his Minnesota income, that the respondent would be able to pay him $60,000.

10. By letter of July 1, 1980, the appellant sent to Mr. Peters a copy of his contract with the foregoing Minnesota entities. Mr. Barden, the institution superintendent, sent the appellant a letter dated July 15, 1980, which included the following:

> This is to confirm your appointment as Staff Physician at the Wisconsin Veterans Home, beginning August 4, 1980.
>
> As agreed previously, your starting salary will be $29.40 per hour or $61,152 on an annual basis. You will be required to serve a six month probationary period, and will receive an increase of 60¢ per hour upon the successful completion of probation.

11. The aforesaid salary included the sum of $1.75 per hour as supplemental supervisory pay (the institution originally had requested of the Division of Personnel a figure of $2.02 per hour. For reasons that do not appear of record, that was reduced by the latter agency to $1.75.)

12. In reliance on the respondent's statement, as set forth in the foregoing letter of July 15, 1980, as to his salary, the appellant left his practice in Minnesota and commenced employment at the home on August 4, 1980, with a starting salary of $29.40 per hour.

13. The appellant had not been informed, and was not aware, when he commenced his employment on August 4, 1980, that his salary of $29.40 per hour included the $1.75 supplemental supervisory pay.

14. The appellant was not officially appointed as assistant medical director until September 30, 1980, when the commandant, Mr. Barden, promulgated the following memo:

> ... Effective this date I have appointed Dr. Rodolfo Mirandilla, Deputy Medical Director of the Wisconsin Veterans Home. In this capacity, Dr. Mirandilla is authorized to act on behalf of Dr. Oscar P. Ansaldo [medical director] whenever he is absent. At such times, Dr. Mirandilla will be the Acting Medical Director.

15. Notwithstanding that the appellant, as aforesaid, was not officially appointed as assistant medical director until September 30, 1980, he received the $1.75 supplemental supervisory pay at all times from August 4 through September 30, 1980.

16. In 1982, Dr. Ansaldo resigned as medical director and replaced the appellant as assistant medical director, resulting ultimately in the appellant's loss of his supplemental supervisory pay.

17. The appellant originally received a letter dated July 1, 1982, from LaVerne L. Hanke, Administrative Officer I, stating that "...effective July 11, 1982, you will be relieved of the duties of Assistant Medical Director... The deletion of administrative duties from your present position will result in a reduction of $1.75 in your hourly salary." Subsequently, a letter dated July 6, 1982, from Mr. Hanke, stated as follows:

> This is to advise you that my letter of July 1, 1982, advising you in a decrease in your salary was in error. Although the salary stated in your original letter of employment did include an adjustment for performing the duties of Assistant Medical Director, this adjustment was not stipulated.
>
> Therefore, effective July 11, 1982, your duties as Assistant Medical Director will be changed to those of a Staff Physician with no reduction in salary.

18. Sometime thereafter, the appellant received a letter dated August 18, 1982, from Mr. Barden (Respondent's Exhibit 18), which stated in part as follows:

> As you are aware, recently your duties at the Wisconsin Veterans Home have been changed. Upon appointment of the new Medical Director, Kay Jewell, it was determined that you would be relieved of the Assistant Medical Director duties that you performed as part of your employment. This action is not a demotion or an adverse reflection on your performance but rather is the result of carefully considered staff assignment changes. These changes are within the state civil service personnel policies and reflect the managerial authority and responsibility to assign and revise the duties of employes as it is determined to be necessary and appropriate.
>
> Your pay will be reduced by $1.75 per hour, as required by the State Compensation Plan, to reflect the change in assignments. The $1.75 is a supplemental pay which you have received since you were hired. At that time, the Assistant Medical Director responsibilities were assigned to you. For this reason, no additional compensation is due to you. The appropriate documents have been processed and the change should be reflected on the check you receive September 2, 1982.

19. The effective date of the deletion of the appellant's supplemental supervisory pay was September 2, 1982. He was notified of this deletion on or after August 26, 1982. The appellant had had permanent status in the classified service since he had successfully completed probation.

20. Management replaced the appellant with Dr. Ansaldo as assistant medical director not because of any management dissatisfaction with the appellant's performance. The sole reason assigned by the respondent for this action was that it believed Dr. Ansaldo to have been better qualified to have been assistant medical director, primarily because of his experience as medical director.

21. Sometime in late 1982 or early 1983, Dr. Ansaldo resigned his employment at the home. The respondent did not reappoint a new assistant medical director thereafter, but rather utilized the two staff physicians to fill in for the medical director in her absence, without additional compensation, as had been the case before the appellant assumed the title in 1980.

22. The appellant filed his appeal with this Commission on September 22, 1982.

CONCLUSIONS OF LAW

1. This appeal was timely filed pursuant to §230.44(3), Stats.

2. The Commission has jurisdiction over the subject matter of this appeal as a constructive reduction in base pay cognizable pursuant to §230.44(1)(c), Stats.

3. The action taken was arbitrary and capricious and accordingly there was not just cause therefore.

OPINION

Section 230.44(3), Stats., provides in part as follows:

> TIME LIMITS. Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later....

The respondent argues that this appeal, filed September 22, 1982, was untimely in that the appellant was notified by letter of July 1, 1982, that he would be relieved of his assistant medical director duties effective July 11, 1982.

However, the appeal on its face is of a "demotion and reduction in pay," (emphasis supplied), and the reduction set forth in the July 1st letter was rescinded not in the July 6th letter and not reinstated until

the August 26th letter, effective September 2nd. Furthermore, it is quite clear from this record, as will be discussed below, that the essence of the subject matter of this appeal is the supplemental salary, not the title of assistant medical director, which was never more than a means to obtain the extra compensation.

The respondent also objects to jurisdiction on the ground that the transaction is not cognizable under §230.44(1)(c), Stats., as it is not a "reduction in base pay." (emphasis supplied), the word "base" having been inserted by Chapter 140, sec. 11, Laws of 1981, effective March 31, 1982.

The appellant argues that the change in the law, if applied to him would constitute "an unconstitutional infringement on the rights of parties to contract and to have contractual obligations performed." Brief filed April 6, 1983. The Commission need not approach this constitutional question inasmuch as in its opinion the transaction in question is cognizable notwithstanding the change in the statute as a constructive reduction in base pay.

The concept of personnel transactions which are considered "constructive" in nature is a familiar one in Wisconsin. The main area where this has been recognized is in the area of discharges. Even though statutes may only give administrative agencies jurisdiction over "discharges," this does not prevent the examination of a transaction facially denominated something other than a discharge to determine whether, in legal effect, it amounts to and should be considered a discharge.

For example, in Watkins v. Milwaukee County Civil Service Comm., 88 Wis. 2d 411, 276 N.W. 2d 775 (1979), the Supreme Court dealt with the question of whether a resignation from civil service employment which was

alleged to have been coerced was cognizable by the Milwaukee County Civil Service Commission under a statute providing for hearings on discharges, § 63.10(1), Stats. Despite the fact that the statute makes no explicit reference to coerced resignations, the Court had no difficulty in concluding that they were covered by the statute:

> Resignation obtained by coercion poses serious possibilities of abuse. "[A] separation by reason of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency." (Emphasis in original.) Dabney v. Freeman, 358 F.2d 533, 535 (D.C. Cir. 1966). Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system. The strength of this policy is underscored by the language of sec. 63.04, Stats., which provides that "no person shall be ... removed from the classified service in any such county [which has adopted the civil service system], except in accordance with the provisions of said sections [secs. 63.01 to 63.16 inclusive]." 88 Wis. 2d at 420.

This type of approach was followed by this Commission in Evard v. DNR, 79-251-PC (2/19/80), and Petrus v. DHSS, 81-86-PC (12/3/81). The Commission's predecessor agency, the Personnel Board, in Juech v. Weaver, (1/13/72), determined that a transaction which had been denominated a reclassification was in legal effect a demotion, where the employer first removed all of the appellant's supervisory duties and subsequently reclassified his position from Maintenance Mechanic 2 to Maintenance Mechanic 1.

In the instant case, the supplemental supervisory pay was, in a literal sense, not part of the base pay, just as, in a literal sense, a resignation is not a discharge. However, the whole concept of an assistant medical director and the attendant supplemental pay was, as the home's personnel manager candidly testified, merely a device to obtain a

sufficient starting salary to satisfy the amount requested by the appellant. The work associated with the title was work that had been performed by the staff physicians before the designation of an assistant medical director and continued to be after Dr. Ansaldo resigned and there no longer was an assistant medical director. The transparency of the assistant medical director title is underscored by the facts that the appellant was not officially so designated until September 30, 1980, almost two months after he commenced employment at the home, but he was paid the additional salary anyway, and that the institution did not see fit to maintain the title after Dr. Ansaldo left.

The intended purpose underlying supplemental supervisory pay is not set forth in the Compensation Plan. It seems manifest, however, based on the very structure of the pay plan, that the intended purpose is to compensate physicians for the performance of supervisory functions that may be assigned to a physician's position in addition to its essential or basic functions--presumably primarily the provision of medical care and treatment. Base pay, on the other hand, does not depend on whether certain specific duties and responsibilities above and beyond patient care are assigned to the physician.

A physician could expect that his or her base pay would continue to be paid unless his or her pay were reduced for disciplinary reasons, in which case an appeal clearly would lie under §230.44(1)(c), Stats., some other disciplinary action were taken, or he or she were laid off.

On the other hand, a physician receiving normal supplemental supervisory pay could expect to be paid such pay only while performing supervisory duties. Once those duties were removed, he or she could expect

not to receive that pay, and, since the change in §230.44(1)(c), Stats., in 1982, there would be no right to appeal.

In this case, the duties and responsibilities of the assistant medical director were not recognized as an entity for pay purposes before the appellant began his employment or after Dr. Ansaldo ended his, even though it was and is necessary for someone on the staff to fill in in the absence of the medical director. The concept of the title of assistant medical director was conceived and implemented solely as a means of meeting the appellant's salary requirements and inducing him to leave his practice in Minnesota and to accept the position in question. The appellant was paid supplemental supervisory pay for approximately two months before he officially was designated assistant medical director. Under these circumstances, the pay associated with the assistant medical director title is far closer in concept to base pay than to supplemental supervisory pay.

In the Watkins case, the court looked to the possibility of abuse in determining that an alleged coerced resignation should be treated in legal effect as a discharge so that it would be subject to administrative review by the Milwaukee County Civil Service Commission:

> Resignation obtained by coercion poses serious possibilities of abuse. [A] separation by reasons of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency. (Emphasis in original.) Dabney v. Freeman, 358 F. 2d 533, 535 (D.C. Cir. 1966). Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system. 88 Wis. 2d at 420.

In the instant case, there is an apparent difference between a more traditional reduction in supplemental pay, where an agency determines to reassign or eliminate real, meaningful duties and responsibilities, and a

case such as this where a title is created and then reassigned basically only for the purpose of augmenting employes' salaries. The potential for abuse in the latter type of transaction is apparent, as an employe can reassign a title for the sole purpose of increasing or decreasing salaries, solely at the employer's whim, and without any available review.

For these reasons, the Commission concludes that the transaction here in question amounted to a reduction in base pay and should be treated as a constructive reduction in base pay which is appealable pursuant to §230.44(1)(c), Stats.

Having determined that jurisdiction is present pursuant to §230.44(1)(c), Stats., the Commission must consider the second issue for hearing, "... whether there was just cause for the action taken."

In appeals under §230.44(1)(c), Stats., involving disciplinary actions taken for workplace misconduct or inefficiency, the just cause standard involves the question of whether the employe's conduct has sufficiently undermined the efficient performance of the duties of employment, with the employer having the burden of proof. See Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974); Reinke v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1964). In Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183 (1976), an appeal of a non-disciplinary layoff for economic reasons, the court held that in such a case, although the respondent continued to have the burden of proof, the standard was less rigorous than that prevailing in disciplinary proceedings:

> While the appointing authority indeed bears the burden of proof to show 'just cause' for the layoff, it sustains its burden of proof when it shows that it has acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious. 71 Wis. 2d at 52.

In this case, there are few explicit legal requirements with respect to the administration of supplemental supervisory pay. The only real question is whether the respondent's action was arbitrary and capricious, which has been defined as action which is "unreasonable" or which "does not have a rational basis." Olson v. Rothwell, 28 Wis. 2d 233, 239, 137 N.W. 2d 86 (19654); Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 54, 237 N.W. 2d 183 (1976).

The only rationale advanced by respondent for their decision to remove the appellant as assistant medical director and to give the title to Dr. Ansaldo was that Dr. Ansaldo was better qualified. The immediate difficulty with this rationale is that the record clearly shows that the assistant medical director title was never more than a device for salary augmentation. What the respondent did was to take a function--filling in for the medical director in his or her absence--that was performed by the staff physician both before and after Drs. Mirandilla and Ansaldo were denominated assistant medical director, and to use it as the basis for a title and the appurtenant payment of supplemental supervisory pay.

To take a title that is transparently and admittedly a salary augmentation device, and to reassign it on the grounds of superior qualifications, when there have never been any concerns expressed about the performance of the appellant, strikes the Commission as at least questionable.

One also must consider that the respondent developed the whole concept of the assistant medical director title for the sole purpose of being able to raise the starting salary offer for the position in question above the $56,300 figure otherwise allowable under the pay plan, in order to induce the appellant to abandon his practice in Minnesota and to accept the

appointment, and the appellant, in reliance on that offer, did exactly that. To then remove this title and the accompanying salary that had been promised the appellant, solely because Dr. Ansaldo was considered better qualified, when there were no questions about the appellant's performance, is even more questionable. The Commission must conclude that the decision was unreasonable, arbitrary, and capricious.

The action of the respondent must be rejected, and the appellant is entitled to have his supplemental supervisory pay restored, with appropriate back pay for the period he has not received such pay.

ORDER

The action of the respondent is rejected and this matter is remanded for action in accordance with this decision.

Dated: July 21, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

AJT:jmf

DENNIS P. McGILLIGAN, Commissioner

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STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

RALPH JACOBSEN,

Appellant/
Complainant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 91-0220-PC
92-0001-PC-ER

* * * * * * * * * * * * * * * * *

INTERIM
DECISION
AND
ORDER

This matter is before the Commission following the promulgation of a proposed decision by the hearing examiner pursuant to §227.46(2), Stats. Respondent has filed objections to the proposed decision and the Commission has heard oral argument and consulted with the hearing examiner.

This case involves an appeal and a handicap discrimination complaint by an employe who was removed from employment under the auspices of §230.37(2), Stats. He participated in two psychological evaluations required by his employer. The evaluators provided the opinion that appellant's personality characteristics contributed to his interpersonal difficulties at work, and that without treatment he could not return to work without becoming involved in more inappropriate interpersonal behavior. Following these evaluations, respondent informed appellant he could not return to work before getting counseling and treatment, and changed his employment status from suspension with pay to a form of indefinite suspension under which he ended up in a leave without pay status once he had exhausted his paid leave accounts. The proposed decision reached the conclusion that appellant's de facto suspension was without just cause under §230.37(2), Stats., not only because it is not a personnel transaction that is authorized under this subsection, but also because respondent failed to establish that appellant was "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his ... position by reason of infirmities due to age, disabilities, or otherwise." The proposed decision also concluded that respondent discriminated against

appellant on the basis of a perceived handicap, and failed to establish an affirmative defense under §111.34(2)(a), Stats., because it did not establish that "the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment."

The Commission agrees substantially with the proposed decision findings of fact. However, certain findings which are implicit in the proposed decision should be set forth as explicit findings. The Commission disagrees with the proposed conclusion that respondent discriminated against complainant on the basis of a perceived handicap. While the Commission agrees with most of the analysis of the §230.44(1)(c), Stats., civil service appeal, it has some additional observations about the issues raised in this area, in part in response to respondent's objections to the proposed decision. Therefore, in the interest of clarity, the Commission will issue a new decision which will incorporate parts of the proposed decision.

FINDINGS OF FACT

1. Appellant was employed by respondent from 1986 until the indefinite suspension of his employment in 1991. Appellant was employed by the Wisconsin Council on Developmental Disabilities (WCDD) in the Department of Health and Social Services (DHSS) with permanent status in class in a position classified as Management Information Specialist 3 (MIS 3). This position was unrepresented — i.e., it was not in a collective bargaining unit for which a representative was certified or with respect to which a collective bargaining agreement existed.

2. Appellant's work performance at WCDD was good with respect to the performance of his assigned tasks. He had some shortcomings with respect to interpersonal relationships which will be discussed below. Appellant's most recent formal evaluation dated June 22, 1991 (Appellant's Exhibit 1C) reflects an overall evaluation of "Exceeds Expectations."

3. During the period of his employment at WCDD, appellant was involved in a practice of listening to his radio in his office, and engaging other employes at work in conversations concerning current events, frequently in connection with news items he had heard on the radio, such as the Persian Gulf war and the Clarence Thomas confirmation hearings.

4. While some of these conversations were willingly engaged in by the other employes, over the course of time most of the employes involved became uncomfortable with these conversations, which were usually initiated by appellant. The other employes were concerned in part because these conversations became more frequent and kept them from their work. They also were concerned because appellant was very didactic in his views and very assertive in expressing himself. Many of the employes felt intimidated by appellant due to his demeanor and his large physical size, although he never made any threats. Appellant also had some positive interpersonal contacts with employes during his employment with WCDD, although by the time of his suspension the attitude of the staff toward appellant predominantly was negative, and ranged from fear to annoyance. Appellant's activities in this area became more frequent and intense in the period of approximately several months prior to his suspension.

5. During his employment at WCDD, appellant never was formally disciplined. He did receive some informal counseling regarding his interpersonal behavior.

6. On Friday morning, October 11, 1991, appellant approached Jackie Wood, another WCDD employe, three times and attempted to engage her in a conversation concerning the Clarence Thomas confirmation hearings, even though she evidenced that she did not want to get involved in this discussion by completely refusing to respond to him. After the third time, she complained to Steve Stanek, appellant's immediate supervisor. He called appellant into his office and directed him to stop interfering with other people's work and to turn off his radio. Appellant complied, but returned Stanek's office a few minutes later with a document he had prepared for Stanek. Appellant tossed this on Stanek's desk and said he considered it harassment that he wasn't allowed to have his radio on while other employes could. Stanek was apprehensive, at least in part because of appellant's agitated, aggressive demeanor.

7. Stanek proceeded to discuss the situation with his immediate supervisor, Jayn Wittenmyer, WCDD Executive Director. After a discussion which also involved representatives from DHSS personnel, the decision was reached to send appellant home on pay status until a psychiatric evaluation could be done. This action was reflected in a letter to appellant dated October 16, 1991,

from Eloise Anderson, Administrator of the Division of Community Services (Appellant's Exhibit 9):

> Several recent situations have taken place so that we are concerned about the safety of Wisconsin Council on Developmental Disabilities employees. Under 230.37(2) we are mandating that you obtain a medical assessment to evaluate your suitability for employment. Examples of unacceptable behavior in the work place that caused us to schedule this medical assessment are as follows:
>
> 1. On Wednesday, September 25, 1991, you came into Jayn Wittenmyer's office at 2:00 p.m. to see what was happening following a verbal confrontation that you had had with another Council staff person on September 20, 1991. During this meeting with Jayn Wittenmyer, you informed her that you had intended to scare the other staff person into getting some mailing list information completed. You also mentioned that you had lost your temper during this confrontation.
>
> 2. Also during the week of September 23, 1991, during a meeting with Steve Stanek about the September 20 incident, you asked for permission (which was denied) to bring in a tape recorder and/or video camera to record the actions and conversations of other people in the office, because you felt that you were being discriminated against and treated unfairly.
>
> 3. On Tuesday, October 8, 1991, you came into Steve Stanek's office to further discuss the September 20 incident and follow-up to the incident (which you felt was "festering"). During this meeting, you reiterated that, on September 20, you had said some things that should not have been said. You also said that you did not want the incident (and the resolution of the incident) to continue to fester, because you did have a bad temper and you didn't know what might happen if this were to be allowed to fester too long.
>
> 4. On Wednesday, October 9, 1991, Marji Contrucci observed you approaching a particular staff person eighteen times during a half-hour period to engage that person in non-work-related conversation. Despite the other person's repeated attempts to let you know that they didn't want to get involved in such a conversation, you persisted again and again.
>
> 5. At 10:00 a.m. on Friday, October 11, 1991, Steve Stanek received a report from another staff person that you had approached that person three times already that morning to converse about news that you had been listening to on the radio (i.e., the Senate Thomas Hearings). Despite that per-

> son's overt attempts to avoid this conversation, you persisted to the point where the other staff person was clearly emotionally affected (e.g., close to tears). Steve Stanek called you into his office and directed you to (a) stop interfering with other people's work and (b) stop listening to the radio during work hours. A few minutes later, you returned to Steve Stanek's office in an agitated state and brusquely said that prohibiting him from listening to the radio constituted harassment.
>
> We have scheduled your medical assessment with Dr. Eric Hummel on Friday, October 18, 1991....
>
> The Department of Health and Social Services will pay for this assessment.
>
> It will be necessary for you to sign a release that will available at the doctor's office on Friday. You will continue to be in pay status until the results of the medical assessment are completed.

The factual assertions in this letter are essentially accurate.

8. Appellant met with Dr. Hummel (a licensed clinical psychologist) as scheduled, and signed the release form referred to in the foregoing letter.

9. Dr. Hummel conducted a standard psychological evaluation of appellant. He concluded that appellant's psychological status was within the normal range, but that he had certain personality characteristics, such as argumentativeness and manipulativeness, that contributed to the problems at work that had motivated respondent's action of removing appellant from the workplace and having him evaluated. He also decided that there was no basis upon which to conclude that appellant was physically dangerous. However, he also concluded that due to his personality characteristics and his reactions to the situation at work, he would not be able to interact with others in a non-inflammatory way.

10. Dr. Hummel reported his findings to respondent in letters dated October 28, 1991 (Respondent's Exhibit 3) and an addendum November 8, 1991 (Respondent's Exhibit 4), which included the following:

> RESULTS OF PSYCHOLOGICAL INVENTORIES
>
> Mr. Jacobsen completed the Multiphasic Personality Inventory-2 (MMPI-2), an instrument designed to be descriptive about one's personality characteristics. Mr. Jacobsen's responses resulted in a profile that is within relatively normal limits, suggesting that most of his difficulties are not as prominent as in psychiatric patients. However, several personality characteris-

tics were noted, such as an irritability, argumentativeness, and a tendency to transfer blame to others. All of these characteristics may result in difficulties with others from time to time. Mr. Jacobsen may also tend to manipulate others for his own advantage and interpersonal situations.

* * *

Mr. Jacobsen's Multidimensional Anger Inventory indicated no unusual characteristics in regard to the duration or intensity of his anger or for situations that may elicit anger in him. He does not perceive himself as a hostile individual nor do his stated values make him inherently susceptible to violence or jealousy.

* * *

SUMMARY

Mr. Ralph Jacobsen is a 44 year-old Caucasian male, who has been a Management Information Specialist 2 for several years with the Wisconsin Council of Developmental Disabilities. Recently he has alleged to be a participant in several matters in the office in which he has reported to have displayed anger, been intimidating, and has essentially bothered other employees. Mr. Jacobsen has ingrained personality characteristics such as irritability, argumentativeness, and a pattern of allaying blame to others which can result in problematic work relationships from time to time. He also displays tendencies toward manipulating others for his own advantage. This will give rise to work relationship difficulties from time to time, particularly in situations where Mr. Jacobsen perceives himself to be in charge or more knowledgeable than others or when he is supervised by others and asked to conform to methods or standards of behavior with which he does not agree. There is little evidence to suggest he has a significant problem controlling his anger in such a manner that would lead to aggressive behavior toward others.

* * *

I do not at this time consider Mr. Jacobsen physically dangerous to the welfare of others. He is an individual of closely held beliefs and a limited ability to maintain cooperative working relationships with individuals whom he perceives are either above or below him in regard to management or supervision of tasks. He appears to be a hard worker who has a relatively good work history when it comes to performing the procedural components of his responsibilities.

It is unclear to me whether or not Mr. Jacobsen can return to the Wisconsin Council on Developmental Disabilities and work in a colleague [sic] fashion with other employees and accept supervision. I would want to have an opportunity to talk with the

people in the supervisory role prior to forming an opinion on the matter. Mr. Jacobsen could, however, benefit from psychological counseling or intervention in regard to his work relationships, including his ability to react and respond to the cues and comments people are giving him, the management of conflict situations, and to attempt to generally enhance his social skills. Mr. Jacobsen left a strong impression that he does not need such assistance, however, improvement in these areas are necessary if he is expected to have an improved work record in regard to his ability to function with other employees. (Respondent's Exhibit 3)

* * *

I met with Ms. Muriel Harper, Ms. Jayn Wittenmyer, and Mr. Steve Stanek in my office on November 6, 1991, to discuss specific questions generated as a result of my independent evaluation. The following were the questions and my responses:

1. Can Mr. Jacobsen return to work as a "team player" who can show cooperation, respect, and dignity to others without instilling fear?

   It is my opinion that at this time, Mr. Jacobsen cannot return to work and conduct himself in a cooperative, respectful manner toward his co-workers and do so without experiencing significant anger and frustration, which will impede the flow of work and emotionally affect others. Ms. Wittenmyer reported she had had a conversation with Mr. Jacobsen over the telephone within the last week, were he sounded "agitated" and "lashed out" at Ms. Wittenmyer. He apparently verbalized significant irritation and agitation at her. Ms. Wittenmyer said that Mr. Jacobsen ostensibly "put all the blame" on her for what has transpired in September and October of this year. She also reported a later conversation with Mr. Jacobsen where he sounded significantly more calm.

   I am also aware that at least three, if not four, co-workers of Mr. Jacobsen have continued to express feeling emotionally upset and very concerned about his returning to work. They continue to feel intimidated by what has transpired and furthermore, expressed concern about their welfare.

* * *

3. Does treatment need to take place before Mr. Jacobsen returns to work?

> Yes. It is my opinion that Mr. Jacobsen should avail himself for psychological treatment specifically related to his management of conflict, his ability to control anger, and to gain an understanding of additional factors in his personal life which may be impinging on his ability to interact with others at work in a cooperative, respectful, and non-threatening manner. It is my opinion that Mr. Jacobsen needs to begin a treatment process and make improvement in these areas prior to returning to work. (Respondent's Exhibit 4)

11. Ms. Wittenmyer consulted with Dr. Hummel on November 6, 1991. Later that day she informed appellant that he could not return to work before getting counseling and treatment, and that as of November 7, 1991, he would not longer be in regular pay status but would have to utilize sick leave or other leave if he wanted to continue to be paid.

12. Appellant also met with Dr. Peter Weiss, a licensed clinical psychologist of his own choosing, on November 22, 1991, and twice thereafter. His diagnosis was that appellant was within normal limits although angry and upset, and he also concluded that appellant did not pose a threat to himself or others, and that there was no reason why he could not return to the workplace as far as his mental condition was concerned.

13. Dr. Weiss spoke to Ms. Wittenmyer on November 22, 1991, and advised her essentially of his conclusions set forth above.

14. In response to Ms. Wittenmyer's request for a written evaluation of Mr. Jacobsen, he sent her a letter dated November 26, 1991 (Respondent's Exhibit 5), in which Dr. Weiss expressed the opinion that "I can see no reason why he cannot return to work," and that further treatment would be provided by Darald Hanusa, MSSW, but did not expressly address whether appellant posed a threat of physical harm.

15. Complainant had been referred to Mr. Hanusa, a specialist in the treatment of anger, by Dr. Hummel. Mr. Hanusa assessed appellant for a total of six hours during the period November 26, 1991, until December 11, 1991. Mr. Hanusa concluded that appellant did not have a "psychiatric syndrome" but did have "interpersonal behavioral difficulties" which created difficulties in the work environment and needed treatment to change.

16. In a December 11, 1991, memo to Ms. Wittenmyer from Mr. Hanusa (Respondent's Exhibit 6), he stated that it appeared that appellant "could ben-

efit from treatment focused on interpersonal relationships, anger and hostility in the workplace." The memo further stated that appellant's "motivation to make personal changes and deal with his interpersonal anger and hostility appears suspect." Mr. Hanusa went on to state, however, that since appellant had made some initial acknowledgements of his problems and had "indicated a willingness to change," Mr. Hanusa was recommending that appellant become involved in a 24 session treatment regimen, during which he would be allowed to return to work with his progress monitored.

17. Appellant met with Mr. Hanusa on December 13, 1991. He became angry with Mr. Hanusa and refused to sign a treatment contract, and they mutually agreed to cease their relationship. In a December 13, 1991, memo to Ms. Wittenmyer (Respondent's Exhibit 7), Mr. Hanusa recounted this and further stated:

> During the treatment process I had recommended that Mr. Jacobsen be allowed to return to work. Today's events, no doubt, put that arrangement in jeopardy. I have recommended that Mr. Jacobsen seek out counseling with Dr. Peter Weiss and Group Health Cooperative, in whom he has expressed an interest.

18. In a December 28, 1991, letter from Dr. Weiss to Ms. Wittenmyer (Appellant's Exhibit 7), he stated as follows:

> This is additional information about Mr. Jacobsen. He will continue in treatment with me for an unspecified period & during which time addressing his work conflicts. I saw him on November 22, 1992 & will be seeing him again on January 6, 1992.

19. Mr. Wittenmyer believed that Dr. Weiss's letters never adequately addressed the question of appellant's potential danger if he returned to the workplace, and neither set forth an adequate treatment plan nor included (as she had previously requested) a release from appellant to permit Dr. Weiss to send her a copy of the treatment plan.

20. As a result of the aforesaid dissolution of the treatment program with Mr. Hanusa, and respondent's opinion that Dr. Weiss had not provided an adequate report on appellant's status, respondent has not allowed appellant to return to work.

21. Appellant has used up all of his available leave time and it is presumed and found that he has been on some kind of leave without pay status since then.

22. The psychological diagnosis of appellant, concurred in by Dr. Hummel and Mr. Hanusa, of within normal limits, with ingrained personality characteristics of irritability, argumentativeness and a tendency to transfer blame to others, is essentially correct.

23. Appellant's psychological condition, as aforesaid, did not make him "physically or mentally incapable or unfit for the efficient and effective performance of the duties of his ... position," §230.37(2), Stats.

CONCLUSIONS OF LAW

91-0220-PC

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden of proof and must establish it had just cause under §230.37(2), Stats. for appellant's indefinite suspension.

3. Respondent has failed to sustain its burden.

4. There was not just cause for appellant's indefinite suspension and respondent violated §230.37(2), Stats.

92-0001-PC-ER

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof to establish that respondent suspended him because of a perceived handicap in violation of the Fair Employment Act.

3. Complainant has not sustained his burden.

4. Respondent did not suspend complainant from employment because of a perceived handicap in violation of the Fair Employment Act.

DISCUSSION

91-0220-PC

The stipulated issues for hearing with respect to this case are:

> 1) Whether the subject personnel transaction was a suspension within the meaning of §230.44(1)(c), Stats.
> 2) If so, whether there was just cause for this action.
> 3) Whether, in regard to the subject personnel transaction, respondent violated §230.37(2), Stats. Conference report dated February 6, 1992.

Section 230.44(1)(c), Stats., does not define the term "suspension," nor is it otherwise defined in the civil service code (Subchapter II, Chapter 230, Stats., and rules issued thereunder). The thrust of respondent's argument that what occurred in this case was not a suspension is that the process involved was not comparable to that followed in what might be characterized as a "typical" suspension. However, the fact that the employe did not follow a certain process is far less significant than the effect of the transaction in question on the employe's employment status, which is the focus of the available definitional material.

The Wisconsin Supreme Court in State ex rel Wendling v. Board of Police and Fire Commissioners, 159 Wis. 295, 297 (1915), characterized a suspension as an "ad interim stoppage or arrest of official power and pay." Black's Law Dictionary 1616 (Fourth Revised Edition 1968), defines "suspension" as: [t]o cause a temporary cessation, as of work by an employe." Webster's Third New International Dictionary 2303 (3d Ed. 1981), defines "suspension" as: "temporary forced withdrawal from the exercise of office, powers, prerogatives, privileges." In this case, once appellant was removed from normal pay status effective November 7, 1991, he in effect was suspended from employment. He was no longer allowed to work and to earn a salary, but his employment was not terminated.

Respondent acted against appellant under the auspices of §230.37(2), Stats., and in order to determine whether there was just cause for the action taken, it must be determined whether respondent's action was proper under the standards set forth in §230.37(2), Stats., see Smith v. DHSS, 88-0063-PC (2/9/89). Section 230.37(2), Stats., provides:

> (2) 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. The cost of such examination shall be paid by the employing agency. In no event shall these provisions affect pensions or other retirement benefits for which the employe may otherwise be eligible.

Initially, it should be noted that §230.37(2), Stats., makes no provision for an indefinite suspension such as was imposed here. Under this subsection, the employer's options, once it has been determined that the employe is "incapable or unfit for the efficient effective performance of the duties of his or her position, by reason of infirmities due to age, disabilities or otherwise," are either to transfer, to demote, to reduce to part-time status, or, as a last resort, to dismiss from state service. Therefore, while respondent's action of suspending appellant from pay status was less onerous and more favorable to appellant than outright dismissal, it was not an option permitted by §230.37(2), Stats.

Respondent's decision also fails to satisfy the requirements of §230.37(2), Stats., on another basis. A prerequisite to action under this subsection is that the employe be "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reasons of infirmities due to age, disabilities, or otherwise." This entails three elements. The employe must have "infirmities due to age, disabilities, or otherwise," the employe must be "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position," and this incapability or unfitness must be "by reason of" — i.e., caused by — the infirmities.

With respect to the first element, the proposed decision concluded that the employe had to have a condition "akin to a disability," or a serious condition that in itself rendered the employe unfit, and that appellant's "personality characteristics" did not fit within this category of conditions. In its objections to the proposed decision, respondent contends that "[a]pplication of 'esjusdem generis,' or the precise version of 'noscitur a sociis' requires that 'otherwise' be defined or limited in terms of a class defined by the enumeration of 'age' and 'disabilities.'" The Commission agrees with this proposition, but respondent goes on to argue that:

> These words [age and disabilities] do not define a class in terms of "seriousness" of incapacity or imply or connote a minimal level of debilitation .... there is no objective test to determine what degree of seriousness would define the class.
>
> The class defined by "age" and "disabilities" should be restricted only insofar as limiting "infirmities" [to] a condition which is caused by a dynamic internal to the employe rather than the work environment. "Infirmity," defined as unsound, unhealthy or debilitated state, and imperfection or weakness, in Webster's New International Dictionary of the English Language (1936), could include conditions resulting from environmental or situational factors. The clause "due to age, disability or other" restricts this to weaknesses with a cause internal to the individual.

The Commission agrees with respondent up to a certain point. To the extent that the proposed decision could be interpreted as limiting the application of the statute based on the relative degree of seriousness of the particular condition involved, this would not be warranted by the statutory language. For example, if an employe had a very mild form of arthritis which nonetheless prevented the employe from being able to perform effectively the particular tasks of his or her job, this situation should be covered under the terms of the statute. However, the Commission does not agree with the remainder of respondent's position — i.e., that the "class defined by 'age' and 'disabilities' should be restricted only insofar as limiting 'infirmities' [to] a condition which is caused by a dynamic internal to the employe rather than the work environment." While it is no doubt correct, as respondent contends, that the language in §230.37(2), Stats., "due to age, disability, or otherwise" limits the word "infirmities" to conditions "internal or the individual," it does not follow from this or from anything else that <u>any</u> condition internal to the individual which causes an inability to adequately perform satisfies the requirement of §230.37(2), Stats., that the employe's inability be "by reason of infirmities due to age, disabilities, or otherwise." The term "infirmity" is defined as "an unsound, unhealthy, or debilitated state." Webster's New International Dictionary 1159 (1981). The term "disability" is defined as: "deprivation or lack esp. of physical, intellectual or emotional capacity or fitness ... the inability to pursue an occupation or perform services for wages because of physical or mental impairment." <u>Id.</u> at 642. These terms define a more limited category of conditions than, as respondent contends, any situation where: "the employe is incapable due to conditions internal to himself or herself, of controlling or changing unacceptable job-related behavior." Objections to pro-

posed decision, 17. An employe may become unable to perform effectively for reasons which are internal to the employe and over which the employe has no control, but which by no stretch of the imagination could be characterized as being caused by "infirmities due to age, disabilities or otherwise." For example, an employe simply may lack the manual dexterity or intelligence to be able to cope with changes in the duties of his or her position. Another example which certainly does not fall within this statutory categorization set forth in §230.37(2) would be an employe who is too short to handle new duties assigned to a position. Cf. American Motors Corp. v. LIRC, 119 Wis. 2d 706, 350 N.W. 2d 120 (1984) (short stature not Wisconsin Fair Employment Act handicap).[1]

In the Commission's opinion, it is unnecessary to attempt to restate the statutory formulation contained in §230.37(2), as the proposed decision apparently did. The question that needs to be addressed is whether appellant's mental condition falls within the commonly accepted meaning of the term "infirmities due to age, disabilities or otherwise." Appellant's "ingrained personality characteristics" simply do not fall within the meanings of "infirmity": "an unsound, unhealthy, or debilitated state." Webster's Third New International Dictionary 1159 (1981); or "disability": "deprivation or lack esp. of physical, intellectual or emotional capacity or fitness ... the inability to pursue an occupation or perform services for wages because of physical or mental impairment." id. at 642. See Daley v. Koch, 892 F. 2d 212, 214, 51 FEP Cases 1077, 1078 (2d Cir., 1989) ("Appellant's personality traits [poor judgment, irresponsible behavior and poor impulse control, in the absence of a diagnosis of a particular psychological disease or mental disorder] could be described as commonplace; they in no way rise to the level of an impairment.") This conclusion is supported by policy considerations.

The civil service code provides two different approaches to issues of employe misconduct or inadequate performance. An appointing authority can, pursuant to §230.34(1)(a), Stats., take disciplinary action, which can include discharge, against an employe manifesting these problems, on the basis

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[1] By analogizing to a case decided under the WFEA, the Commission is not attempting to equate the scope of that law with that of §230.37(2), Stats. However, it is at least instructive to compare the situation in the instant case to the Supreme Court's application of the concept of handicap, defined as "a physical or mental disability that makes achievement unusually difficult or limits the capacity to work," 119 Wis. 2d at 712, in American Motors.

of a "just cause" standard. See Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974). However, if the employe's problems are attributable to "infirmities due to age, disabilities or otherwise" which render the employe "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position," §230.37(2), Stats., he or she is still subject to a type of discipline, but in some respects is afforded more protection than is provided under §230.34(1)(a), Stats. The employe may be dismissed from the civil service pursuant to §230.37(2) only as a "last resort" if the less onerous options are not feasible.

An interpretation of §230.37(2), which would permit employes with personality characteristics like appellant's[2] which could be shown to be causal with respect to their performance or conduct problems, to be entitled to the statute's relative leniency has the potential to significantly impair the employer's disciplinary authority. On the other hand, as is observed in the proposed decision, extension of §230.37(2)'s coverage to these kinds of personality characteristics carries the possibility of potential abuse by the employer under certain circumstances.

In Daley v. Koch, 892 F. 2d 212, 215, 51 FEP Cases 1077, 1079 (2d Cir. 1989), the Court observed: "Appellant's personality traits [of poor judgment, irresponsible behavior and poor impulse control without a diagnosis of a particular psychological disease or disorder] could be described as commonplace." The same undoubtedly could be said of appellant's personality traits in this case. There are many other rather commonplace personality characteristics that impede the success of many employes. On the basis of respondent's interpretation of §230.37(2), Stats., and under the right circumstances, such employes would be subject to being removed from the workplace and even discharged for behavior that normally would involve relatively minor discipline under a progressive discipline process. On the other hand, an employe may manifest extremely problematical performance problems that have not been corrected after extensive efforts by the employer, yet could argue that he or she is entitled to the less severe options short of discharge, under §230.37(2), Stats., based on a showing that his or her ingrained personality characteristics are the cause of the problematic behavior. For example, an employe may be

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[2] "[I]rritability, argumentativeness, and a pattern of allaying blame to others." (Respondent's Exhibit 3)

performing inadequately due to a tendency to procrastination. If this tendency could be attributed to ingrained personality characteristics, conceivably the employing agency could be prevented from a normal course of progressive discipline against that employe.

Even if the Commission were to accept respondent's interpretation of §230.37(2), Stats., respondent would not have established just cause under §230.37(2), Stats., because respondent has not sustained its burden of establishing that appellant's ingrained personality characteristics have caused him to be "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position," §230.37(2), Stats. In the opinion of Dr. Hummel, a clinical psychologist, appellant's "ingrained personality characteristics such as irritability, argumentativeness, and a pattern of allaying blame to others ... can result in problematic work relationships from time to time." (emphasis added) (Respondent's Exhibit 3). After conferring with management, Dr. Hummel went on to say:

> It is my opinion that at this time, Mr. Jacobsen cannot return to work and conduct himself in a cooperative, respectful manner toward his co-workers and do so without experiencing significant anger and frustration, which will impede the flow of work and emotionally affect others. Ms. Wittenmyer reported she had had a conversation with Mr. Jacobsen over the telephone within the last week, where he sounded "agitated" and "lashed out" at Ms. Wittenmyer. He apparently verbalized significant irritation and agitation at her. Ms. Wittenmyer said that Mr. Jacobsen ostensibly "put all the blame" on her for what has transpired in September and October of this year. She also reported a later conversation with Mr. Jacobsen where he sounded significantly more calm.
>
> I am also aware that at least three, if not four, co-workers of Mr. Jacobsen have continued to express feeling emotionally upset and very concerned about his returning to work. They continue to feel intimidated by what has transpired and furthermore, expressed concern about this welfare.
>
> * * *
>
> 3. Does treatment need to take place before Mr. Jacobsen returns to work?
>
> Yes. It is my opinion that Mr. Jacobsen should avail himself for psychological treatment specifically related to his management of conflict, his ability to control anger, and to gain an understanding of additional factors in his personal life which may be impinging on his ability to interact with others at work in a co-operative, respectful, and non-threatening manner. It is my opinion that Mr. Jacobsen needs to begin a treatment process and

> make improvement in these areas prior to returning to work. (Respondent's Exhibit 4)

This opinion, which is based in part on appellant's actual interactions with other staff, is not an opinion that appellant was incapable per se of controlling his behavior. It cannot be determined from Dr. Hummel's opinion the extent that appellant's behavior was attributable to volitional factors which he conceivably could have changed if he were sufficiently motivated.

Mr. Hanusa's testimony was very similar to Dr. Hummel's. Mr. Hanusa testified that his diagnosis of appellant was the same as Dr. Hummel's, and he also testified as follows:

> I think he [appellant] 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 wouldn't say there's a psychiatric syndrome in play here, but there certainly are behavioral features that are causing him some difficulty.

Mr. Hanusa testified as follows concerning his proposed treatment for appellant's "interpersonal behavioral difficulties:"

> I don't think Mr. Jacobsen had an opportunity throughout his lifetime, given his family background and his social learning history, to learn how to deal with conflict in a real effective way. Without that kind of training, I think it's probably going to the kind of thing where he's going to repeat some of the same behavior. That's why I elected this particular kind of approach for him, because it really helps him learn some more constructive ways to deal with conflict, interpersonally.

Furthermore, neither witness addressed the fact that, notwithstanding appellant's ingrained personality characteristics, his interpersonal behavior had been within the parameters of respondent's expectations until a relatively short period before this suspension.

In conclusion, since respondent did not establish either that appellant had a condition that is covered by §230.37(2), or that the condition caused his work place difficulties, it failed to establish just cause under these criteria.

Turning to the discrimination claim, in La Crosse Police Comm. v. LIRC, 139 Wis. 2d 740, 761, 407 N.W. 2d 510 (1987), the Supreme Court held that there is a two step process of analysis involved in the determination of whether a handicap has been established:

> First, is there a real or perceived impairment? Second, if so, is the impairment such that it either actually makes or is perceived as making achievement unusually difficult or limits the capacity to work.
>
> The first step in the analytical process requires determining whether an impairment, real or perceived, exists. As stated above, an impairment for purposes of the statute is a real or perceived lessening or deterioration or damage to a normal bodily function or bodily condition, or the absence of such bodily function or such bodily condition.
>
> If the individual satisfies the first step, then he or she must establish that the impairment either actually makes or is perceived as making "achievement unusually difficult or limits the capacity to work." Section 111.32(8)(a), Stats.

Thus, the first step in the process is to determine whether there is a real or perceived impairment. If so, it must be determined whether the actual or perceived impairment makes, or is perceived to make, "achievement unusually difficult or limits the capacity to work." §111.32(8)(a), Stats.

With respect to the first step, the Court held that "the element of 'impairment' is satisfied by showing either an actual lessening, deterioration or damage to a normal bodily function or bodily condition which makes achievement unusually difficult or limits the capacity to work ... or by showing that the condition perceived by the employer would constitute an actual impairment if it in fact existed." 139 Wis. 2d at 760. In the Commission's opinion, the kind of problematic personality characteristics found in a person such as complainant whose mental status otherwise is considered within the normal range would not fall within these parameters.

In American Motors Corp. v. LIRC, 119 Wis. 2d 706, 713-714, 350 N.W. 2d 120 (1984), the Supreme Court held that a complainant who was four feet, ten inches tall and who was not hired because of her height, was not handicapped:

> These definitions indicate that a "handicap" is an injury, deterioration or lessening that could impede a person's normal functioning in some manner and preclude the full and normal use of one's sensory, mental or physical faculties. Thus, a handicap within the meaning of the Act is a physical or mental condition that imposes limitations on a person's ability to achieve and capacity to work beyond the normal limitations that might render a person unable to make certain achievements or perform every possible job. All persons, given their individual characteristics and capabilities, have inherent limitations on their general ability to achieve or to perform certain jobs. All persons have some mental or physical deviations from the norm. However, such inherent limitations or deviations from the norm do not automati-

> cally constitute handicaps. A handicap is a mental or physical *disability or impairment* that a person has in addition to his or her normal limitations that makes achievement not merely difficult but *unusually* difficult, or that limits the capacity to work.

It may also be said that every person has a particular set of personality characteristics, some of which help and some of which hinder that person in life's endeavors, including the workplace. A person who has certain problematical personality characteristics, but whose psychiatric diagnosis is "well within the normal range" (testimony of Dr. Hummel) does not appear to fit within the concept of a handicapped individual envisioned by the Supreme Court in American Motors Corp. Another case from a different jurisdiction adds support to this conclusion. Daley v. Koch, 51 FEP Cases 1077, 892 F.2d 212 (2d Cir. 1989), involved a claim under the Rehabilitation Act of 1973, which defines a handicapped person as one who:

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. 706 (8) (B) (Supp. V 1987). The plaintiff had been rejected for employment by the New York City Police Department after a psychological screening reached the conclusion that he:

> [S]howed "poor judgment, irresponsible behavior and poor impulse control" which rendered plaintiff "unsuitable to be a police officer." Plaintiff was not diagnosed as having any particular psychological disease or disorder.
>
> In a subsequent review of [plaintiff's] file and Dr. Udanis' report, the Coordinator of the Psychological Services Testing Program agreed with the doctor that appellant had "significant personality traits" that would prevent him from effectively functioning as a police officer.

51 FEP Cases at 1078, 892 F.2d at 214 (emphasis supplied). The Court held:

> In *Forrisi*, the Court of Appeals for the Fourth Circuit noted that the Rehabilitation Act was intended to protect the disabled from discrimination in employment and stated that:
>
> > [i]t would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and

> whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.

794 F.2d at 934 (citation omitted). Appellant's personality traits could be described as commonplace; they in no way rise to the level of an impairment.

This Court holds that "poor judgment, irresponsible behavior and poor impulse control" do not amount to a mental condition that Congress intended to be considered an impairment which substantially limits a major life activity and therefore a person having those traits or perceived as having those traits cannot be considered a handicapped person within the meaning of the Act.

51 FEP Cases at 1079, 892 F.2d at 215. The meaning of the term "mental impairment" under the Rehabilitation Act of 1973 is illuminated by a federal regulation which provides the definition of: "'any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.' 45 C.F.R. §84.3(j)(2)(i)(B) (1988)." id. However, the general thrust of the Court's holding, which focuses on the commonplace nature of the personality traits involved, is consistent with the Wisconsin precedent established in American Motors and LaCrosse Police and Fire Commission.

The proposed decision concluded, however, that complainant established a perceived handicap under the LaCrosse Police Commission test:

> Respondent perceived (incorrectly) that complainant fell within the coverage of §230.37(2), Stats., which means respondent concluded he was "mentally incapable of or unfit for the efficient and effective performance of the duties of his ... position by reason of infirmities due to age, disabilities, or otherwise." Such a perceived incapacitating infirmity meets the court's definition of a "perceived lessening or deterioration or damage to a normal bodily function or bodily condition." Since respondent concluded that complainant's mental condition made him "incapable of or unfit for the efficient and effective performance of the duties of his or her position," this obviously satisfies the second element of a perception that the perceived handicap makes "achievement unusually difficult or limits the capacity to work."

This approach is flawed because it relies on the general language found in a civil service statute (§230.37(2)) under which respondent sought to justify its actions, to supply the first criterion — the existence of a perceived handicap.

That is, since respondent obviously had reached the conclusion for purposes of §230.37(2), Stats., that appellant had an incapacitating "infirmity," the proposed decision reasons that this means respondent perceived a "lessening or deterioration or damage to a normal bodily function or bodily condition," 139 Wis. 2d at 760. However, it does not follow that because respondent contends that appellant's condition would satisfy the criteria in §230.37(2), Stats., that the condition would constitute a perceived handicap in the sense, set forth in La Crosse Police Commission, "that the condition perceived by the employer would constitute an actual impairment if it in fact did exist." 139 Wis. 2d at 760. (emphasis added) This requires a focus on the factual nature of the perceived condition itself, not on the legal implications respondent attempted to attach to the condition in attempting to justify its actions in the context of another statute. Appellant's "condition" consisted of certain personality characteristics that were part of his psychological makeup that was within normal limits. From a factual standpoint, respondent's perception of this condition was not different from his actual condition. Since, as discussed above, the proposed decision correctly concluded that appellant's personality characteristics do not fall within the meaning of the term "impairment," there is neither an actual nor a perceived handicap. This absence is not remedied by the fact that respondent contends, for §230.37(2), Stats., purposes, that appellant's condition is an "infirmit[y] due to age, disabilities, or otherwise" which renders him "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his ... position."

This point is illustrated to a certain extent by a comparison of these facts to those found in La Crosse Police Commission. In that case, the employer perceived that the employe had a weak back based on its evaluation of his score on a "Cybex" machine test. The record demonstrated that the Cybex machine was not a reliable indicator. The Court held:

> In the instant case Rusch had no actual impairment of his back. However, the first step is satisfied because the employer perceived that Rusch had an impairment that consisted of a weak back that portended future back problems. Inasmuch as the condition that the PFC perceived would constitute an impairment if it in fact existed, the employer's perception satisfied the first step. 139 Wis. 2d at 763. (emphasis added)

Here, the employer did not perceive a nonexistent condition that would have constituted an impairment if it did exist, but rather perceived that a condition that did not constitute an impairment was interfering with appellant's capacity to function appropriately in the workplace. An example of a perceived handicap in the instant case would have been a perception by respondent that appellant actually had a mental disease.

Since appellant failed to establish the existence of a real or perceived handicap, his WFEA claim of handicap discrimination must be dismissed.

Dicta

In order to allay possible concerns about the ability of an agency to deal with troublesome employes and because this decision requires appellant's restoration to his employment at WCDD, the Commission makes a number of points as dicta. It should be obvious that an agency does not have to put up with an employe who listens to his radio all day, and wanders around the office repeatedly attempting to engage other employes in conversations about current events, while behaving in a querulous, intimidating manner. Such behavior clearly provides a basis for just cause for disciplinary action under the test enunciated in Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974). However, rather than proceeding under more conventional disciplinary procedures, in this case respondent chose to invoke §230.37(2), Stats. If the diagnosis of appellant had involved a psychological condition that had met the requirements of §230.37(2), Stats., respondent presumably could have proceeded under that subsection to have transferred or demoted appellant, placed him on part-time status, or discharged him. However, respondent took an action (indefinite suspension) that was not authorized by §230.37(2), Stats., on the basis of a condition (appellant's personality characteristics) that does not satisfy the criteria set forth in that subsection. Therefore, although it appears that respondent's actions were in good faith and motivated both by a genuine concern about what had been happening in the workplace and by the very real fears of appellant's coemployes, it unfortunately proceeded along a course of action that was not authorized by the civil service code.

Finally, to the extent this has not already been made obvious, the Commission suggests that complainant not interpret this decision as in any

way a condonation of his behavior in the workplace, but that he attempt to correct his behavioral problems in a cooperative effort with management.

ORDER

Respondent's action suspending appellant from employment is rejected and this matter is remanded for action in accordance with this decision. Appellant is entitled to restoration with back pay and benefits, less mitigation.

The Commission rejects the proposed order's requirement for the payment of reasonable attorney's fees. This part of the proposed order was based on the incorrect conclusion that appellant had prevailed on his WFEA discrimination complaint. However, appellant will have the opportunity to petition for attorney's fees pursuant to §227.485(5), Stats. Therefore, pursuant to §227.485(5), appellant has 30 days from the date of this interim decision either to petition for costs or to advise in writing that his previously filed petition shall stand as his petition under §227.485, and respondent will have 15 working days from receipt thereof in which to respond.

Dated: October 16, 1992

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT:rcr:gdt

STATE OF WISCONSIN

PERSONNEL COMMISSION

ROBERT RODGERS,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0094-PC

RULING ON RESPONDENT'S MOTION TO DISMISS

NATURE OF THE CASE

This case is before the Commission to resolve respondent's motion to dismiss. Respondent contends the Commission lacks jurisdiction over a disciplinary action, which resulted in no time off from work and no loss of pay. Both parties filed written arguments. The Commission received the final argument on November 18, 1998.

The facts recited below appear to be undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. Appellant has worked for respondent as a Corrections Field Supervisor since August 7, 1994. He is in a non-represented position, meaning his position is not covered by a collective bargaining agreement. His position also is exempt under the federal Fair Labor Standards Act (FLSA).

2. This appeal was filed with the Commission on July 24, 1998 (by letter dated July 23rd). The action being appealed was described in the letter as noted below:

> On behalf of our client, Robert Rodgers, we wish to file an Appeal of the written reprimand issued by Mickey Thompson, Assistant Administrator of the Division of Community Corrections, dated June 11, 1998, and delivered to Mr. Rodgers on June 26th, 1998 . . .
>
> Facts forming the basis of the Appeal: The work rule allegedly violated had been superseded by a subsequent Order and therefore was no longer a directive that needed to be followed. The language that is claimed to be offensive and demeaning is not offensive and demeaning to a reasonable person in this type of work setting. Additional facts will be brought forth at the hearing which will form the basis for the appeal.

> The reason the Appellant believes the action to be improper: There is no factual basis for the disciplinary action and it is believed that the disciplinary action was taken as a means of retaliation by Mr. Rodger's supervisors. Additional reasons will be brought forth at the hearing on this appeal.
>
> The relief requested: That the disciplinary action be dismissed and removed from Mr. Rodger's Personnel Record.

3. The text of the disciplinary letter dated June 11, 1998, is shown below in relevant part:

> This letter shall serve as your notice of a written reprimand equal to and carrying the weight of a one day suspension under the Fair Labor Standards Act (FLSA). Although these work rule violations warrant a one day suspension, as an FLSA exempt employee, you cannot be suspended for less than a full week, (5 work days), increment.
>
> This disciplinary action is a result of your violation of the following Department Work Rules . . .
>
> Specifically, you violated work rule #1 when you failed to follow directives previously given to you on March 10, 1997, by Regional Chief Sally Tess regarding travel outside of Eau Claire and Clark Counties. On February 11, 1998, you traveled to Douglas County on a transport and did not seek pre-approval from Regional Chief Tess. You violated work rule #13 by using offensive and demeaning language in the office, specifically using the term "mental masturbation" and commenting on a victim of domestic violence "deserving it." Both of these comments were made in front of staff, who found it offensive. In addition, you staffed a case with Agent Kim Hankey on 12/15/97 and discussed a sexual assault scenario using you and Agent Hankey as the involved parties, causing discomfort for Agent Hankey . . .
>
> If you believe this action was taken without just cause, you may appeal through the Personnel Commission.

4. Respondent considers the disciplinary letter to be a one-day suspension for purposes of applying progressive discipline. Further violations of a similar nature, accordingly, would be subject to discipline more severe than a one-day suspension.

CONCLUSIONS OF LAW

1. The disciplinary transaction in this case constitutes a constructive suspension.

2. This commission has jurisdiction over the subject matter of this appeal pursuant to §§230.44(1)(c) and 230.45(1)(a), Stats.

OPINION

The appellant asserts the Commission has jurisdiction pursuant to §230.44(1)(c), Stats., the text of which is shown below in relevant part:

> (1) APPEALABLE ACTIONS AND STEPS. (T)he following are actions appealable to the commission under §230.45(1)(a) . . .
>
> (c) *Demotion, layoff, suspension or discharge.* If an employe has permanent status in class . . . the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

Respondent contends that the discipline imposed was a written reprimand, and, accordingly, asserts that the Commission lacks jurisdiction because written reprimands are not an enumerated discipline in §230.44(1)(c), Stats. (See respondent's brief dated October 5, 1998.) Appellant contends that respondent imposed a suspension and, accordingly, that the Commission has jurisdiction.

The Commission will look beyond an employer's characterization of an action to determine whether it has the legal effect of an action over which the Commission has jurisdiction under §230.44(1)(c), Stats. For example, the Commission considered whether a constructive demotion occurred in *Cohen v. DHSS*, 84-0072-PC, 85-0214-PC, 86-0031-PC & *Cohen v. DHSS & DER*, 84-0094-PC, 2/5/87. The Commission in *Cohen* held as follows:

> In addition to reviewing these disciplinary actions identified (in §230.44(1)(c), Stats.) as demotions, layoffs, suspensions, discharges and reductions in base pay, the Commission may review actions which have the same legal effect as an enumerated disciplinary action even though they may be denominated as something else. P. 3.

The *Cohen* case was before the Commission to resolve respondent's objection to including as an issue for hearing whether Mr. Cohen was demoted "constructively or otherwise."

Mr. Cohen was moved from one position to another at the same classification, a transaction which the employer did not characterize as a "demotion." Mr. Cohen, however, contended that the duties of the new job were such that it fell within a lower classification than his prior position. The Commission allowed the constructive demotion issue to go forward to hearing to determine if the transaction had the legal effect of a demotion. In considering this question, the Commission indicated reliance upon the definition of "demotion" found in §ER-Pers 17.01, Wis. Adm. Code, shown below:

> A demotion means the permanent appointment of an employe with permanent status in one class to a position, for which the employe is qualified to perform the work after customary orientation provided for newly hired workers in such positions, in a lower class than the highest position currently held in which the employe has permanent status in class.

Based on the foregoing definition and upon common sense, the Commission held that Mr. Cohen could attempt to establish at hearing that the transaction had the same legal effect as a demotion by showing that he was moved to a different position which ultimately is determined to be of a lower classification than the prior position, as well as that the employer intended to cause demotion for the purpose of discipline.

The Commission took the same approach in *Davis v. ECB,* 91-0124-PC, 5/14/92, regarding a constructive demotion issue. While in *Davis* the Commission followed *Cohen* in holding that there was a constructive demotion, it rejected appellant's additional contention that she had been subjected to a constructive layoff. The Commission looked to the definition of the term "layoff" in §ER-Pers 1.02(11), Wis. Adm. Code, which includes the "termination of services of an employe . . . from a position." The Commission noted that the transaction involving Ms. Davis was a movement from a full-time to a part-time position which did not have the legal effect of a layoff because Ms. Davis' employment relationship continued, whereas the definition in the administrative code embodied the concept of total cessation of employment.

The Commission addressed the meaning of the term "suspension" as used in §230.44(1)(c), Stats., in *Passer v. DHSS*, 90-0003-PC, 5/16/90. The Commission noted that the statutes did not include a definition of the term "suspension" and, accordingly, the term was ambiguous and it was proper to construe the term in light of related statutes. Specifically, the Commission looked to §230.34(1)(a), Stats., which requires that an employer must have just

cause for suspending an employe without pay. The transaction appealed by Mr. Passer was a suspension with pay pending an investigation. The Commission concluded that

> A suspension with pay is not a cognizable transaction under 230.44(1)(c), Stats. . . .
>
> "Statutes must be construed in light of related statutes. When ss. 230.44(1)(c) and 230.34(1)(a) are read in conjunction, it is clear that a 'suspension' for purposes of s. 230.44(1)(c) is a suspension *without pay* as referenced in s. 230.34(1)(a)." P. 2. (citations omitted)

However, the *Passer* case suggests that a cognizable claim of constructive suspension can exist if the employe demonstrates that the disputed transaction had the same legal effect as a suspension, but that the appellant had not made such a showing:

> Appellant's brief contains the following: "It is arguable, however, [that] he did not get paid overtime or an increase in pay." Appellant has not alleged that his suspension caused him to lose any overtime pay or pay increase to which he otherwise would have been entitled. In the absence of such an allegation, there is no basis upon which to treat what on its face is a suspension with pay as a suspension without pay. *Id.*

These and a number of other decisions rendered by this and other bodies, interpreting similar statutes, demonstrate the functional approach that has been taken in determining the appropriate characterization of personnel transactions. *See e. g., Watkins v. Milwaukee Co. Civil Service Commission,* 88 Wis. 2d 411, 420, 276 N. W. 2d 775 (1979), which involved an attempt to appeal as a constructive discharge what was alleged to have been a coerced resignation:

> Petitioner urges the court to construe coerced resignations as a form of discharge, which would invoke the procedural mechanisms of sec. 63.10, Stats. Respondents argue that the provisions of sec. 63.10 apply only where charges are filed and that charges are not required to be filed where, as here, the employee resigned.
>
> Sec. 63.10, Stats.. provides procedures designed to ascertain through an impartial hearing whether the accusations brought against an employee demonstrate his unfitness for employment. The statute reflects the legislature's determination that the employee has a legitimate interest in not being "wrongly deprived of his or her livelihood and not suffering injury to reputation on the basis of charges which might prove unfounded."
>
> Resignation obtained by coercion poses serious possibilities of abuse. "[A] separation by reason of a *coerced* resignation is, in substance, a discharge effected by adverse action of the employing agency." Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats.. fits well with the policies of security of tenure and impartial evaluation which

> underlie the civil service system. The strength of this policy is underscored by the language of see. 63.04, Stats., which provides that "no person shall be . . . removed from the classified service in any such county [which has adopted the civil service system], except in accordance with the provisions of said sections [sees. 63.01 to 63.16, inclusive]." (citations omitted) (brackets and emphasis in original)

See also Juech v. Weaver, Wis. Pers. Bd., 1/13/72 (a nominal reclassification was considered in legal effect a constructive demotion, where the employer first reassigned all of the employe's supervisory duties and then effected a downward classification); *Mirandilla v. DVA,* No. 82-0189-PC, 7/21/83 (reassignment of duties was considered in legal effect a constructive reduction in base pay cognizable under §230.44(1)(c), Stats., where the underlying transaction caused a reduction in the employe's salary and the duties in question were essentially non-existent and always had been a mere ploy respondent had used to augment the employe's salary); *Jacobsen v. DHSS,* 91-0220-PC, 10/16/92 (where respondent told appellant he could not return to work before getting counseling and treatment, and that he would have to utilize accumulated paid leave time until that occurred if he wanted to continue to get paid, the employe was effectively suspended and his appeal was cognizable under §230.44(1)(c), Stats.).

The overriding principle that emerges from these and other cases is that it is not dispositive for appeal purposes whether a personnel transaction fits or does not fit within the definition of a particular type of transaction. The Commission must examine the practical effect the transaction has on the employe's employment status, in the context of the employer's intention in effecting the transaction, and the policy factors which underlie the statutory framework of the civil service, to determine whether the transaction partakes more of the nominal category of personnel transaction—e. g., a reprimand—or more of the more serious category—e. g., a suspension.

When an employe is given a disciplinary suspension per se, there are three obvious impacts. First, the employe is relieved of the performance of his or her duties. Second, he or she loses the opportunity to earn wages during the period of the suspension. Third, the employe's disciplinary record is blemished, and this record may move the employe "up the ladder" in terms of progressive discipline in connection with any future disciplinary action.

In the instant case, the first and second impacts did not occur, but it is uncontroverted that appellant was subject to the third effect. Respondent could hardly have made this clearer in its letter to appellant:

> This letter shall serve as your notice of a written reprimand *equal to and carrying the weight of a one day suspension* under the Fair Labor Standards Act (FLSA). Although these work rule violations warrant a one day suspension, as an FLSA exempt employee, you cannot be suspended for less than a full week, (5 work days), increment. (emphasis added)

The Commission has found, based on respondent's explicit acknowledgement in its brief in support of the motion to dismiss, that: "[r]espondent considered the disciplinary letter to be a one-day suspension for purposes of applying progressive discipline. Further violations of a similar nature, accordingly, would be subject to discipline more severe than a one-day suspension." Finding, #4, p. 2, above. Respondent's obvious intention was to discipline appellant, and to do so in a manner that would be as close as possible to a one day suspension without jeopardizing appellant's exempt status under the FLSA. While the discipline imposed resulted in neither any interruption in appellant's performance of his duties nor any interruption in his salary, it constitutes not only a blemish on his disciplinary record that could negatively affect his career in general,[1] but also a blemish that, in the case of further disciplinary action, predictably will result in an increased disciplinary penalty over what he would receive if respondent were not treating the suspension as equivalent to a one-day suspension. Thus the discipline imposed in this case had a significantly more severe disciplinary impact on appellant's employment status than would have been the case with a mere reprimand. This serves to distinguish this case from others where the Commission has focused on other effects of potential constructive suspensions.

For example, in *Passer* the Commission relied on the fact that the employe was suspended *with pay* in holding that there had been no constructive suspension. However, unlike the instant case, the employe was suspended pending an investigation of alleged misconduct, and respondent did not consider the suspension a disciplinary matter. In *Jacobsen* the Commission relied on the fact that after respondent advised the appellant that he could not

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[1] For example, it could affect his future promotability.

return to work, he was prevented from earning remuneration. However, in that case the employer had never denominated the suspension as disciplinary in nature, unlike this case where respondent has explicitly advised appellant that his reprimand was disciplinary in nature and equivalent for disciplinary purposes to a one day suspension without pay.

From a policy standpoint, allowing an employe situated like appellant to appeal serves:

> [T]he legislature's determination that the employee has a legitimate interest in not being "wrongly deprived of his or her livelihood and not suffering injury to reputation on the basis of charges which might prove unfounded." . . [and] fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system. *Watkins v. Milwaukee Co. Civil Service Commission,* 88 Wis. 2d 411, 420, 276 N. W. 2d 775 (1979).

Allowing such appeals does add a layer of administrative review to the transaction, and requires respondent to reallocate its resources in a way that would not be required with a ruling against the right of appeal. However, it should be kept in mind that if this discipline had occurred prior to the federal FLSA determination that suspensions of less than five days are inconsistent with exempt status, respondent would have proceeded with a one day suspension and would have had to establish just cause on an appeal of that transaction. Thus, a ruling in favor of the right to appeal written reprimands deemed equivalent to suspensions for disciplinary purposes would only restore respondent's administrative burden to what it was prior to the aforesaid federal FLSA ruling.

ORDER

Respondent's motion to dismiss filed on October 5, 1998, is denied, and this case will proceed to a hearing on the merits.

Dated: Jan 27, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT IV

Appeal No. 01-1899

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner-Respondent,

v. Circuit Court Case No. 99-CV-2959

STATE OF WISCONSIN PERSONNEL
COMMISSION,

Respondent-Respondent-Co-Appellant,

DALE R. BRENON,

Appellant.

DALE R. BRENON,

Petitioner-Appellant,

v. Circuit Court Case No. 00-CV-661

STATE OF WISCONSIN PERSONNEL
COMMISSION,

Respondent-Respondent.

Appeal from Final Judgment
Dane County Circuit Court, Case Nos. 99-CV-2959 and 00-CV-661
Honorable Michael N. Nowakowski Presiding

PETITIONER-APPELLANT, DALE R. BRENON'S, BRIEF

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STATEMENT OF ISSUES AND TRIAL COURT'S DISPOSITION OF THE ISSUES

ISSUE 1: Whether Personnel Commission erred in excluding evidence of a "new" basis for terminating Sgt. Brenon from the University of Wisconsin-Milwaukee Police Department (hereinafter referred to as "UWMPD") raised for the first time at the backpay hearing three years after UWMPD's notice of the new basis and three years after the hearing on just cause.

Disposition by the trial court:

Personnel Commission: In two written decisions the Personnel Commission explained its rationale for excluding the evidence.

Circuit Court: Reversed because Personnel Commission allegedly failed to explain how it exercised its discretion.

ISSUE 2: Whether the Personnel Commission erred in awarding attorneys fees after finding that Sgt. Brenon's constitutional rights had been violated.

Disposition by the trial court:

Personnel Commission: Attorneys' fees denied because UWMPD was substantially justified in its actions.

Circuit Court: Affirmed Personnel Commission decision.

STATEMENT ON ORAL ARGUMENT

The petitioner-appellant, Sgt. Brenon, believes oral argument is necessary.

STATEMENT ON PUBLICATION

This case involves issues which publication of this court's decision will help create precedent for the orderly administration of future Personnel Commission cases.

STATEMENT OF THE CASE

A. Procedural History.

By letters dated February 19, 1996 and March 18, 1996 to the Personnel Commission, Sgt. Brenon appealed both a ten day suspension and subsequent termination by the University of Wisconsin-Milwaukee Police Department (hereinafter referred to as "UWMPD"). (R.13:47-48)[1] A conference report dated April 4, 1996 ordered the parties to produce all exhibits and names of witnesses three working days before the date for the hearing, pursuant to Section PC4.02, Wis. Admin. Code. (R.13:46) A hearing was held on August 1, 2 and 12, 1996. (R.13:50-52) On October 6, 1997, Commissioner Murphy issued a proposed decision and order reinstating Sgt. Brenon. The Personnel Commission issued an Interim Decision and Order on February 12, 1998. (R.13:34) As a result of the interim decision and order, an issue remained as to Sgt. Brenon's backpay. Sgt. Brenon moved for immediate reinstatement by letter to Commissioner Murphy dated July 9, 1998. (R.13:28) In response to Sgt. Brenon's motion, the parties agreed to a procedure on determining the backpay remedy. (R.13:27) Pursuant to the agreement of the parties, the amount of backpay would be determined after submissions by the parties of briefs to Commissioner Murphy. UWMPD filed its backpay

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[1]Record 13 is the Dane County Circuit Court Return of Record. Where R.13 is referred to, the second reference number refers to the document number as listed on the Return of Record. (A.App. 1-8)

calculation on September 15, 1998. (R.13:26) Sgt. Brenon's response was filed September 23, 1998. (R.13:25) UWMPD's reply brief was filed September 25, 1998. (R.13:24) Due to materials raised for the first time and UWMPD's reply brief, Sgt. Brenon filed a motion to strike on October 8, 1998. (R.13:23) In correspondence subsequent to Sgt. Brenon's motion to strike, UWMPD requested a hearing to deal with the materials which Sgt. Brenon's motion sought to be struck relating to mitigation. (R.13:20) Commissioner Murphy granted UWMPD's request for hearing and issued a conference report on April 30, 1999. (R.13:12) Pursuant to the conference report, all names of witnesses and exhibits needed to be exchanged three working days prior to the hearing. The backpay hearing was held May 18, 1999. (R.13:49) On June 18, 1999, Commissioner Murphy issued a proposed decision and order. (R.13:10) The Personnel Commission issued an interim decision and order dated September 1, 1999. By motion filed October 22, 1999, UWMPD moved for reconsideration of the interim decision. (R.13:4) The Personnel Commission issued a final decision and order dated November 19, 1999 on Sgt. Brenon's request for attorney's fees and UWMPD's motion for reconsideration. (R.13:1)

UWMPD filed a petition for review on December 17, 1999. (R.1) Sgt. Brenon filed a petition for review in Milwaukee County which pursuant to the agreement of the parties was

consolidated before Judge Nowakowski in Dane County. (R.7) Judge Nowakowski filed a decision and order affirming in all respects the Personnel Commission's actions except one relating to evidence excluded at the remedy hearing and ordered the matter remanded for consideration of such evidence. (R.24) On July 13, 2001, both the Personnel Commission and Sgt. Brenon filed a notice of appeal of Judge Nowakowski's decision. (R.26)[2]

B. Statement of Facts.

This case involves the initial ten-day suspension of Sgt. Brenon on December 19, 1995 and subsequent termination of Sgt. Brenon on February 9, 1996. Sgt. Brenon's employment is subject to Wisconsin's Civil Service Code found in section 230 of the Wisconsin Statutes. Pursuant to that chapter, Sgt. Brenon appealed the discipline meted out by UWMPD by written applications to the Personnel Commission.

In 1995, at roll-call for the third shift supervised by Sgt. Brenon, P.O. Sorrell of the UWMPD described several jokes he had heard on the radio about the Million Man March. (R.13:51:266-267; A.App. 144-145) Subsequently, Sgt. Brenon encountered an officer from an earlier shift, P.O. Peters. Sgt. Brenon repeated the P.O. Sorrell's comments to this off

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[2]Sgt. Brenon's Notice of Appeal is identified as document 4 for the Index of Record for Case 00-CV-661/01-1899. Unless otherwise indicated, all references to the index refer to Case No. 99-CV-2959/01-1899.

duty officer. Subsequently, P.O. Peters repeated these jokes to Lt. Hodermann (R.13:49:75-77; A.App. 132-134), and Lt. Hodermann claimed this was a complaint. Lt. Hodermann then ordered P.O. Peters, a subordinate to Sgt. Brenon, to investigate a superior officer, Sgt. Brenon, and find corroborating witnesses to "strengthen" his complaint. (R.13:49:75-77; A.App. 132-134)

At all times relevant to this case, Lt. Sroka was Sgt. Brenon's direct supervisor. (R.13:50:75; A.App. 137) Rather than reporting the matter to Sgt. Brenon's direct supervisor, consistent with UWMPD policy, Lt. Hodermann undertook a surreptitious investigation.[3] Asst. Chancellor Melkus testified that there was no precedent that he is aware of in the University system where both an investigation and discipline was meted out without the employee's immediate supervisor being involved. (R.13:52:563-564; A.App. 159-160)

It was not until December 4, 1995 that Lt. Sroka, was informed of the investigation. (R.13:52:579; A.App. 161) By this time Lt. Hodermann ordered several individuals to send p-mail[4] about Sgt. Brenon which were included in the investigation of the case resulting in discipline.

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[3]At the time of the Commission hearing Lt. Hodermann claimed to have been authorized to conduct this internal investigation. Chief Clark, denied this however. See. Vol. 7, p. 404. In fact, at that time Lt. Boinski was in charge of creating the internal investigation policy. ((R.13; Vol. 7, p. 399)

[4]P-mail is the name for UWMPD's internal e-mail system.

(R.13:51:269; A.App. 147) On December 5, 1995, in a meeting with Chief Clark and Lt. Hodermann, Lt. Sroka was instructed to interview Sgt. Brenon. (R.13:52:584; A.App. 162) Lt. Sroka was not informed that Chief Clark had already been in contact with Assistant Chancellor Melkus. (Id.) Lt. Sroka was not informed that UW-Milwaukee Administration had already determined that if Sgt. Brenon denied the charges he would be terminated or, alternatively, if Sgt. Brenon admitted the charges he would be suspended, without pay, for ten days. (R.13:52:584) As a result, Lt. Sroka sent a p-mail to Sgt. Brenon that indicated Sgt. Brenon should remain after his shift on the morning of December 8th to meet with him regarding a matter that was "no big deal". (R.13:53d:Ex. 8; A.App. 182)

On December 8, 1995, Lt. Sroka interviewed Sgt. Brenon regarding the matters previously investigated by Lt. Hodermann. (R.13:52:591; A.App. 164) At the meeting, Lt. Sroka told Sgt. Brenon that based on the information Sgt. Brenon provided, a "verbal" reprimand was in order. (R.13:52:592; A.App. 165) Knowing that Chief Clark was in an adjacent room, Lt. Sroka asked Sgt. Brenon to remain for a moment. Lt. Sroka then told Chief Clark what had occurred. Chief Clark, for the first time, told Lt. Sroka that "administration" was involved. This was the first time in Lt.

Sroka's career that the "administration" had been involved in a matter at this stage. (R.13:52:601-602; A.App. 168-169)

Prior to the meeting on December 8, 1995, Lt. Sroka had not been informed that any discipline felt to be appropriate would not be within his authority as Sgt. Brenon's supervisor. (R.13:52:593; A.App. 166) Lt. Sroka was informed by Chief Clark that had Sgt. Brenon denied the charges "administration" wanted him "terminated." (R.13:52:598; A.App. 167) Lt. Sroka was instructed to tell Sgt. Brenon that rather than a verbal reprimand, he would be receiving a suspension of ten days without pay and the level of discipline was out of Chief Clark's hands. (R.13:52:603; A.App. 170) Sgt. Brenon was allowed to talk to Chief Clark on December 8, 1995. He was informed that the suspension was a "done deal." (R.13:52:660-661; A.App. 172-173)

Lt. Sroka admitted that his meeting of December 8, 1995 did not constitute a pre-disciplinary hearing. (R.13:52:588-589; A.App. 162-163) Lt. Sroka admitted that had anything as serious as a ten day suspension or termination been contemplated he would not have sent a p-mail indicating the December 8, 1995 meeting was "no big deal." (R.13:52:585-586; A.App. 159-160) By letter dated December 19, 1995, Sgt. Brenon was suspended for ten days effective January 22, 1999. (R.13:53a:Ex. 2; A.App. 177-178)

Following the notice of suspension, Lt. Hodermann then started a new investigation. The next mission apparently was to terminate Sgt. Brenon. To accomplish this next internal investigation, Sgt. Brenon's direct supervisor, Lt. Sroka, was again excluded. Lacking any new incidents, Lt. Hodermann and Chief Clark filed new charges against Sgt. Brenon relating to matters included in the prior investigation or matters pre-dating the December suspension. (R.13:34:16; A.App. 115) Anyone who stood in their way was severely sanctioned. For example, P.O. Holmes sent a p-mail to Lt. Sroka in support of his beleaguered supervisor, Sgt. Brenon. (R.13:53d:Ex. 16; A.App. 183-185) P.O. Holmes was promptly suspended without any indication as to why he was being disciplined. (R.13:52:532-533; A.App. 156-157) The hearing in the Brenon matter took place eight months after the Holmes suspension, and as of that time, Holmes had yet to be informed why he had been suspended. (R.13:52:532-533; A.App. 156-157) Clearly, the Holmes suspension was a message to other members of the UWMPD that anyone who attempted to support Sgt. Brenon would be punished severely.

P.O. Holmes testified to the enormous pressure put on Cadet Panas by management to complain about Sgt. Brenon. P.O. Holmes testified:

> Q. All right. When you say that she was receiving pressure from Peters, is that something that she

personally related to you, Cadet Panas?

A. That was one half of the coin, when she used the word pressure. She related to me that she was getting a lot of pressure from Ken Peters and the entourage that followed and she was getting a lot of pressure from management. So she was kind of between a rock and a hard place.

Q. Did she identify anyone from management who had been pressuring her?

A. Again, I'm looking to be sure-- I don't know if I can actually recall her pointing out any individual or individuals, other than to say that she was getting a lot of pressure from management to come forward and file a complaint. And her words to me were that management told her it would be in her best interest if she came forward. And, and I didn't delve into that too much. This is something she felt by talking to me about it.

Q. And was this at or about the time she was expressing concerns to you about her status, her future status within the Department?

A. Very much so. There was some doubt about the program, whether or not it was going to come true or whether or not she was going to (inaudible word). A lot of things seemed to be racing through her head.

(R.13:52:530-531; A.App. 154-155) P.O. Klobukowski also stated how Cadet Panas, in telephone calls to her home, was pressured by management to make a statement against Sgt. Brenon. (R.13:50:183; A.App. 142)

Further, P.O. Klobukowski and P.O. Holmes had requested, when being interviewed by Lt. Hoderman and Chief Clark, that a representative be present. Both officers' requests were denied. (R.13:50:180-181; A.App. 140-141; R.13:52:533; A.App. 157) P.O. Klobukowski was interviewed knowing P.O. Holmes was home on a mysterious suspension. P.O. Holmes filed a grievance over his inability to have a representative present. (R.13:52:533; A.App. 157) P.O. Holmes was ordered not to speak to his co-workers. (R.13:52:539; A.App. 158) There was a University wide policy that <u>any</u> employee who makes the request shall be allowed to have a representative present during such investigation. (R.13:53d:Ex. 35; A.App. 231) P.O. Klobukowski testified that Chief Clark physically reacted during an interview when he told Ms. Boswell, from the Office of Diversity and Compliance about the pressure management was placing on Cadet Panas. (R.13:50:183-184; A.App. 143-145) Ms. Boswell indicated that she had to ban Chief Clark from the interviews she conducted because of the chilling effect his presence had. (R.13:51:437; A.App. 149)

Further proof of the pressure Cadet Panas was put under is found in the various memos and interviews that she endured. In a memo dated December 23, 1995, Cadet Panas vaguely referenced jokes told by Sgt. Brenon but specifically indicates that "I do not have exact dates that most of these occurrences [sic] took place." (R.13:53d:Ex. 21; A.App. 186-

191) The only detailed information found in this memo relates to a concern Cadet Panas had with respect to changing from the night shift to second shift. (Id.) On January 10, 1996 both Chief Clark and Lt. Hodermann interviewed Cadet Panas. Lt. Hodermann's notes and memos of the various interviews were marked as exhibits. (R.13:53d:Ex. 22; A.App. 192-202) All of these memos and interviews disclose clearly that there was no inappropriate joke telling involving Cadet Panas after December 19, 1995, the date of the suspension letter to Sgt. Brenon. (R.13:53a:Ex. 2; A.App. 177-178)

On January 12, 1996, Sgt. Brenon was interviewed by Chief Clark regarding alleged "new" complaints (R.13:53d:Ex. 29), and on February 5, 1996 Chief Clark held a "predisciplinary hearing." At no time prior to the February 5th meeting did Sgt. Brenon receive any notice, written or otherwise, of the alleged misconduct for which the "hearing" was being held.

By letter dated February 9, 1996, Sgt. Brenon was terminated by Chief Clark. (R.13:53a:Ex. 9; A.App. 179-181) In the termination letter, Chief Clark indicated that Sgt. Brenon was being terminated because of ". . . untruthfulness uncovered in the course of the investigation of those complaints . . ." and due to alleged retaliation against subordinates who cooperated in that earlier investigation. (R.13:53a:Ex. 9; A.App. 179-181) Chief Clark's letter also indicates that following the notice of suspension, Sgt. Brenon

"continued to tell jokes to subordinate officers substituting 'Irishmen for other ethnic groups.'" (R.13:53a:Ex. 9; A.App. 179-181) Chief Clark also claims in the termination letter that "new complaints were received about sexually explicit and demeaning comments."

The February 9, 1996 termination letter, however, indicates that the only "new" complaints were related to: (1) activities alleged to have taken place in November of 1995 prior to the suspension; and (2) allegations that P.O. Sorrell claimed Sgt. Brenon had changed his pattern of appointing him as Officer-In-Charge (hereinafter "OIC") after P.O. Sorrell "complained" about Sgt. Brenon by memo dated December 5, 1995. (R.13:53a:Ex. 9; A.App. 179-181) Based on the evidence that he had available to him, however, Chief Clark knew that there was no evidence to support the allegations of continued offensive joke telling. In fact, Commissioner Murphy of the Commission reached the same conclusion based on the same information available to Chief Clark in February of 1996. (R.13:34:16-17; A.App. 123-124)

Further, the evidence relating to retaliation simply did not exist. The investigator, Lt. Hodermann, admitted that of the days following notice of Sorrell's "complaint," Sgt. Brenon was off duty on only three occasions when P.O. Sorrell could have been made OIC.[5] There were three individuals

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[5]OIC is a substitute for Sgt. Brenon when he is not commanding his shift.

including P.O. Sorrell who rotated as OIC. (R.13:50:121; A.App. 138) Of the three days that P.O. Sorrell worked when Sgt. Brenon was not present, P.O. Sorrell was made OIC on one occasion. (R.13:51:285; A.App. 148) Clearly there was no change in rotation as a result of Sorrell's complaint. Further, it is undisputed that there is no monetary or other reward for being made OIC, and the decision to appoint an employee as the OIC is completely discretionary in the supervisor.[6]

The other evidence of retaliation was so silly that Commissioner Murphy simply dealt with it in one sentence stating "the two other complaints by Sorrell of retaliation need no comment, except to observe, based on the record, that Sorrell had enjoyed a personal friendship with Brenon, prior to his complaint to Hodermann." (R.13:34:12-14; A.App. 119-121)

Commissioner Murphy further found that there was only evidence to support a claim of untruthfulness as to one matter. It was alleged that as a humorous gesture, like other employees, Sgt. Brenon mimicked an employee. Id. P.O. Sorrell testified this occurred in November, 1995, prior to the ten day suspension. (R.13:51:273; A.App. 147) There was

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[6]Interestingly, Sgt. Brenon was suspended ten days for repeating P.O. Sorrell's jokes but, Lt. Hoderman wanted Sorrell to take Sgt. Brenon's place as "OIC."

no evidence that the pantomime referred to occurred subsequent to the December 19, 1995 notice of suspension.

In October 1997, Commissioner Murphy issued his proposed decision reversing Sgt. Brenon's termination and reinstating Sgt. Brenon. (R.13:39) Sgt. Brenon had already served a ten day suspension before the termination in February of 1996. (R.13:52:663; A.App. 175) Therefore, Sgt. Brenon was eligible for immediate reinstatement. UWMPD refused to reinstate Sgt. Brenon at that time, and instead filed objections to the proposed decision which were summarily dealt with by the Commission in its interim decision of February 12, 1998. (R.13:34; A.App. 100-126) Following the Interim Decision, the only remaining issue before this Commission was back-pay. UWMPD demanded the opportunity to obtain discovery as part of the backpay issue, and that demand was granted.

In July of 1998, UWMPD stipulated that in return for the voluntary disclosure of certain information as well as a deposition of Sgt. Brenon, the back-pay issue would be submitted via briefs to Commissioner Murphy. (R.13:27; A.App. 94-5) The stipulation called for UWMPD to file a brief regarding backpay by September 15, 1998. Sgt. Brenon's response was to be filed by September 18, 1998. UWMPD's reply was then due September 28, 1998.

It became clear from UWMPD's initial brief that it was going to try to reserve its entire argument for the reply

brief where Sgt. Brenon would be precluded from preparing a meaningful response. (R.13:26; A.App. 86-93) In anticipation of this tactic, Sgt. Brenon moved in his response brief to exclude such argument by UWMPD. (R.13:25; A.App. 78-85) When UWMPD's reply was served and Sgt. Brenon's concerns were borne out, he filed a motion to strike. (R.13:23; A.App. 69-77) Thereafter, a number of contacts with Commissioner Murphy ensued wherein he urged the parties to stipulate at least to the gross backpay amount, which was done. (R.13:54d:21) Subsequently, UWMPD requested a hearing on the issues raised in its reply brief and Sgt. Brenon's motion to strike. (R.13:20; A.App. 67-68) In short, those issues dealt with Sgt. Brenon's bank records UWMPD obtained through a secret subpoena and the question of offset for Sgt. Brenon's part-time employment following termination. (Id.) Sgt. Brenon had fully complied with all aspects of the earlier stipulation and incurred significant attorney's fees in the briefing required by that stipulation.

Commissioner Murphy, in an attempt to save the parties stipulation held a status conference on January 15, 1998.[7] As a result, the parties again supplied briefs to Commissioner Murphy. (R.13:14-19; A.App. 49-66)

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[7]Commissioner Murphy's conference report is not referenced in the Personnel Commission's "Return of Record on Review." The conference is referred to in letter briefs submitted pursuant to that report.

Despite Sgt. Brenon fully complying with Commissioner Murphy's January 15, 1998 requests, UWMPD filed a motion for *en banc* order on April 26, 1999. (R. 13:13; A.App. 46-48) In response to UWMPD's motion, Commissioner Murphy set a hearing date. (R. 13:12; A.App. 44-45) In a conference report dated April 30, 1999, Commissioner Murphy identified the issues that the parties had previously briefed and argued as the issues for hearing. (Id.) Further, the conference report referencing PC6.02(2) Wis. Admin. Code required the parties to exchange witness lists and exhibits three working days before the hearing. Nothing was identified by UWMPD as indicating that the issues for the hearing would be expanded in any way.

On May 18, 1999, the backpay hearing was held before Commissioner Murphy. (R.13:49) At the beginning of the hearing, counsel for UWMPD indicated for the first time that Sgt. Brenon would have been terminated around the time of his June 1996 deposition for reasons not previously litigated. (R. 13:49:24; A.App. 128) Subsequent to Commissioner Murphy sustaining Sgt. Brenon's objection to this line of questioning, UWMPD made an offer of proof. In support of this offer of proof, Exhibit R-22 was produced. (See R.13:54d:Ex. 22) (R.13:49:33) Exhibit 22 had not been submitted pursuant to the three day requirement found in the conference report. (R.13:12; A.App. 44-45) Commissioner Murphy confirmed that UWMPD was attempting to present new evidence at the backpay

hearing to show "just cause" for terminating Sgt. Brenon as of June 24, 1996. (R. 13:49:32; A.App. 130)

At no time up to and including the hearing on May 18, 1999, was Sgt. Brenon served with a "writing" required under §230.34(1)(b), Wis. Stats. for any action taken against him relative to "demotion, suspension, discharge or layoff." At the backpay hearing, the attorney for UWMPD conceded that they had known about Sgt. Brenon's practice of maintaining records at home since his deposition in June of 1996. (R.13:49:29; A.App. 129) Despite this knowledge, UWMPD failed to raise the issue at the original "just cause" hearing in August of 1996.

Commissioner Murphy issued a proposed decision and order on June 18, 1999. (R. 13:10; A.App. 34-43) In an interim decision and order dated September 1, 1999, the Personnel Commission discussed the ruling by Commissioner Murphy to exclude "after acquired evidence." (R. 13:6; A.App. 9-19)

ARGUMENT

I. PERSONNEL COMMISSION PROPERLY EXCLUDED UWMPD'S LAST MINUTE "AFTER-ACQUIRED EVIDENCE" THEORY.

Sgt. Brenon was terminated on February 9, 1996. The Personnel Commission held a hearing in August of 1996 to determine whether or not Sgt. Brenon should be reinstated. Prior to the hearing, Sgt. Brenon was deposed. UWMPD, three years later, at the backpay hearing, attempted to raise the issue of "after-acquired evidence" in order to defeat or

reduce Sgt. Brenon's claim for backpay. The "after-acquired evidence" was testimony of Sgt. Brenon's, from his deposition, that he brought work papers home. (R.13:49:29; A.App. 129)

It is undisputed that UWMPD was put on notice that Sgt. Brenon had kept work-related documents at home as of his June 24, 1996 deposition. (R.13:49:29; A.App. 129) Nonetheless, prior to resting its case at the hearing in August of 1996, UWMPD failed to raise the issue. No documents were submitted under the three-day rule prior to the August 1996 hearing. In addition, no mention of the "after-acquired evidence" issue was raised in any of the objections to the proposed decision stemming from that hearing. Subsequently, when UWMPD sought discovery relative to backpay, (R.13:29; A.App. 96-99) no mention was made at that time of an "after-acquired evidence" issue.

In July of 1998, the parties stipulated to a procedure where the backpay issue would be decided by the Personnel Commission on written submissions. (R.13:27; A.App. 94-95) The agreement of the parties made no merit of "after-acquired evidence." (Id.) No mention was made of the after-acquired evidence issue in UWMPD's September 15, 1998 submission, its September 24, 1998 submission, or its October 12, 1998 submission. Additionally, the theory was not mentioned in UWMPD's January 15, 1999 submission, its February 15, 1999 submission, its April 26, 1999 motion, nor in the conference

identifying the issues to be heard at the May 18, 1999 backpay hearing. (R.13:12; A.App. 44-45)

The April 30, 1999 conference report from Commissioner Murphy cited to the three-day rule in which UWMPD was required to produce any exhibits to be used at the backpay hearing. Moreover, a motion was filed by UWMPD on May 13, 1999, only five days before the hearing, again failing to identify an "after-acquired evidence" issue.

There were substantial briefs and submissions to Commissioner Murphy stemming from the initial attempt by UWMPD to ambush Sgt. Brenon when the backpay issue was to be determined from written submissions. On October 8, 1998, Sgt. Brenon filed a motion to strike materials that UWMPD attempted to submit by way of its reply brief which had never been argued previously. (R.13:23; A.App. 69-77) Under the agreement between the parties, UWMPD was to submit its backpay calculations in writing by September 15, 1998. (R.13:27; A.App. 94-95) Sgt. Brenon would then have an opportunity to respond and UWMPD would then be entitled to reply. (Id.) Rather than providing its substantive arguments in its initial submission to Commissioner Murphy, UWMPD back loaded its reply brief in an effort to submit arguments to Commissioner Murphy which Sgt. Brenon would be precluded from responding to.

At the time of the May 18, 1999 backpay hearing, UWMPD again attempted to ambush Sgt. Brenon by raising for the first

time, while cross-examining Sgt. Brenon, the "after-acquired evidence" theory. At that time, Sgt. Brenon objected to the "after-acquired evidence" theory due to lack of notice on the issue. Commissioner Murphy sustained the objection. UWMPD failed to request a continuance to cure the notice defect. Subsequently, the Personnel Commission, in its interim decision and order, upheld the decision by Commissioner Murphy to exclude such evidence.

The standard of review for discretionary determinations by the Personnel Commission is similar to that of discretionary determinations by trial courts.

> In reviewing an administrative agency's discretionary decision, we defer to the administrative agency as we defer to trial courts because the exercise of discretion is so integral to the efficient functioning of both the administrative agency and the courts. The burden to demonstrate an erroneous exercise of discretion rests on the party claiming the exercise of discretion was improper.

Verhaagh v. Labor & Industry Review Comm'n., 204 Wis. 2d 154, 554 N.W.2d 678, 680 (Ct. App. 1996). The appellate courts have further described the process of review as follows:

> We sustain a discretionary determination by a trial court unless the court abused its discretion or acted on an erroneous view of the law. We will not find an abuse of discretion if the record shows that discretion was exercised and a reasonable basis exists for the court's determination. If the record fails to show that the court exercised discretion, we nevertheless will sustain a

> discretionary determination if facts of record support the decision, had discretion been exercised on that basis. [Citations omitted]

Biel v. Biel, 114 Wis. 2d 191, 336 N.W.2d 404, 407 (Ct. App. 1983). An agency's discretionary decisions should be reviewed under the arbitrary and capricious standard. When applying the arbitrary and capricious standard to an agency's discretionary decision, the reviewing court determines whether the agency's actions had a reasonable basis. Sterling Worth Condominium Ass'n, Inc. v. State Dept. of Natural Resources, 205 Wis. 2d 710, 556 N.W.2d 791 (Ct. App. 1996). This court reviews the administrative agency's decision rather than that of the circuit court. Begel v. LIRC, 2001 WI App. 134, ¶5, 631 N.W.2d 220 (Ct. App. 2001).

A. The "After-acquired Evidence" Theory Does Not Apply to Employment Actions under the Civil Service Code.

In support of its attempt to utilize the "after-acquired evidence rule," UWMPD cited to McKennon v. Nashville Banner Pub. Co., 513 U.S. 532 (1995). McKennon is not a civil service case. Christine McKennon was an at-will employee suing under the Age Discrimination and Employment Act (ADEA). There is nothing in the McKennon decision to suggest that there was any requirement, statutory requirement or otherwise, that McKennon be provided with written notice regarding the reasons for which she was being terminated.

Sgt. Brenon, on the other hand, is subject to the Civil Service Code. Pursuant to §230.34(1)(b), Wis. Stats., no action to demote, terminate or suspend Sgt. Brenon can be taken unless he is served in writing with "reasons" for the action. It is undisputed that throughout the underlying administrative proceeding, Sgt. Brenon was never served with the necessary notice under §230.34(1)(b), Wis. Stats. The Personnel Commission also noted that the method that UWMPD was attempting to utilize would be "in effect the retroactive addition of reasons for the discharge of the appellant." (R.13:6:11; A.App. 20) Referencing Liethen v. WGC, 93-0095-PC, the Personnel Commission noted that "once written notice of reasons for discharge are provided and an employee is discharged on that basis, new charges can not be added as an additional basis for discharge.". The Personnel Commission also noted its decision in Alff v. DOR, 78-0227-PC, that "respondent could not amend discharge letter to add two charges which were not known to the respondent prior to the discharge letter." (Id.)

UWMPD filed a motion for reconsideration of the Personnel Commission's interim decision. In its November 19, 1999 decision denying the motion for reconsideration, the Personnel Commission reiterated that "the appointing authority can not add additional reasons for discharge after the facts of the initial notice of termination, appellants *Loudermill* hearing,

and the hearings before the Commission." (R.13:1:5; A.App. 25) Citing to State Ex Rel Tracy v. Henry, 219 Wis. 53, 262 N.W. 222 (1935). The Tracy decision is directly on point. In Tracy, the Wisconsin Supreme Court stated that "in that case the employees were entitled to have been restored with all backpay going back to the point of their original discharges, and the subsequent attempt at retroactive discharges was illegal." (Id. at p. 6.)

An agency's interpretation or application of a statute may be accorded great weight deference if the following requirements are met: the agency was charged by the legislature with the duty of administering the statute; the interpretation of the agency is one of long standing; the agency employed its expertise or specialized knowledge in forming the interpretation; and the agency's interpretation will provide uniformity and consistency in the application of the statute. Begel v. LIRC, 2001 WI App 134, ¶ 7, 631 N.W.2d 220, 224 (Ct. App. 2001). Because the Personnel Commission was charged by the legislature with the duty of administering the Civil Service Code and because it has expertise in this area of the law, a reviewing court should accord great weight deference to their interpretation of the employment statutes at issue in this case, particularly §230.34(1)(b), Wis. Stats. The Personnel Commission found that Sgt. Brenon was not given

The Personnel Commission found that Sgt. Brenon was not given proper notice of his termination as required under §230.34(1)(b), Wis. Stats. and that UWMPD was not permitted to offer new reasons at that subsequent date to explain Sgt. Brenon's termination. Under the "great weight" deference standard, an agency's interpretation of a statute should be upheld if it is not contrary to the clear meaning of the statute. Id. Clearly, the Personnel Commission's interpretation of §230.34(1)(b), Wis. Stats. is a reasonable one and it, therefore, must be upheld.

To allow employers to use "after-acquired evidence" to defeat a claim of backpay would render §230.34(1)(b), Wis. Stats. meaningless. It is a long-standing rule of statutory construction that interpretations which would render a statute meaningless and surplusage should be avoided. Liles v. Employers Mut. Ins. Of Wausau, 377 N.W.2d 214, 126 Wis.2d 492 (Ct. App. 1985). Furthermore, any construction of a statute rendering a portion of it meaningless must be avoided. In re Brzezinski, 65 B.R. 336 (Wis. W.D. Bkrtcy). UWMPD clearly did not give the proper written notice to Sgt. Brenon as required under §230.34(1)(b), Wis. Stats. when they terminated his employment. If the trial court's interpretation of the notice requirement and UWMPD's termination of Sgt. Brenon are both upheld, the notice requirement of §230.34(1)(b), Wis. Stats. would be rendered meaningless. Rules of statutory

construction mandate that this type of interpretation must be avoided.

The Civil Service Code requirement that the employee be served with written reasons for termination has not changed subsequent to Tracy. Section 230.34(1)(b), Wis. Stats. remains in effect and requires that before any employment action can be taken, the employer is required to serve the employee with written notice of the reasons for the action. McKennon does not overrule the Wisconsin Civil Service Code and the Wisconsin Supreme Court decisions thereunder. Therefore, even had Sgt. Brenon not been surprised by the attempt to use the "after-acquired evidence" theory, that theory is legally irrelevant to the proceedings before the Personnel Commission.

B. UWMPD Waived Its "After-Acquired Evidence" Argument.

As noted above, for three years UWMPD had the opportunity to notify Sgt. Brenon in writing that it was terminating him for taking work records home. Even assuming that the Personnel Commission would have been allowed to hear the "after-acquired evidence" argument in the backpay portion of the case, despite enumerable submissions to the Personnel Commission and enumerable conferences with Commissioner Murphy, UWMPD failed to raise the issue and put Sgt. Brenon on notice that it would attempt to use that theory.

As is noted in the argument below relating to attorneys' fees, UWMPD has used extremely questionable tactics throughout the course of its attempt to terminate Sgt. Brenon. As early as the Fall of 1998, UWMPD attempted to ambush Sgt. Brenon with new theories raised at a point when he may not have been able to respond. Much like the failure to provide the appropriate notice to Sgt. Brenon in December of 1995 that he may be facing a suspension, UWMPD used the same tactic going into the May 18, 1999 backpay hearing.

On April 30, 1999, Commissioner Murphy issued a conference report identifying the issues to be heard at the backpay hearing. (R.13:12; A.App. 44-45) During the conference, the parties agreed to the issues for the backpay hearing. Of note, there was no mention of an issue relating to "after-acquired evidence" or any other terminable offense by Sgt. Brenon. No issue was raised at all regarding documents that Sgt. Brenon had taken home. In fact, UWMPD had notified Sgt. Brenon's counsel on May 14, 1999 that if forced to reinstate Sgt. Brenon it would initiate a new disciplinary process because of the records issue. (R.13:8:11-12; A.App. 32-33)

Commissioner Murphy's Conference Report of April 30, 1999 required that the parties exchange any exhibits to be used at the backpay hearing three working days before the hearing. (R.13:12; A.App. 44-45) At the hearing, the offer of proof

made by counsel for UWMPD included Respondent's Exhibit 22, a calculation of backpay assuming an earlier termination for the "after-acquired evidence" reasons. This exhibit had not been exchanged prior to the hearing. Of note, the circuit court erroneoulsy claimed there was no order regarding the bakpay hearing violated by UWMPD. (R.24:29) In fact, there was the conference report and the administrative code incorporated by reference therein. (R.13:12; A.App. 44-45)

When faced with Commissioner Murphy's ruling excluding the "after-acquired evidence" argument, UWMPD at no time made a request for a continuance. The circuit court in its decision suggested that Sgt. Brenon should have requested the continuance. (R.24:27; A.App. 94-95) Had Sgt. Brenon's objection to the newly-raised theory not been sustained, Sgt. Brenon may have moved for a continuance at that time. Where the timing was to UWMPD's detriment, UWMPD, had the burden of requesting a continuance to remedy the notice defect, failed to do so.

C. The Personnel Commission Appropriately Exercised Its Discretion in Excluding the "After-Acquired Evidence" Theory.

In reversing the Personnel Commission's decisions, the circuit court erroneously stated that the Commission engaged in "unexplained decision making." In fact, however, the Personnel Commission provided extensive support for its decision.

> Respondent also contends that even if the hearing examiner's ruling on the after acquired evidence had been proper, the examiner should at least have continued the hearing to obviate the problem of notice to the appellant by giving him time to prepare to respond to the missing documents issue. As appellant points out in his response to respondent's objections to the proposed decision and order, respondent did not request a continuance at the time when the issue of the after acquired evidence was before the examiner. Also, given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated. There is also a question as to whether it would violate the civil service code to sanction what would be in effect the retroactive addition of reasons for the discharge of the appellant, See, e.g., Liethen v. WGC, 93-0095-PC, 10/20/93 (once written notice of reasons for discharge are provided and an employe is discharged on that basis, new charges can not be added as an additional basis for discharge); Alff v. DOR, 78-0227-PC, 3/8/79 (respondent could not amend discharge letter to add two charges which were not known to the respondent prior to the discharge letter). However, because the commission concludes that lack of notice precludes litigation of the issue of the missing documents at this point in the remedy process, it will not address the question of whether injecting this issue into this case at this time would violate the civil service code.

(R.13:6:11; A.App. 20)

II. THE PERSONNEL COMMISSION ERRED IN DENYING ATTORNEYS' FEES.

Sgt. Brenon was the prevailing party before the Personnel Commission. Further, Sgt. Brenon was the subject of vexatious

litigation tactics that continue even today.[8] At every turn Sgt. Brenon's due process rights have been trampled. Under no construction of the law or facts of this case can UWMPD be said to have been substantially justified in its abuse of Sgt. Brenon's rights.

Sections 227.485 and 814.245, Wis. Stats. provide for costs to the prevailing party in an action by a state agency or in any proceeding for judicial review under § 227.485(6). Sgt. Brenon has made timely motions for costs before the Commission. Each such motion was denied.

Upon review, this court must award costs unless UWMPD can satisfy this court that it was substantially justified in the position it took. Id. Under Sheely v. DHSS, 150 Wis. 2d 320, 442 N.W.2d 1 (1989) there are three factors that UWMPD must demonstrate:

1. A reasonable basis and truth for the facts alleged;

2. A reasonable basis and law for the theory propounded; and

3. A reasonable connection between the facts alleged and the legal theory advanced.

Due to UWMPD's failure to provide any semblance of due process to Sgt. Brenon, the matters making up the two separate disciplinary charges against him are not easily distinguished.

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[8]Sgt. Brenon was reinstated by UWMPD, immediately suspended and then discharged. That matter is pending in Personnel Commission Case No. 00-0130-PC.

For purposes of this argument, the first disciplinary matter shall be referred to as the ten day suspension. The second disciplinary matter shall be referred to as termination.

A. UWMPD was not substantially justified in imposing the ten-day suspension because it failed to provide due process and failed to follow its own rules.

An agency's action has no reasonable basis in law and is not substantially justified if the agency fails to follow its own rules. Stern v. Wis. Dept. of Health & Human Servs., 212 Wis. 2d 393, 400-401, 569 N.W.2d 79, 82-83 (Ct. App. 1997); Whiting v. Bowen, 671 F. Supp. 1219, 1231 (W.D. Wis. 1987). Here, UWMPD was not substantially justified in its actions because it failed to provide due process, and failed to follow the guidelines for disciplinary procedure imposed by the collective bargaining agreement which it voluntarily applied to non-union employees.

It is fundamental that due process attaches to the action of state agencies and imposes certain rules. The Personnel Commission found that UWMPD failed to conform to the rules of due process. UWMPD has previously argued that even if the Commission finds that Srokas meeting with Brenon did not comport with due process as provided by Commission precedent, any such defect was cured when Brenon met with Chief Clark. At the meeting with Chief Clark, Brenon was apprised of the seriousness of the charges, was given the opportunity to tell

his side of the story and received notice that Sroka's oral reprimand was not discipline he was being given.

The problem with this argument is that it is unsupported by the record. At the hearing, Clark could not recall what occurred during the conference, whereas Sgt. Brenon could recall what occurred and had taken notes contemporaneous to the meeting. Sgt. Brenon testified he told Clark that he (Brenon) was shocked and surprised that a 10-day suspension would be imposed and he (Brenon) felt the level of discipline was wrong and too severe. According to Sgt. Brenon's testimony, Clark replied that the decision was a done deal and he (Clark) would not reconsider it. According to Sgt. Brenon's testimony, Clark further said if discipline were overturned, then it would be overturned. (R.13:52:661; A.App. 174) In short, respondent did not establish that the due process defects previously discussed were cured during Sgt. Brenon's conference with Clark. (R.13:34:7; A.App. 106)

The Personnel Commission nevertheless denied Sgt. Brenon's request for attorney's fees stating:

> Under the facts present here, appellant was given notice of the specific allegation against him, i.e., the Million Man March joke he had repeated; was given an opportunity to answer the allegation during the meeting with Lt. Sroka; was made aware as part of his meeting with Lt. Sroka that the purpose of the meeting was to discuss this particular allegation and what consequence should follow; was provided notice, although not until the end of his meeting with Lt. Sroka, of the

> fact that a ten-day suspension was being contemplated; and was provided an opportunity, through his meeting with Chief Clark, to persuade the employer to impose a lesser penalty. The Commission concludes that this pre-disciplinary process possessed enough of the attributes of a sufficient due process proceeding to support a conclusion that respondent had a reasonable basis in law and fact for contending that the just cause standard had been met in this regard. As a result, the application for fees and costs must fail as it relates to the ten-day suspension.

(R.13:29:3; A.App. 98)

UWMPD did not provide Sgt. Brenon with sufficient process to support a finding that UWMPD was substantially justified in its actions. Fundamental due process requires notice and an opportunity to be heard. Neither one of these key attributes were provided by UWMPD, and thus UWMPD's claim that it was substantially justified fails.

Where termination of employment is contemplated, notice is especially important. As the Personnel Commission stated in McCready & Paul v. Dept. of Health & Soc. Servs., Case Nos. 85-0216-PC, 0217-PC (9/10/87), "[a]n employe who knows he or she is facing possible discharge may well marshal entirely different arguments and prepare differently for the predisciplinary hearing, including the decision on whether to retain counsel, than would be the case if the employee believes he or she is facing only a possible reprimand." Id. at 9. "For example, an employee might be willing to simply

concede substantive misconduct in a case where no serious discipline appears likely. However, if an employe realizes that discharge is a possibility, he or she may be less likely to admit misconduct and more likely to stress extenuating circumstances and to present a rationale why the degree of discipline was unwarranted. Furthermore, the employe would be more likely to retain counsel if he or she is aware of the possibility of discharge." Id. at 11.

UWMPD provided Sgt. Brenon with no advance notice of the purpose of the meeting with Lt. Sroka other than the p-mail which Lt. Sroka sent to him stating that the matter to be discussed was "no big deal." Further, Sgt. Brenon was not informed that Chief Clark was considering suspending him or terminating him, if he refused to admit to the misconduct. In fact, Sgt. Brenon's immediate supervisor, Lt. Sroka, was not even aware that these actions were being contemplated. Because of UWMPD's failure to provide this notice, Sgt. Brenon was not aware when he went to the meeting, that his future with the police department was in serious jeopardy. He was deprived of the opportunity to obtain counsel and prepare for a critical meeting which was to determine whether or not he would be deprived of his Constitutionally protected property interest in continued employment. UWMPD's Labor Relations Manager acknowledged that a pre-disciplinary hearing should be held when termination is being considered. (R.13:52:494;

A.App. 150) Given that UWMPD was considering termination and knew that a pre-disciplinary hearing was required, it clearly was not substantially justified in proceeding to discipline Sgt. Brenon without first providing advance notice of the allegations against him and the discipline being considered.

UWMPD provided Sgt. Brenon with no meaningful opportunity to be heard. While he met with both Lt. Sroka and Chief Clark, Sgt. Brenon never had any real chance of convincing them that the level of discipline imposed was inappropriate prior to the decision to impose such discipline. The Personnel Commission emphasized the importance of such a process when it said:

> As noted in the PDO (pp. 9-10), Clark's discretionary imposition of a ten-day suspension was excessive even when the due process considerations are put aside, meaning even when due process is not considered part of the analysis. This finding underscores the importance of providing employes with an opportunity for input as to what discipline should be imposed prior to the decision being made. The most informed exercise of discretion would occur with full input, including input from the employe. An additional danger exists when the decision is made (as occurred in Sgt. Brenon's case) prior to obtaining input from the employee in that the decision maker may be reluctant for a variety of reasons (such as to save face) to change the initial decision despite persuasive arguments to the contrary.

(R.13:34:6-7; A.App. 105-106)

Chief Clark had already decided before Sgt. Brenon met with Lt. Sroka, that if Sgt. Brenon denied the allegations, he would be terminated, and if Sgt. Brenon admitted the allegations, he would be suspended for ten days. Neither the meeting with Lt. Sroka nor the meeting with Chief Brenon gave Sgt. Brenon any meaningful opportunity to be heard. In fact, these meetings served no purpose other than to determine which of these two pre-selected disciplinary actions would be imposed based on Sgt. Brenon's response to the allegations.

Further, UWMPD failed to follow the union rules with respect to investigation of complaints which it applies to both non-union and union employees. (Depo. of Pamela S. Hoderman, June 25, 1996, at 29-30.) The union rules requires that discipline be imposed progressively, with the first step being a reprimand. (R.13:52:500-501; A.App. 151-152) Instead of verbally reprimanding Sgt. Brenon, UWMPD immediately imposed a ten-day suspension. Further, UWMPD violated the one year look back rule by reviewing Sgt. Brenon's entire record when determining what discipline should be imposed. (R.13:52:668; A.App. 176)

It is clear that UWMPD failed to comply not only with its own rules but also with the requirements of due process imposed by the Constitution. Thus, UWMPD was not substantially justified in imposing a ten-day suspension on Sgt. Brenon, and Sgt. Brenon is entitled to attorneys' fees.

B. UWMPD was not substantially justified in terminating Sgt. Brenon.

In ruling against awarding Sgt. Brenon attorneys' fees the Personnel Commission had to go through gymnastics to find that UWMPD was substantially justified in terminating Sgt. Brenon, basically because it would have been the next step in the progressive discipline process.

> In regard to the discharge, it was reasonable for respondent to have relied upon representations made by appellants co-workers to the effect that he was continuing to engage in the type of behavior cited as the basis for his previous discipline. In addition, since discharge was the next step in the progressive discipline process, it was reasonable for respondent to have decided to discharge appellant based on these representations by co-workers. Although, at hearing, certain of these representations were not corroborated, respondent had no reason to doubt the reliability of these representations at the time discharge was imposed, i.e., not only did they come from several apparently independent sources but they were also consistent with a pattern of behavior that appellant had exhibited over a period of time. As a result, the application for fees and costs is denied as it relates to the subject discharge.

(R.13:29:3; A.App. 98)

Termination of Sgt. Brenon was not the next step in the progressive discipline. Moreover, since the first suspension was not justified and was excessive, termination was clearly inappropriate. The issues of substantial justification of UWMPD's actions with respect to the ten-day suspension and the

termination are inseparable. If UWMPD was not substantially justified in suspending Sgt. Brenon, then it was clearly not justified in terminating him.

What is most disturbing is that Sgt. Brenon was subjected to double jeopardy. The initial investigation was merely continued until the Chief thought he had enough to terminate. The Personnel Commission admits that "representations" by co-workers were not "corroborated." Further, the Personnel Commission did not find evidence of any retaliation. (R.13:34:12; A.App. 111) There is no evidence that the "new" instances of conduct occurred after the December 8, 1995 discipline.

C. To Give Meaning to the Fee Shifting Statute and Fulfill the Intent of the Legislature, Sgt. Brenon's Request for Attorney Fees Should Be Awarded.

The purposes of the Equal Access to Justice Act, Wis. Stat. 814.245, include compensating a party for the costs of defending against unreasonable government action. Bracegirdle v. Dept. of Reg. & Licensing, 159 Wis. 2d 402, 428, 464 N.W.2d 111, 120-21 (Ct. App. 1990). The Equal Access to Justice Act is also intended to "encourage challenges to agency action and to provide a disincentive to agencies to prolong the litigation process." Stern at 404, 569 N.W.2d at 84 (citation omitted).

UWMPD's actions in this case can only be described as a vendetta against Sgt. Brenon. UWMPD failed to provide Sgt.

Brenon with his Constitutional right to due process prior to depriving him of his property interest in continued employment, and imposed a harsher degree of discipline than was warranted by the claimed misconduct. Sgt. Brenon sought to right this injustice by obtaining counsel and filing a claim for relief with the Personnel Commission. When he prevailed, UWMPD refused to comply with the Commission's order to reinstate him, choosing instead to continue to prolong the litigation by appealing to this Court. Five years have now passed since that initial meeting with Lt. Sroka. This is exactly this type of abuse of authority which the Equal Access to Justice Act was enacted to protect citizens against. The court must award Sgt. Brenon's requested attorney fees to fulfill this legislative purpose and prevent further abuses of authority by UWMPD.

CONCLUSION

Based on the foregoing arguments, Sgt. Brenon respectfully requests that this court affirm the Personnel Commission's decision to exclude the "after-acquired evidence" theory and grant Sgt. Brenon's request for attorney's fees.

Dated this 19th day of October, 2001.

GUTGLASS, ERICKSON, BONVILLE,
SEIBEL & FALKNER, S.C.

Paul R. Erickson (#1003920)
Attorney for Sgt. Brenon

CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced using the following font:

☒ Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 37 pages.

☐ Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is _____ words.

Dated this 19th day of October, 2001.

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COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT IV

Appeal No. 01-1899

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner-Respondent,

v. Circuit Court Case No. 99-CV-2959

STATE OF WISCONSIN PERSONNEL
COMMISSION,

Respondent-Respondent-Co-Appellant,

DALE R. BRENON,

Appellant.

DALE R. BRENON,

Petitioner-Appellant,

v. Circuit Court Case No. 00-CV-661

STATE OF WISCONSIN PERSONNEL
COMMISSION,

Respondent-Respondent.

Appeal from Final Judgment
Dane County Circuit Court, Case Nos. 99-CV-2959 and 00-CV-661
Honorable Michael N. Nowakowski Presiding

PETITIONER-APPELLANT, DALE R. BRENON'S, APPENDIX

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 13 | DANE COUNTY

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner,

v.

RETURN OF RECORD ON REVIEW

Case No. 99-CV-2959

WISCONSIN PERSONNEL COMMISSION,

Respondent.

DALE R. BRENON,

Petitioner,

v.

RETURN OF RECORD ON REVIEW

Case No. 00-CV-661

PERSONNEL COMMISSION,

Respondent.

STATE OF WISCONSIN)
) SS
COUNTY OF DANE)

I, ANTHONY J. THEODORE, Legal Counsel and Chief Clerk of the State Personnel Commission, having supervision of all records and other matter pertaining to this Commission hereby certify:

That the annexed Record is the Return of the State Personnel Commission in this matter consisting of the original documents or true copies thereof, and to the best

of my knowledge and belief, constitutes the entire record in the hands of the Commission which is material to the review.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO
SET MY HAND THIS 22 DAY OF SEPT., 2000,
AT MADISON, WISCONSIN

Anthony J. Theodore

Anthony J. Theodore
Legal Counsel and Chief Clerk

AJT:rcr

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4. Respondent's brief in support of motion to reconsider interim decisions, with attached exhibits, filed October 22, 1999

5. Appellant's motion and brief for costs, filed October 1, 1999

6. Interim decision and order dated September 1, 1999

7. Respondent's reply to appellant's response to respondent's objections to proposed decision and order, filed July 30, 1999

8. Appellant's response to respondent's objections to proposed decision and order, filed July 23, 1999

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14. Respondent's February 11, 1999 letter to Commission, filed February 15, 1999

15. Respondent's reply to appellant's reply [sic] to respondent's brief regarding the exclusion of post-termination wages, filed February 15, 1999

16. Affidavit of Dale R. Brenon, filed February 9, 1999

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26. Respondent's letter of September 15, 1998, filed September 15, 1998, regarding back pay calculation, with attached exhibits

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30. April 16, 1998 letter from respondent to Commission, filed April 17, 1998, regarding appellant's application for fees and costs

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Received this 25th day of September, 2000, in the matter of Board of Regents of the University of Wisconsin System v. Wisconsin Personnel Commission, Case No. 99-CV-2959, and Brenon v. Personnel Commission, Case No. 00-CV-661, (Brenon v UW, 96-0016-PC), the Return of Record on Review.

9/25/00
Date

Signature
Clerk, Dane County Circuit Court

STATE OF WISCONSIN

PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

Case No. 96-0016-PC

INTERIM DECISION AND ORDER

RECEIVED
SEP 2 1999
GUTGLASS, ERICKSON & BONVILLE, S.C.

NATURE OF CASE

This matter before the Commission involves an appeal of a suspension without pay and, later, a discharge brought pursuant to §230.44(1)(c), Stats. The Commission entered its decision and order with respect to the merits on February 12, 1998, but retained jurisdiction to consider and work out any remaining remedial entitlements. After a protracted period of time involving many failed attempts to even reach agreement on the amount of appellant's gross back pay, the parties agreed to table all motions and proceed toward resolving the matter by hearing. A hearing on the issue of remedy was held May 18, 1999. The parties agreed to the following subissues: "(1) What is the sum of appellant's back pay and other credits? (2) What is the sum of respondent's mitigating damages and setoffs? and (3) What is the total sum of appellant's remedy?" The parties gave oral arguments at the conclusion of the hearing.

FINDINGS OF FACT

1. By letter dated February 9, 1996, the University of Wisconsin-Milwaukee (UWM) terminated the employment of Dale Brenon with them, effective February 11, 1996. Just prior to that, on January 22, 1996, Brenon had been suspended by UWM for ten days without pay.

2. Brenon began employment at UWM in October 1974 as a police cadet. At the time of his termination, Brenon was serving with permanent status in class as a police sergeant.

3. Brenon appealed the actions taken against him by UWM to the Personnel Commission. The Commission rejected the suspension and modified respondent's (UWM's) decision terminating Brenon to ten days without pay in an Interim Decision and Order issued February 12, 1998.

4. The respondent did not reinstate appellant to his former position in accordance with the Commission order nor has it offered appellant any position since his termination in February 1996.

5. After his employment with UWM was terminated, appellant applied for the following positions in 1996: American Family Insurance Group – April 10, 1996; a driver position at the Blood Center of Southwest Wisconsin – April 24, 1996; Alpha Omega Security (where he was hired in July 1996); Director of Security, regional shopping mall, Denver, CO – October 10, 1996; security position, U.S. facility, Marshall Islands – October 18, 1996.

6. In July 1997 appellant applied for a civil service investigator position with Milwaukee County. Appellant received the following response: "Milwaukee County Civil Service Rule II, Section 7(2) provides that the Director of Human Resources may refuse to examine an appellant who: (d) has been dismissed for good cause from the public services. We are refusing to examine you because you were terminated for cause from the University of Wisconsin-Milwaukee."

7. Appellant appealed Milwaukee County's refusal to examine him to its Civil Services Commission. After a hearing in October 1997, the Commission sustained the refusal to examine appellant and referred the matter back to the Human Resources director for "appropriate action" to dispose of the matter.

8. In November 1997, appellant applied for a Communications Dispatcher position at North Shore Public Safety Communications Center, Whitefish Bay, WI. By

letter dated February 2, 1998, appellant was advised that his name was not included in the list of eligible candidates.

9. Since April 1999, appellant has worked for Dominican Management Services, Plymouth, MN, as a security agent at the apartment where he resides.

10. Between January 1996 and December 31, 1998, appellant's yearly income was $9,000 to $12,000.

11. During the period in question, appellant did not visit a state job service office or seek unemployment benefits, but he did attempt to obtain work through an employment agency.

12. Appellant's back pay without setoffs, between February 11, 1996, to May 1999, is $190,272.34. This total sum includes a quarterly 12 percent interest rate computation.[1] In addition, appellant has a credit of $391.70 for June and July 1999 health insurance premiums.

13. With setoffs, based on income tax returns and earning statements, appellant's back pay totals $159,533.64 (Resp. Exh. 21, 26, 27 and 28).

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden to show that appellant failed to exercise reasonable diligence to mitigate his damages, and that there was a reasonable likelihood that appellant might have found comparable work by exercising reasonable diligence.

3. Respondent has failed to sustain this burden.

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[1] The parties stipulated to respondent's exhibit R-20, a spreadsheet showing appellant's estimated back pay without setoffs, computed quarterly, between February 11, 1996, and May 22, 1999.

OPINION

At the start of the hearing on May 18, 1999, the parties stipulated to appellant's estimated back pay without setoffs through May 22, 1999 (Resp. Exh., R-20). Appellant never disputed this calculation of back pay, except to the extent that appellant had prepaid health insurance premiums for the months of June and July 1999 – a sum of $195.85 per month; and this was acknowledged by respondent. So the remaining legal issue concerns mitigating damages and setoffs.

The statutory basis for awarding relief in cases such as this, where an employe has been removed from his position in violation of the state classified service law, is provided in §230.43(4), Stats.:

> If an employe has been removed...from...employment in contravention, or violation of this subchapter, and has been restored to such...employment by order of the commission..., the employe shall be entitled to compensation therefore from the date of such unlawful removal.... *Interim earnings or amounts earnable with reasonable diligence shall operate to reduce back pay otherwise allowable....* The employe shall be entitled to an order of mandamus to enforce the payment on other provisions of such order. (Emphasis added.)

Very little guidance is provided in case law in regard to the proper interpretation or application of this statutory language. In *State ex rel. Schilling and Klingler v. Baird*, 65 Wis. 2d 394, 398-99, 22 N.W.2d 666 (1974), a case involving the suspension of two county deputy sheriffs, the court stated:

> This court has held that the burden of establishing the lack of reasonable and diligent efforts by the employees to seek other employment is on the employer. *Schiller v. Keuffel & Esser Co., supra*, page 553; *Barker v. Knickerbocker Life Ins. Co.* (1869), 24 Wis. 630, 638. Thus the question of whether such opportunities exist is primarily a question of fact and as such relates not to the existence of a legal duty on the part of Klinger and Schilling, but to the sufficiency of the evidence proving a violation of that duty. . . .

This court stated the rule in *Barker v. Knickerbocker Life Ins. Co., supra*, page 638, as follows:

> "...The rule in such cases is that although damages may be so reduced, yet the burden is on the defendant to show affirmatively that the plaintiff might have had employment and compensation elsewhere..."

In *Warren v. DHSS*, 92-0720-PC, 92-0234-PC-ER, 5/14/96, the Commission concluded that the mitigation of damages language in §230.43, Stats., paralleled language set forth in the Wisconsin Fair Employment Act (WFEA) in §111.39(4), Stats. Also, the "reasonable diligence" requirement to mitigate damages has been applied in deciding back pay issues in non-public employe and Family and Medical Leave Act (FMLA) cases, and in Title VII cases. *Marten Transport, Ltd. v. DILHR*, 171 Wis. 2d 147, 491 N.W.2d 96 (1992), *Kelley Co. Inc. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.68 (1992), *Hutchison v. Amateur Elect. Supp., Inc. et al.*, 66 FEP Cases 1275 (7th Cir. 1994).

In *Hutchison v. AES, supra*, the court said that once a plaintiff has established the amount of damages resulting from the employer's conduct, the burden of going forward shifts to the defendant to show the plaintiff failed to mitigate damages or that the damages were, in fact, less than the plaintiff asserts; and that "[t]o establish the affirmative defense of a plaintiff's failure to mitigate damages, the defendant must show that: (1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence (citation omitted)." With these cases as guidelines, we address the issue of mitigation of damages and setoffs, since appellant's gross back pay is not in dispute.

I. Mitigation of Damages

First, respondent contends that appellant failed to seek a job as a law enforcement officer and that appellant's back pay should be reduced by the amount he could

have earned as a law enforcement officer during the period of time in issue – some forty thousand dollars per year (Resp. Exh. 23).[2] Respondent's expert witness in the field of Employment and Hiring Standards (for Wisconsin law enforcement positions) testified about jobs posted in a monthly Department of Justice (DOJ) Law Enforcement Bulletin (Resp. Exh. 16); and that he believed appellant "could have been a competitive applicant [for such positions] in the sense that he was an experienced officer." Respondent argues that appellant did not call or visit the State Job Service office where these bulletins were available. The Commission does not find this argument and this testimony provided by the expert witness persuasive for the following reasons.

The expert witness testified that between February 1996 and the present there were a high number of qualified applicants for any given position. Further, the expert witness testified that appellant lost his police officer certification when terminated by UWM and that the DOJ Training and Standards Bureau would be required to notify any employer that appellant would need 120 hours of training for certification as a law enforcement officer.

Also, respondent's expert witness testified that, other than the Board standards, he did not know what qualifying rules, county or city, impact on the positions listed in the bulletin and did not know if appellant was eligible for any of them. While appellant did not go to the State Job Service office, he did register at an employment agency, circulate his resume, and look for positions noticed in newspapers. In addition, appellant's rejection by Milwaukee County (Finding of Fact 7) made it plain he was not apt to be a successful candidate for a law enforcement position.

Finally, the Commission issued a decision in February 1998, affirming an October 1997 proposed decision and order to reinstate appellant, but respondent elected not to abide it; and to the present date, respondent has not offered appellant any position in its coordinate responsibility to mitigate damages. Based on the evidence presented and

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[2] The $40,000/year amount was based on information provided to the author of R-23 by respondent's UWM Legal Services office.

for reasons stated, the Commission concludes that respondent failed to establish appellant violated his duty to mitigate damages.

Alternatively, respondent argues that its damages should be reduced by the amount appellant earned during the period in issue. Based on this calculation (Resp. Exh. 21, 26, 27 and 28), appellant's back pay with setoff of his earnings from February 11, 1996, to May 22, 1999, is $159,533.64 (Finding of Fact 13). The Commission agrees. One of the purposes of back pay is to make the individual victim of an unlawful employment action whole by putting the victim in nearly the same financial position had the unlawful employment action not occurred. Appellant argues that he could have earned this income even if he had been employed by respondent, but he offered no evidence that prior to termination he did work outside his regular job at UWM.

Respondent also argues that appellant's back pay should be reduced with setoffs totaling $110,332.80, as disclosed in appellant's bank statements as deposits during the period in issue. In support, respondent presented a spreadsheet (Resp. Exh. 24) with setoffs (column H) based on appellant's 1996-1998 bank statements (Resp. Exh. 15). The spreadsheet was prepared and explained in testimony by a UWM financial and personnel division administrator. Respondent presented no other evidence to substantiate this claimed setoff. When questioned about these bank statements, appellant testified that the bank deposits included funds obtained from multiple monthly credit card advances and loans from relatives. Appellant testified that he kept his accounts current by implementing the "robbing Peter to pay Paul" principle – covering one credit card advance by obtaining another one. Appellant also testified that he reported all earned income on his income tax return forms. Respondent's only rebuttal is its assertion that appellant's testimony was a falsification. Clearly the evidence presented failed to establish respondent's defense of bank deposit setoffs.

II. Matters of Procedure

During the adverse examination of appellant, respondent asked appellant whether he had a practice of making copies of certain documents and his counsel objected on the basis of relevancy. In response to the objection, respondent stated that it pertained to the issue of mitigation of damages. Respondent further explained that, through this line of questions to appellant and the testimony of another witness, it would show that UWM would have terminated appellant for misconduct in June 1996 if he had still been employed there; and that under the "after acquired evidence" theory, appellant's back pay damages should be cut off in June 1996, the date appellant would have been terminated by respondent because of the evidence acquired after the termination in issue.

After a recess, the examiner sustained the objection without explanation. The examiner granted respondent's request to make an offer of proof for the record, which included respondent's exhibit R-22, calculations of respondent's back pay liability based on the after-acquired evidence theory.

The Commission concludes that this ruling of the examiner was proper.[3] To have allowed this evidence would have unfairly required appellant to have tried to address a significant new issue in this case—in a nutshell, whether he had violated work rules by having improperly removed documents from the workplace, and whether such conduct would have led to his discharge in June 1996—without any prior notice that it would be raised in this proceeding.

Respondent argues that appellant should have been on notice because he had been questioned on the subject during a June 1996 deposition, and respondent's attorney had mentioned this in a July 20, 1998, letter to the Commission in opposition to appellant's motion for reinstatement. This letter includes the following:

> In addition, the State of Wisconsin has a separate legal action pending against Brenon. Because of the circumstances of that litigation, his presence in the workplace would be disruptive and cause irreparable harm to

[3] The following discussion is added to explain the rationale for the examiner's ruling and to address respondent's objection to this ruling in the proposed decision and order.

> the university. After Brenon was terminated, it was brought to my attention that during his employment, he very likely had copied and removed documents from the workplace containing confidential student and employee information which he had no right to remove. Informal attempts to convince him to return all copies of such documents were unsuccessful. In order to protect the privacy of individuals named in said records and mitigate potential liability for UWM because of Brenon's actions in this regard, the State of Wisconsin has commenced a replevin action in Milwaukee County Circuit Court.
>
> Brenon's presence in the workplace would give him access, in the course of fulfilling his job responsibilities, to the same types of confidential materials he has had access to in the past. . . .
>
> *If ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him,* for unauthorized possession of university property with regard to the records issue. This would unnecessarily complicate all pending matters. In the interests of judicial efficiency the parties should be permitted to pursue the replevin action *and* the appeal process, accepting that an order to remit backpay may result. (emphasis added)

The commission does not agree that the foregoing notified appellant that the issue of after-acquired evidence (concerning purloined documents) would be litigated as part of the damages phase of this case. Rather, this suggests that the document issue would continue to be pursued in respondent's separate replevin action, and, if appellant were restored to his employment pursuant to the commission's decision, would be raised by a new disciplinary action against appellant. Similarly, while, as respondent contends, the questioning of appellant concerning the documents during appellant's June 1996 deposition, and the filing of the replevin action, should have put appellant on notice that respondent took the document issue seriously, these factors would not have put appellant on notice that the issue would be raised in the context of the damages phase of this case. This conclusion is further supported by the procedural history of this case. Respondent did not raise the after acquired evidence issue during either the second discovery phase of this proceeding relating to remedy, or when the parties agreed to submit the issue of remedy on briefs to the hearing examiner. This briefing process was

complicated by a series of motions and document submissions, and the parties agreed to table all pending motions and resolve the remedy issue by a hearing before the hearing examiner. The parties agreed to the following statement of issues for hearing: "(1) What is the sum of appellant's back pay and other credits? (2) What is the sum of respondent's mitigating damages and setoffs? (3) What is the total sum of appellant's remedy?" Again, there was no mention of after acquired evidence, and appellant was justified in anticipating that the issue of the purloined documents would be addressed in the pending replevin action and/or a new disciplinary action following appellant's restoration to his former job. Finally, appellant points to respondent's statement in a May 14, 1999, memo and settlement offer about what process would be followed if appellant were to be restored as a result of the commission's decision on the merits: "After the final decision we also intend to reinstate your client and initiate the discipline process because of his gross violation of the records policies." (Attachment to appellant's response to respondent's objection to proposed decision and order.) This statement is inconsistent with the notion that appellant should have been aware that the records issue would be raised in the hearing on damages. Respondent objects to the consideration of this document, citing §904.08, Stats.:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

This section leads to the result that "[e]vidence of offers to settle and related statements during the negotiations may be admitted if offered to prove any relevant proposition *other* than the validity of the disputed claim or its amount." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE 152 (1991) (emphasis added) Appellant is not offering this statement to prove the validity or amount of his claim, but rather to prove that he was

not on notice that respondent intended to raise the issue of purloined documents during the damages hearing. Therefore, it is admissible. In any event, even if this statement were not considered, there is sufficient other evidence to support appellant's notice argument, as discussed above.

Respondent also contends that even if the hearing examiner's ruling on the after acquired evidence had been proper, the examiner should at least have continued the hearing to obviate the problem of notice to the appellant by giving him time to prepare to respond to the missing documents issue. As appellant points out in his response to respondent's objections to the proposed decision and order, respondent did not request a continuance at the time when the issue of the after acquired evidence was before the examiner. Also, given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated. There is also a question as to whether it would violate the civil service code to sanction what would be in effect the retroactive addition of reasons for the discharge of the appellant. *See, e. g., Liethen v. WGC,* 93-0095-PC, 10/20/93 (once written notice of reasons for discharge are provided and an employe is discharged on that basis, new charges can not be added as an additional basis for discharge); *Alff v. DOR,* 78-0227-PC, 3/8/79 (respondent could not amend discharge letter to add two charges which were not known to the respondent prior to the discharge letter). However, because the commission concludes that lack of notice precludes litigation of the issue of the missing documents at this point in the remedy process, it will not address the question of whether injecting this issue into this case at this time would violate the civil service code.

Respondent also argues it had an inadequate opportunity for discovery during the remedy stage of this proceeding. At the prehearing conference held on April 28, 1999, the parties agreed to table all motions and to resolve the outstanding issues at a hearing on remedy, which was held on May 18, 1999. To the extent respondent had any outstanding issues on discovery at that time, it waived them by agreeing to proceed in this fashion.

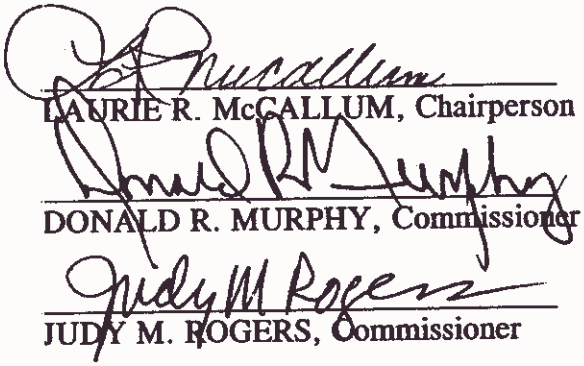
ORDER

Respondent's action of discharging appellant is rejected and this matter is remanded to respondent for action in accordance with this decision. Respondent is required to immediately offer appellant reinstatement to his former position or its equivalent.

The amount of back pay and benefits actually due appellant pursuant to this decision must be recalculated so that it is current as of the date of payment, thereby reflecting the appropriate amount of interest.

Dated: September 1, 1999.

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

DRM:rcr:960016Adec5.2

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STATE OF WISCONSIN

PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

Case No. 96-0016-PC

RULING ON MOTION FOR RECONSIDERATION
RULING ON MOTION FOR ATTORNEY'S FEES
FINAL ORDER

NATURE OF THE CASE

This case is pending before the commission after the entry of an interim decision and order on September 1, 1999, which rejected the respondent's discharge of appellant and addressed issues related to appellant's remedy. The commission retained jurisdiction to resolve any further issues concerning attorney's fees. The appellant filed a motion for attorney's fees. Respondent filed a response to that motion and also a motion to reconsider interim decisions. The Commission now addresses both motions.

MOTION FOR RECONSIDERATION

During the hearing which preceded the September 1, 1999, interim decision and order, respondent sought to question appellant about whether he had purloined documents from the workplace. A relevancy objection was sustained. In the interim decision and order, the commission discussed this ruling as follows:

> During the adverse examination of appellant, respondent asked appellant whether he had a practice of making copies of certain documents and his counsel objected on the basis of relevancy. In response to the objection, respondent stated that it pertained to the issue of mitigation of damages. Respondent further explained that, through this line of questions to appellant and the testimony of another witness, it would show that UWM would have terminated appellant for misconduct in June 1996 if he had still been employed there; and that under the "after acquired evidence" theory, appellant's back pay damages should be cut off

> in June 1996, the date appellant would have been terminated by respondent because of the evidence acquired after the termination in issue.
>
> After a recess, the examiner sustained the objection without explanation. The examiner granted respondent's request to make an offer of proof for the record, which included respondent's exhibit R-22, calculations of respondent's back pay liability based on the after-acquired evidence theory.
>
> The Commission concludes that this ruling of the examiner was proper. To have allowed this evidence would have unfairly required appellant to have tried to address a significant new issue in this case—in a nutshell, whether he had violated work rules by having improperly removed documents from the workplace, and whether such conduct would have led to his discharge in June 1996—without any prior notice that it would be raised in this proceeding. P. 8. (footnote omitted)

The Commission also addressed respondent's alternative argument that the hearing should have been continued to facilitate notice to the appellant of the after-acquired evidence issue and time to prepare:

> As appellant points out in his response to respondent's objections to the proposed decision and order, respondent did not request a continuance at the time when the issue of the after acquired evidence was before the examiner. Also, given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated. There is also a question as to whether it would violate the civil service code to sanction what would be in effect the retroactive addition of reasons for the discharge of the appellant. *See, e. g., Liethen v. WGC,* 93-0095-PC, 10/20/93 (once written notice of reasons for discharge are provided and an employe is discharged on that basis, new charges can not be added as an additional basis for discharge); *Alff v. DOR,* 78-0227-PC, 3/8/79 (respondent could not amend discharge letter to add two charges which were not known to the respondent prior to the discharge letter). However, because the commission concludes that lack of notice precludes litigation of the issue of the missing documents at this point in the remedy process, it will not address the question of whether injecting this issue into this case at this time would violate the civil service code. P. 11.

On October 22, 1999, respondent filed a motion to reconsider the interim decisions on back pay and reinstatement, and brief in support. Respondent asserts that on April 8, 1998, it had filed a replevin action in Milwaukee County Circuit Court seeking

the recovery of documents appellant improperly had removed from the workplace. Respondent further asserts that in connection with this proceeding the documents in question were returned to it on September 29, 1999, and were very voluminous (10 file boxes and approximately 24,000 documents). Earlier, appellant had produced only one file box of documents and had asserted privilege with regard to about 30 other documents when he had been asked to produce "all documents which [he] has removed from the UWM Police Department and are now under his possession or control." Furthermore, in his June 24, 1996, deposition when appellant was asked if he had "boxes and boxes of documents at home from things copied at work," he answered "I don't believe that would be an accurate characterization."

Respondent asserts in its motion that it would have fired appellant on the basis of his having removed these documents—i. e., that the removal of these documents was in itself a ground for dismissal independent of the grounds contained in the charges against appellant that were the subject of this appeal. Respondent further asserts that this newly discovered evidence is a basis for the commission to reverse its order requiring appellant's restoration, and to limit its back pay award to the period of February 11, 1996 (the date of the discharge) to June 24, 1996 (the date when appellant allegedly dissembled during his deposition and did not reveal the true extent of the documents he had taken from the workplace). [1]

In support of its motion, respondent cites *McKennon v. Nashville Banner Publishing Co.,* 513 U. S. 352, 361-62, 66 FEP Cases 1192, 1196-97 (1995), and *Hoell v. LIRC,* 186 Wis. 2d 603, 610, 522 N. W. 2d 234 (Ct. App. 1994).

McKennon is an age discrimination case where the employer learned in the course of discovery that the discharged employe had removed confidential documents concerning the employer's finances from the workplace. The Court found that these

[1] This motion was filed at the same time as respondent's response to appellant's second motion for costs. In light of the multitudinous volume of motions and briefs that have been filed in this case, the extended nature of this proceeding, and the proliferation of attorney's fees, the Commission has determined, after independently having reached the conclusion that this motion for reconsideration should not be granted, not to require appellant to file a brief on the motion.

after-discovered facts were an independent basis for discharge, and that this should affect the issue of remedy:

> We . . . conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.
>
> . . . Once an employer learns about employe wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information even if it is discovered during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a back pay remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information was discovered.

Respondent also cites *Hoell v. LIRC,* 186 Wis. 2d 603, 610, 522 N. W. 2d 234 (Ct. App. 1994), where the Court held that in a mixed motive WFEA case, if the discharge would have taken place in the absence of an unlawful motive, the employe's remedy should be limited to a cease and desist order and attorney's fees.

Respondent contends that both cases stand for the proposition that if the employer can show it would have terminated the employe regardless of the improper reason for termination, reinstatement and back pay are inappropriate. However, *Hoell* and *McKennon* are distinguishable on two bases.

First, in the instant case we have a distinct issue relating to lack of notice and waiver not present in those cases. Here, respondent has known since June 1996 that appellant had removed documents from the workplace, and never raised an after-acquired evidence issue in this proceeding until the hearing on remedy on May 18, 1999. In fact, as discussed in the interim decision, respondent has specifically advised during the course of this proceeding that it intended to raise the issue of the purloined documents in a new disciplinary action after appellant's restoration. The only factual difference between now and June 1996 is that now respondent implies it is aware as a result of newly-discovered evidence that appellant took ten boxes of documents rather

than one. However, respondent earlier had asserted (in a July 20, 1998, letter to the Commission in opposition to appellant's motion for reinstatement) that it had an independent basis for terminating appellant on the basis of the one box of documents that then were known. Respondent at that time stated that "[i]f ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him, for unauthorized possession of university property with regard to the records issue." As also was discussed in the Commission's September 1, 1999, interim decision, respondent reiterated this position in a May 14, 1999, memo. This statement provided notice to appellant at that time that respondent was aware that its recourse with regard to the allegedly purloined documents would be to proceed with a new disciplinary action against appellant after he had first been reinstated—i. e., after the entry of the Commission's final order.

Under these circumstances, the "newly-discovered" evidence—the actual physical return of the file boxes of documents—does not constitute a material difference that should permit respondent to raise the issue of the improperly-removed documents at this stage in these proceedings.

Second, this case involves an appeal of a discharge under the civil service code, not a WFEA discrimination claim. The respondent can not take any disciplinary action against appellant without complying with the requirements of the civil service code and the due process clause. The appointing authority can not add additional reasons for discharge after the facts of the initial notice of termination, appellant's *Loudermill* hearing, and the hearings before the Commission. *See Alff v. DOR,* 78-0227-PC, 3/8/79; *Liethen v. WGC,* 93-0095-PC, 10/20/93. *See also State ex rel Tracy v. Henry,* 219 Wis. 53, 262 N. W. 222 (1935). In the latter case, there had been a judicial determination that certain employes had been illegally discharged under the civil service code because the notice of discharge either had not given any reason for the discharge, or a legally insufficient reason. After this judicial decision, the employer conducted an investigation and concluded there had been adequate, independent grounds for discharge at the time of the original, illegal discharges, and took steps to discharge the employes effec-

tive the date of the original discharges. The Court held that the employes were entitled to have been restored with all back pay going back to the point of their original discharges, and the subsequent attempt at retroactive discharges was illegal. This case is consistent with the proposition that respondent would have the right to proceed to discharge appellant on the basis of the purloined documents, but only after first having restored him with back pay from the date of the original termination to the date of restoration. For the Commission to now deny restoration and limit appellant's back pay to the time from the original discharge (February 11, 1996) to the date of the discovery of the missing documents (June 24, 1996) amounts effectively to an unlawful retroactive discharge of the nature involved in *Tracy*.

RULING ON MOTION FOR ATTORNEY'S FEES

In an interim ruling entered on June 23, 1998, the Commission denied appellant's application pursuant to §227.485, Stats., for fees and costs on the ground that respondent had been substantially justified with respect to its decision to suspend and then discharge appellant. On October 1, 1999, appellant filed another motion for costs. In his current motion for costs, appellant seeks costs with regard to all activity in this case performed since the Commission's June 23, 1998, ruling. He also seeks costs for all activity involved in the replevin action mentioned above.

The Commission will first address the question of fees in connection with the replevin action. Any basis for awarding fees in this matter must be found in §227.485, Stats.[2] That statute authorizes fees with regard only to either a "contested case" or a proceeding for judicial review under §227.52, Stats. The term "contested case" encompasses agency proceedings, §227.01(3), Stats. Clearly, the replevin action is neither an agency proceeding nor a §227.52 judicial review proceeding, and thus there is no basis for an award of fees as to the replevin action. While appellant argues that the

[2] The Commission also has authority to award costs and fees in proceedings in certain kinds of discrimination or retaliation cases. However, the instant case involves an appeal pursuant to §230.44(1)(c), Stats., not a discrimination complaint.

replevin action was undertaken "in connection with the contested case [before the Commission]," the language of §227.485 is explicit and does not cover such ancillary proceedings which may have been undertaken in connection with this contested case before this Commission.[3] *See Duello v. UW-Madison,* 87-0044-PC-ER, 3/9/90; *McCready v. DHSS,* 85-0216-PC, 9/10/87.

In its June 23, 1998, interim ruling on fees and costs, the Commission outlined the standards applicable to an award of fees for proceedings before this agency:

> As the prevailing party, appellant argues that he is entitled to fees and costs pursuant to §§227.485, 814.245, Stats., and PC 5.05, Wis. Adm. Code. Section PC 5.05 (3), Wis. Adm. Code, provides that a motion for fees and costs raised under §227.485, Stats. shall be addressed under the standards and procedures of that statute. Sections 227.485 (3), (5) and (6), Stats., authorize the Commission to determine and award costs using the criteria in §814.245, Stats. Section 814.245 (3) provides:
>
> > If an individual . . . is the prevailing party in an action by a state agency or in any proceeding for judicial review under §227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position.
>
> The Commission must determine then whether respondent's position was "substantially justified." *Sheely v. DHSS*, 150 Wis. 2d 320, 442 N.W.2d 1 (1989). Under *Sheely*, to satisfy the "substantially justified" burden respondent must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. June 23, 1998, ruling, p. 2.

In his brief in support of his motion for costs incurred in this proceeding before the Commission since its June 23, 1998, interim decision denying appellant's first motion for costs, appellant focuses primarily on respondent's litigation of the replevin action. As has just been discussed, costs are not recoverable in this proceeding before this Commission for appellant's litigation expenses incurred in the replevin action. The

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[3] The Commission notes that §814.245, Stats., provides for recovery of costs in judicial proceedings in a manner analogous to §227.485.

only reference appellant makes to respondent's handling of the Commission proceeding itself since June 23, 1998, is the contention that respondent deviated from and had never sought to be relieved from "its stipulation to let [the Commission] decide the back-pay issue based on the briefs filed in the early fall of 1998." Appellant's brief in support of motion for costs, 2. However, the record on this point ultimately does not support appellant's contention.

The stipulation in question is memorialized in a letter from appellant's attorney dated July 28, 1998. The parties agreed on a schedule for appellant to respond to respondent's discovery requests, for appellant's deposition, for respondent to file a calculation of appellant's back pay, and for the parties to file submissions in connection with that calculation on dates in September. The stipulation further provides:

> Based on the submissions, the Commission shall make a finding as to the remedy. If in the interim there are discovery objections, such objections shall be telephoned to you [Commissioner Murphy] for immediate ruling. If there is no objection to UWM's calculation, then the Commission shall adopt that as the remedy in this matter. If there are objections or further submissions, the Commission shall make finding [sic] on the submissions of the parties. Letter dated July 28, 1999, from appellant's counsel to Commissioner Murphy, p. 1.

This stipulation did not rule out further submissions after the September submissions; rather, it provided that if there were further objections or submissions, they would be resolved on the basis of those submissions. The parties submitted their arguments and materials in September. However, a dispute was engendered as respondent subpoenaed appellant's bank records in connection with the question of mitigation. During discovery, appellant had produced a checkbook which showed one deposit of $2000 during the period in question. However, the subpoenaed bank records reflect over $80,000 in deposits during this period. Appellant objected to this on a number of grounds, including improper rebuttal. The parties then filed further briefs and arguments. Two status conferences were held and on January 11, 1999, the parties reached a stipulation reflected in a January 15, 1999, letter from Commissioner Murphy to the parties:

> After further discussion about the issue of remedy and the necessity of a hearing, the parties agreed to the following:
>
> 1) Respondent will provide the Commission and appellant a revised spreadsheet of Brenon's estimated back pay from February 11, 1996 through March 1999.
>
> 2) Respondent will file a brief in response to appellant's assertions regarding mitigation of damages and the exclusion of earned wages after his termination by respondent, by February 1, 1999.
>
> 3) Respondent will file a copy of the August 28, 1998, deposition of appellant with the Commission.
>
> 4) Appellant will file an affidavit as to all earnings in 1998 with appropriate documentation—check stubs—exclusive of the $22,400 reported in his deposition. Also, appellant agreed to provide copies of all tax withholding statements, as they become available to him. Finally, it is anticipated that appellant will supplement this information with documentation of any earnings in 1999 through March 1999. Letter to parties from Commissioner Murphy dated January 15, 1999.

On January 19, 1999, respondent filed a copy of appellant's August 28, 1998, deposition and requested a hearing, arguing that a hearing was necessary to resolve material issues of fact regarding appellant's other income. Respondent contended that appellant had not complied with discovery requirements and that there were major discrepancies between appellant's disclosures in deposition testimony and in document submissions, and the bank records respondent had subpoenaed.

On January 26, 1999, appellant filed a response to this submission, contending, *inter alia,* that respondent had misrepresented the state of discovery, and objecting to a further hearing. After this, further documents and motions were filed and eventually a conference was held on April 28, 1999, at which Commissioner Murphy scheduled a hearing on remedy for May 18, 1999. At that conference, the parties agreed to withdraw all motions and to resolve the outstanding issues at the hearing on remedy.

In the Commission's opinion, respondent had a reasonable basis for its posture in this proceeding. To begin with, as mentioned above, the stipulation reflected in the July 28, 1998, letter from appellant's attorney did not rule out further submissions; it anticipated that possibility. The Commission ultimately agreed with respondent's re-

quest to schedule a hearing after numerous additional submissions raising a number of issues. A party can be relieved from a stipulation on the basis of changed conditions or unforeseen developments. *See 73 Am Jur 2d STIPULATIONS,* §§13-14; *Burmeister v. Vondrachek,* 86 Wis. 2d 650, 664, 273 N. W. 2d 242 (1979). In the instant case, respondent first received appellant's bank records on September 21, 1998.[4] There appear to be discrepancies between the record of deposits thus revealed and what information appellant had provided in discovery up to that point. These discrepancies are relevant to the back pay issue because they relate to respondent's contention that appellant must have hidden sources of income that properly should be considered in the mitigation calculation. Respondent ultimately did not sustain its burden on the issue of mitigation. However, losing a case does not mean that a party was not substantially justified in its position. *See, e. g., Stern v. DHFS,* 212 Wis. 2d 393, 397, 569 N. W. 2d 79 (Ct. App. 1997). Given the apparent discrepancies in appellant's financial records in the amount of about $78,000, respondent had a reasonable basis for proceeding as it did.

AMENDMENT OF SEPTEMBER 1, 1999, DECISION

While neither party raised this point, there is a typographical error in this decision which the Commission herewith corrects. The first page of this decision quotes the stipulated statement of the issues for hearing. This statement of issues is reiterated on page ten. However, the latter entry misstates the second issue. Instead of "What is the sum of respondent's mitigating damages and setoffs," it states "What is the sum of respondent's back pay and other credits?" The Commission will make this correction, insert a revised page in the decision, and send copies to the parties.

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[4] On September 25, 1998, respondent filed, among other things, a request for a hearing before the entire Commission. This was equivalent to a request to be relieved from its stipulation to submit the remedy issue on the basis of written submissions.

FINAL ORDER

1. Respondent's action of discharging appellant is rejected and this matter is remanded to respondent for action in accordance with this decision. Respondent is required to immediately offer appellant reinstatement to his former position or its equivalent with back pay and benefits from the date of his discharge to the date of his restoration, as set forth in this decision, except that the amount of back pay and benefits actually due appellant pursuant to this decision must be recalculated so that it is current as of the date of payment and reflects the appropriate amount of interest.

2. Appellant's motion for costs filed October 1, 1999, is denied.

3. Respondent's motion filed October 22, 1999, to reconsider interim decisions is denied.

4. The Commission's September 1, 1999, decision is amended as set forth above.

Dated: November 19, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95

CONFIDENTIAL-IMMEDIATE REPLY REQUESTED

TO: Paul Erickson

FROM: P.J. Boylan PJB

RE: Brenon-settlement offer

DATE: May 14, 1999

I have a rough outline of terms to offer to settle the disputes between your client and the state. I believe it will meet the major concern of my client—that he not return to work at UWM—and the concern of your client to protect his retirement position. Time is of the essence in responding to this offer. If we make good progress in negotiating a settlement, we may be willing to postpone the hearing on Tuesday.

1. Termination becomes a resignation retroactive to February, 1996.
2. UWM guarantees a monthly payment of at least $1707.04 upon retirement at age 50 provided your client retires at age 50 (the minimum retirement age for the protective employment category) and provided he does not withdraw funds from the Wisconsin Retirement System prior to retirement. This amount is calculated to be the formula benefit paid as if he had continued working at UWM until age 50. UWM will make up the difference between the payment from WRS and the amount of $1707.04. Attached is a calculation based upon your client's three highest years of income and 28.76 years of creditable service.
3. UWM will pay to your client $35,000.00 in a lump sum.
4. UWM will pay attorneys fees of $20,000.00.
5. Your client agrees to a global release, covenant not to sue for anything related to his employment, and withdraws his appeal.
6. Agreement by both parties and their attorneys not to discuss the terms of the settlement.
7. You and your client will destroy all state records in your and his possession and provide an affidavit that destruction has been accomplished.
8. The state will withdraw its replevin action.

We can agree to settle the Personnel Commission case on its own without regard to the other litigation if you prefer.

We believe this settlement offer is fair considering the amounts that we believe can be proven as setoffs to backpay. Please understand that if we proceed to hearing, after we obtain a final decision we will petition for review. We believe we have strong legal arguments. After the final decision we also intend to reinstate your client and initiate the discipline process because of his gross violation of the records polices. That will likely

end in termination of his employment. His years of service for retirement purposes are currently 21.27. Settlement at the above terms will enhance his employability because he will have resigned and he has a university guarantee that it will make up for any WRS payment that does not meet the formula payment for 28.76 years of service as if he had stayed on until age 50.

Please discuss this offer with your client and call me this weekend either at home—225-0326, or at the office—229-3792. In any event, if I do not hear from you by noon on Monday, I will assume your client is not interested.

State of Wisconsin \ PERSONNEL COMMISSION

131 West Wilson Street
Suite 1004
Madison, Wisconsin 53703

Phone: (608) 266-1995
Fax: (608) 266-9608
E-Mail: roberta.bushey@pcm.state.wi.us

Laurie R. McCallum
Chairperson

Donald R. Murphy
Commissioner

Judy M. Rogers
Commissioner

June 18, 1999

Paul Erickson
Gutglass, Erickson & Bonville
735 N. Water Street Ste. 1400
Milwaukee WI 53202

P.J. Boylan, Attorney
UW-Milwaukee
Mitchell Hall Rm 239
PO Box 413
Milwaukee WI 53201-0413

Re: *Brenon v. UW*
Case No. 96-0016-PC

Dear Parties:

Enclosed is a proposed decision and order in this case pursuant to §227.46(2), Stats., which provides in part:

> Each party adversely by the proposed decision shall be given an opportunity to file objections to the proposed decision, briefly stating the reasons and authorities for each objection, and to argue with respect to them before the officials who are to participate in the decision. The agency may direct whether such argument shall be written or oral.

Please file any objections with written arguments and serve a copy on the other parties no later than July 12, 1999. In the event written objections are filed, the opposing parties are provided ten days to file any written response to the objections unless, upon application, the hearing examiner or the Commissioner concludes that some other period is more appropriate. §PC 5.06(1), Wis. Adm. Code. Requests for oral argument will not be entertained.

As provided in §227.485, Stats., the prevailing party in cases before the Commission may, under certain circumstances, submit a motion for costs. In those cases in which a party other than a state agency is the prevailing party, the Commission will issue its decision on the merits as an interim decision and will then provide the prevailing party an opportunity to file a motion for costs.

Sincerely,

Donald R. Murphy
Commissioner
rcr:960016Alet9
Enclosure

STATE OF WISCONSIN

PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN-SYSTEM,
Respondent.

Case No. 96-0016-PC

PROPOSED DECISION AND ORDER

NATURE OF CASE

This matter before the Commission involves an appeal of a suspension without pay and, later, a discharge brought pursuant to §230.44(1)(c), Stats. The Commission entered its decision and order with respect to the merits on February 12, 1998, but retained jurisdiction to consider and work out any remaining remedial entitlements. After a protracted period of time involving many failed attempts to even reach agreement on the amount of appellant's gross back pay, the parties agreed to table all motions and proceed toward resolving the matter by hearing. A hearing on the issue of remedy was held May 18, 1999. The parties agreed to the following subissues: (1) What is the sum of appellant's back pay and other credits? (2) What is the sum of respondent's mitigating damages and setoffs? and (3) What is the total sum of appellant's remedy? The parties gave oral arguments at the conclusion of the hearing.

FINDINGS OF FACT

1. By letter dated February 9, 1996, the University of Wisconsin-Milwaukee (UWM) terminated the employment of Dale Brenon with them, effective February 11, 1996. Just prior to that, on January 22, 1996, Brenon had been suspended by UWM for ten days without pay.

2. Brenon began employment at UWM in October 1974 as a police cadet. At the time of his termination, Brenon was serving with permanent status in class as a police sergeant.

3. Brenon appealed the actions taken against him by UWM to the Personnel Commission. The Commission rejected the suspension and modified respondent's (UWM's) decision terminating Brenon to ten days without pay in an Interim Decision and Order issued February 12, 1998.

4. The respondent did not reinstate appellant to his former position in accordance with the Commission order nor has it offered appellant any position since his termination in February 1996.

5. After his employment with UWM was terminated, appellant applied for the following positions in 1996: American Family Insurance Group – April 10, 1996; a driver position at the Blood Center of Southwest Wisconsin – April 24, 1996; Alpha Omega Security (where he was hired in July 1996); Director of Security, regional shopping mall, Denver, CO – October 10, 1996; security position, U.S. facility, Marshall Islands – October 18, 1996.

6. In July 1997 appellant applied for a civil service investigator position with Milwaukee County. Appellant received the following response: "Milwaukee County Civil Service Rule II, Section 7(2) provides that the Director of Human Resources may refuse to examine an appellant who: (d) has been dismissed for good cause from the public services. We are refusing to examine you because you were terminated for cause from the University of Wisconsin-Milwaukee."

7. Appellant appealed the Milwaukee County's refusal to examine him to its Civil Services Commission. After a hearing in October 1997, the Commission referred the matter back to the Human Resources director for "appropriate action" to dispose of the matter.

8. In November 1997, appellant applied for a Communications Dispatcher position at North Shore Public Safety Communications Center, Whitefish Bay, WI. By

letter dated February 2, 1998, appellant was advised that his name was not included in the list of eligible candidates.

9. Since April 1999, appellant has worked for Dominican Management Services, Plymouth, MN, as a security agent at the apartment where he resides.

10. Between January 1996 and December 31, 1998, appellant's yearly income was $9,000 to $12,000.

11. During the period in question, appellant did not visit a state job service office or seek unemployment benefits, but he did attempt to obtain work through an employment agency.

12. Appellant's back pay without setoffs, between February 11, 1996, to May 1999, is $190,272.34. This total sum includes a quarterly 12 percent interest rate computation.[1] In addition, appellant has a credit of $391.70 for June and July 1999 health insurance premiums.

13. With setoffs, based on income tax returns and earning statements, appellant's back pay totals $159,533.64 (Resp. Exh. 21, 26, 27 and 28).

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden to show that appellant failed to exercise reasonable diligence to mitigate his damages, and that there was a reasonable likelihood that appellant might have found comparable work by exercising reasonable diligence.

3. Respondent has failed to sustain this burden.

OPINION

At the start of the hearing on May 18, 1999, the parties stipulated to appellant's estimated back pay without setoffs through May 22, 1999 (Resp. Exh., R-20).

[1] The parties stipulated to respondent's exhibit R-20, a spreadsheet showing appellant's estimated back pay without setoffs, computed quarterly, between February 11, 1996, and May 22, 1999.

Appellant never disputed this calculation of back pay, except to the extent that appellant had prepaid health insurance premiums for the months of June and July 1999 – a sum of $195.85 per month; and this was acknowledged by respondent. So the remaining legal issue concerns mitigating damages and setoffs.

The statutory basis for awarding relief in cases such as this, where an employe has been removed from his position in violation of the state classified service law, is provided in §230.43(4), Stats.:

> If an employe has been removed...from...employment in contravention, or violation of this subchapter, and has been restored to such...employment by order of the commission..., the employe shall be entitled to compensation therefore from the date of such unlawful removal.... *Interim earnings or amounts earnable with reasonable diligence shall operate to reduce back pay otherwise allowable....* The employe shall be entitled to an order of mandamus to enforce the payment on other provisions of such order. (Emphasis added.)

Very little guidance is provided in case law in regard to the proper interpretation or application of this statutory language. In *State ex rel. Schilling and Klingler v. Baird*, 65 Wis. 2d 394, 22 N.W.2d 666 (1974), a case involving the suspension of two county deputy sheriffs, the court stated at page 398:

> This court has held that the burden of establishing the lack of *reasonable and diligent* efforts by the employees to seek other employment is on the employer. *Schiller v. Keuffel & Esser Co., supra*, page 553; *Barker v. Knickerbocker Life Ins. Co.* (1869), 24 Wis. 630, 638. Thus the question of whether such opportunities exist is primarily a question of fact and as such relates not to the existence of legal duty on the part of *Klinger and Schilling*, but to the sufficiency of the evidence proving a violation of that duty. (Emphasis added.)

This court stated the role in *Barker v. Knickerbocker Life Ins. Co., supra*, page 638, as follows:

> "...The rule in such cases is that although damages may be so reduced, yet the burden is on the defendant to show affirmatively that the plaintiff might have had employment and compensation elsewhere..."

In *Warren v. DHSS*, 92-0720-PC, 92-0234-PC-ER, 5/14/96, the Commission concluded that the mitigation of damages language in §230.43, Stats., paralleled language set forth in the Wisconsin Fair Employment Act (WFEA) in §111.39(4), Stats. Also, the "reasonable diligence" requirement to mitigate damages has been applied in deciding back pay issues in non-public employe and Family and Medical Leave Act (FMLA) cases, and in Title VII cases. *Marten Transport, Ltd. v. DILHR*, 171 Wis. 2d 147, 491 N.W.2d 96 (1992), *Kelley Co. Inc. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.68 (1992), *Hutchison v. Amateur Elect. Supp., Inc. et al.*, 66 FEP Cases 1275 (7th Cir. 1994).

In *Hutchison v. AES* (*supra*), the court said that once a plaintiff has established the amount of damages resulting from the employer's conduct, the burden of going forward shifts to the defendant to show the plaintiff failed to mitigate damages or that the damages were, in fact, less than the plaintiff asserts; and that "[t]o establish the affirmative defense of a plaintiff's failure to mitigate damages, the defendant must show that: (1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence (citation omitted)." With these cases as guidelines, we address the issue of mitigation of damages and setoffs, since appellant's gross back pay is not in dispute.

I. Mitigation of Damages

First, respondent contends that appellant failed to seek a job as a law enforcement officer and that appellant's back pay should be reduced by the amount he could have earned as a law enforcement officer during the period of time in issue -

some forty thousand dollars per year (Resp. Exh. 23).[2] Respondent's expert witness in the field of Employment and Hiring Standards (for Wisconsin law enforcement positions) testified about jobs posted in a monthly Department of Justice (DOJ) Law Enforcement Bulletin (Resp. Exh. 16); and that he believed appellant "could have been a competitive applicant [for such positions] in the sense that he was an experienced officer." Respondent argues that appellant did not call or visit the State Job Service office where these bulletins were available. The Commission does not find this argument and this testimony provided by the expert witness persuasive for the following reasons.

The expert witness testified that between February 1996 and the present there were a high number of qualified applicants for any given position. Further, the expert witness testified that appellant lost his police officer certification when terminated by UWM and that the DOJ Training and Standards Bureau would be required to notify any employer that appellant would need 120 hours of training for certification as a law enforcement officer.

Also, respondent's expert witness testified that, other than the Board standards, he did not know what other qualifying rules, county or city, impact on the positions listed in the bulletin and did not know if appellant was eligible for any of them. While appellant did not go to the State Job Service office, he did register at an employment agency, circulate his resume, and look for positions noticed in newspapers. In addition, appellant's rejection by Milwaukee County (Finding of Fact 7) made it plain he was not apt to be a successful candidate for a law enforcement position.

Finally, the Commission issued a decision in February 1998, affirming an October 1997 proposed decision and order to reinstate appellant, but respondent elected not to abide it; and to the present date, respondent has not offered appellant any position in its coordinate responsibility to mitigate damages. Based on the evidence

[2] The $40,000/year amount was based on information provided to the author of R-23 by respondent's UWM Legal Services office.

presented and for reasons stated, the Commission concludes that respondent failed to establish appellant violated his duty to mitigate damages.

Alternatively, respondent argues that its damages should be reduced by the amount appellant earned during the period in issue. Based on this calculation (Resp. Exh. 21, 26, 27 and 28), appellant's back pay with setoff of his earnings from February 11, 1996, to May 22, 1999, is $159,533.64 (Finding of Fact 13). The Commission agrees. One of the purposes of back pay is to make the individual victim of an unlawful employment action whole by putting the victim in nearly the same financial position had the unlawful employment action not occurred. Appellant argues that he could have earned this income even if he had been employed by respondent, but he offered no evidence that prior to termination he did work outside his regular job at UWM.

Respondent also argues that appellant's back pay should be reduced with setoffs totaling $110,332.80, as disclosed in appellant's bank statements as deposits during the period in issue. In support, respondent presented a spreadsheet (Resp. Exh. 24) with setoffs (column H) based on appellant's 1996-1998 bank statements (Resp. Exh. 15). The spreadsheet was prepared and explained in testimony by a UWM financial and personnel division administrator. Respondent presented no other evidence to substantiate this claimed setoff. When questioned about these bank statements, appellant testified that the bank deposits included funds obtained from multiple monthly credit card advances and loans from relatives. Appellant testified that he kept his accounts current by implementing the "robbing Peter to pay Paul" principle – covering one credit card advance by obtaining another one. Appellant also testified that he reported all earned income on his income tax return forms. Respondent's only rebuttal is its assertion that appellant's testimony was a falsification. Clearly the evidence presented failed to establish respondent's defense of bank deposit setoffs.

II. Matters of Procedure

During the adverse examination of appellant, respondent asked appellant whether he had a practice of making copies of certain documents and his counsel objected on the basis of relevancy. In response to the objection, respondent stated that it pertained to the issue of mitigation of damages. Respondent further explained that, through this line of questions to appellant and the testimony of another witness, it would show that UWM would have terminated appellant for misconduct in June 1996 if he had still been employed there; and that under the "after acquired evidence" theory, appellant's back pay damages should be cut off in June 1996, the date appellant would have been terminated by respondent because of the evidence acquired after the termination in issue.

After a recess, the examiner sustained the objection without explanation. The examiner granted respondent's request to make an offer of proof for the record, which included respondent's exhibit R-22, calculations of respondent's back pay liability based on the after-acquired evidence theory.

The Commission concludes that this ruling of the examiner was proper. To have ruled otherwise would have been in deprivation of appellant's job property rights without due process of law.

ORDER

This matter is remanded to respondent for action in accordance with this decision. Respondent is required to immediately offer appellant reinstatement to his former position or its equivalent.

The amount of back pay and benefits actually due appellant pursuant to this decision must be refigured so that it is current as of the date of payment, thereby reflecting the appropriate amount of interest.

Dated: _____, 1999.

STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

DRM:rcr
960016Adec5

_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

Parties:
Dale Brenon
8250 North 46th Street Apt. 122
Brown Deer, WI 53223

Katharine Lyall, President
UW-System
1720 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

STATE OF WISCONSIN

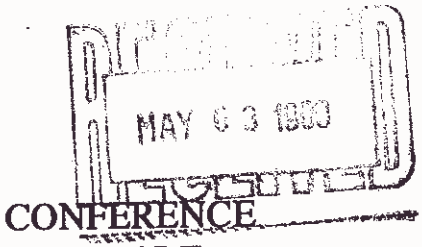
PERSONNEL COMMISSION

DALE R. BRENON,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

Case No. 96-0016-PC



CONFERENCE REPORT

This is a report of a prehearing conference held by telephone on April 28, 1999, with Donald R. Murphy, Commissioner, presiding.

APPEARANCES:

Complainant appeared by Attorney Paul Erickson. Mr. Erickson's mailing address is: Gutglass Erickson & Bonville, 735 N Water St Ste 1400, Milwaukee WI 53202.

Respondent appeared by Attorney P.J. Boylan. Respondent's mailing address is: UW-Milwaukee, Mitchell Hall Rm 239, PO Box 413, Milwaukee WI 53201-0413.

ISSUE: The examiner proposed the following statement of issue for hearing:

Remedy.
Sub-issues:

1. What is the sum of appellant's back pay and other credits.
2. What is the sum of respondent's mitigation damages and setoffs.
3. What is the total sum of appellant's remedy.

HEARING:

The parties agreed to hearing on May 18, 1999, starting at 9:30 a.m. The hearing will be held at the Commission's office located at 131 W. Wilson St., Rm. 1004, Madison, WI 53703.

This report will serve as the sole and statutory notice of hearing. This will be a class 3 proceeding with jurisdiction pursuant to §230.44(1)(c), Wis. Stats. The matters asserted are as set forth under the statement of issue, above.

ADDITIONAL IMPORTANT INFORMATION:

1. The parties are reminded that pursuant to §PC 4.02 and PC 6.02(2), Wis. Admin. Code, copies of exhibits and names of witnesses must be exchanged at least 3 working days before the day established for hearing, or will be subject to exclusion. **This means the information must be exchanged at or before 4:30 p.m. on May 13, 1999.** A timely exchange occurs if the Commission and opposing party each receive said information by the stated deadline.

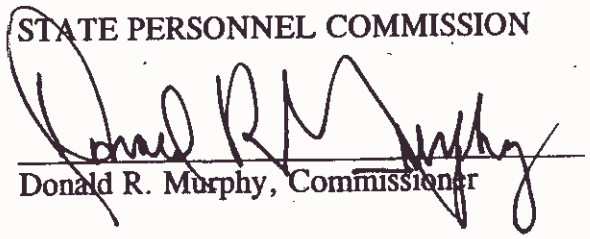
2. You are reminded that each party is responsible for securing the presence at the hearing of his or her own witnesses by either formal (appearance letter or subpoena) or voluntary means (witness' agreement to attend). In general, it is in the best interests of all concerned to provide the earliest possible notice of the hearing date to all witnesses. The Commission will issue appearance letters to require the attendance of state employes if a party submits a written request for such letter with the names and addresses of the witnesses. The Commission, upon written request, also will provide subpoenas for non-state employes but service of the subpoenas is the responsibility of the requesting party. The Commission requests at least 2 weeks advance notice for issuing appearance letters or subpoenas.

3. As provided in §PC 5.02, Wis. Adm. Code, a request to postpone a date for hearing will be granted only upon a showing of good cause. Postponement requests should be in writing, if possible, and the party making the request should indicate the reason for the request and whether the opposing party agrees with the request. Generally speaking, the following reasons are not considered as good cause for granting a hearing postponement: a) waiting an unreasonable amount of time to request postponement after knowing that a reason exists to request the same, b) being unprepared for hearing, and waiting until too close to the hearing date to initiate settlement negotiations or to seek representation.

4. Each party has the responsibility to send the opposing party copies of any materials mailed to the Commission. §PC 1.05, Wis. Adm. Code. Further, conferences with the Commission regarding substantive matters cannot be held without both parties' participation. These restrictions are part of the prohibition against ex parte contacts.

Dated: April 30, 1999.

STATE PERSONNEL COMMISSION



Donald R. Murphy, Commissioner

DRM:rjb:960016Aoth1

cc: Erickson
Boylan

STATE OF WISCONSIN PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

vs. Case No. 96-0016-PC

UNIVERSITY OF WISCONSIN-MILWAUKEE,
Respondent.

NOTICE OF MOTION AND MOTION FOR *EN BANC* ORDER COMPELLING FINAL DECISION OF PENDING ISSUES IN CASE 96-0016-PC

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

TO: Ms. Laurie McCallum
Mr. Donald Murphy
Ms. Judy Rogers
Wisconsin Personnel Commission
Suite 1004
131 West Wilson Street
Madison, WI 53702

Dale R. Brenon
c/o Attorney Paul Erickson
Gutglass, Erickson & Bonville, S.C.
735 North Water Street, Suite 1400
Milwaukee, WI 53202-4267

PLEASE TAKE NOTICE that the above-named respondent, University of Wisconsin-Milwaukee, by one of its attorneys, P. J. Boylan, moves the Personnel Commission to direct or take action to finally decide the issues presently pending in this case. The grounds for the motion are set forth below.

The above-captioned case has been pending before the Personnel Commission for over three years. A hearing was held in August,1996, yet a proposed decision and order was not issued until October, 1997. Issues relating to back pay and mitigation of damages have been pending since March, 1998. Since September, 1998, both parties have presented several motions and requests related to the issues of back pay, mitigation of damages, and the briefing and discovery related to these two issues. Respondent's exposure to liability increases every day

while these issues are pending. (Boylan Affidavit, ¶¶ 4,5, 9-21)

Appellant has argued that Dale Brenon ("Brenon") should have been reinstated because the Respondent has a duty to mitigate and because he will not lose. This argument is unreasonable. Respondent does not have a duty to reinstate Dale Brenon to mitigate its damages because reinstatement prior to a final decision is inappropriate. The Seventh Circuit recently discussed this issue in a case where a university professor sought a preliminary injunction that would allow him to teach classes of his choice prior to the resolution of his litigation. Webb v. Board of Trustees of Ball State University, 167 F.3d 1146, (7th Cir. 1999). The court stated:

> *Giving the plaintiff a particular job while the litigation continues has potentially high costs for the employer if the plaintiff eventually loses, for in the interim the employer will have lost control of the workplace any may disburse salary that cannot be recouped; but waiting until the end of the case has low costs for the employee, because back pay and damages are available to compensate for any loss while the case proceeds.*

Id. at 1149.

For the reasons stated above, Respondent urges the Personnel Commission to issue an *en banc* order compelling the assigned commissioner to decide the issues presently pending in this case or in the alternative, to issue a decision *en banc* with respect to the outstanding issue.

Dated at Milwaukee, Wisconsin, this 23rd day of April 1999.

Respectfully submitted,

UNIVERSITY OF WISCONSIN-MILWAUKEE

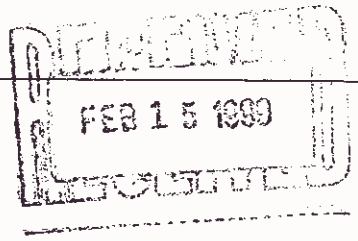
By: P.J. Boylan
P. J. Boylan
State Bar No. 1003899

Attorney for Respondent

MAILING ADDRESS:
Office of Legal Affairs
Mitchell Hall Room 359
P. O. Box 413
Milwaukee, Wisconsin 53201

UNIVERSITY OF WISCONSIN MILWAUKEE

Office of Legal Affairs



February 11, 1999

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY
Commissioner Donald R. Murphy
Personnel Commission
131 West Wilson Street
Suite 1004
Madison, Wisconsin 53703

RE: *Brenon v. UW-Milwaukee*
Case No. 96-0016-PC

Dear Commissioner Murphy:

The purpose of this letter is to renew Respondent's motion for an order finding Appellant in contempt and for related costs for Appellant's refusal to answer questions completely and honestly under the law during the discovery process of this case, including interrogatories, request for production of documents and in his deposition. (See Respondent's September 24, 1998 submission, page 4 for original motion).

The February 2,1999 affidavit submitted by Appellant to the Personnel Commission on February 3, 1999, validates what Respondent has been arguing throughout this case -- Appellant has not fulfilled his duty to be complete and honest during the discovery process. Items 4, 6, and 7 of the affidavit describe documents relating to Appellant's accounts with Prudential Insurance, TIAA-CREF and Wisconsin Energy Corporations, respectively. Prior to receiving the affidavit, Respondent had no knowledge of these accounts because Appellant failed to provide documentation about them, despite the fact that Respondent asked Appellant for: 1) documents "of any and all bank records and investment records for the period of February 11, 1996 to the present, including but not limited to records of checking accounts, savings accounts, IRA accounts and mutual fund accounts, to which Appellant had made contributions or deposits" and 2) identification of "financial institutions and/or investments companies, firms, or brokerages during the period of February 11, 1996 to the present to which Appellant made deposits during the same period." (Request for Production of Documents, 7/24/98, #8; Interrogatories, 7/24/98, #8) ..." Similarly, it is important to note that Appellant failed to provide any documentation in his February 2, 1999 affidavit for Norwest Bank, an institution at which Appellant admitted he has an account. (Response to Interrogatory #8, 7/24/98)

Appellant's actions prove that he has been incomplete and dishonest during the discovery

Mitchell Hall • PO Box 413 • Milwaukee, WI 53201
http://www.uwm.edu/Dept/LEGAL

414 229-4278
FAX 414 229-3919

process. This necessitates the need for a hearing on the issue of back pay. Respondent respectfully requests a motion finding Appellant in contempt for failure to answer questions completely and honestly under the law during the discovery process of this case

Sincerely,

P.J. Boylan
Senior University Legal Counsel

c: Paul Erickson, Esq.
Phillip Clark
Donald Melkus

STATE OF WISCONSIN PERSONNEL COMMISSION

DALE R. BRENON,

Appellant,

v. Case No. 96-0016-PC

UNIVERSITY OF WISCONSIN-MILWAUKEE,

Respondent.

RESPONDENT'S REPLY TO APPELLANT'S REPLY [sic] TO RESPONDENT'S BRIEF REGARDING THE EXLCUSION OF POST-TERMINATION WAGES

Appellant appears to be confused about mitigation principles. Respondent is not required to perform any action, reinstatement or otherwise, in this case until a final order is issued. Since this has not yet happened, Appellant's argument that Respondent must have been reinstated prior to a final decision is frivolous.

Furthermore, Appellant continues to frivolously argue and ignore a basic tenet of employment law that is well established in Wisconsin -- the injured party in an employment situation must make reasonable efforts to mitigate damages. [1] Instead, Appellant argues that it is Respondent's duty to mitigate. It is important to note that Appellant has provided no case law citations to support his theory.

---

[1] As cited in Respondent's September 15, 1998 submission: *It has been long held in Wisconsin law that an injured party in an employment situation must make reasonable efforts to mitigate damages. See Klug v. Flambeau Plastics Corp., 62 Wis.2d 141, 155, 214 N.W.2d 281(1974) (requiring that the injured party in an employment situation "must make reasonable efforts to mitigate damages"); Gauf v. Milwaukee Athletic Club, 151 Wis. 333, 335, 139 N.W.207 (1912) (damages in a wrongful discharge case are "subject to mitigation by the amount the employee earn[s], or might by the exercise of reasonable diligence [earn]); Marten Transport v. DILHR, 171 Wis.2d 147, 155, 491 N.W.2d 96, (Ct. App. 1992); Hale v. Stoughton Hospital Ass'n Inc. 126 Wis.2d 267, 279, 376 N.W.2d 89 (Ct. App. 1985).*

Similarly, Appellant also misses the point of the precedents contained in State ex rel. Schilling v. Baird, 65 Wis. 2d 394, 222 N.W.2d 666 (1974), Unico v. Acton Street Coroporation, 888 F.Supp 103 (E. D. Wis. 1995), and Board of Education of Berwyn School District No. 100, Cook County v. Metskas, 106 Ill. App.3d 943 (1982). Appellant asserts that these cases are not relevant to the present case because the facts therein "involved sources of [part-time] income in addition to the employee's regular pay which had existed prior to the employees' suspension or termination." That is exactly why the cases are relevant. The point of these cases is that an employer is not entitled to a credit to back pay for an employee's part-time wages when the employee held the part-time job prior to the employer's breach. In an analysis of Schilling, Wisconsin Employment Law, §4.20, states:

> ***To the extent that the employee's interim earnings derive from outside or part-time employment that he or she already held prior to the employer's breach, the employer is not entitled to a credit.***
> (emphasis supplied)

Applying the obverse, this line of cases is exactly on point for the issue at hand. Appellant admits "Sgt. Brenon did not receive any earnings, beyond those received from UWM prior to his termination." (emphasis supplied) Therefore, Respondent is entitled to a credit against the back pay award for the full amount of Appellant's interim earnings.

Dated at Milwaukee, Wisconsin, this 11th day of February, 1999.

Respectfully submitted,

UNIVERSITY OF WISCONSIN-MILWAUKEE

By: P.J. Boylan

P.J. Boylan
State Bar No. 1003899

Attorney for Respondent

MAILING ADDRESS:
Office of Legal Affairs
Mitchell Hall Room 359
Post Office Box 413
Milwaukee, Wisconsin 53201-0413
(414) 229-4278

STATE OF WISCONSIN PERSONNEL COMMISSION

DALE R. BRENON,

Appellant,

v. Case No. 96-0016-PC

PRESIDENT, UNIVERSITY OF WISCONSIN-SYSTEM,

Respondent.

AFFIDAVIT DALE R. BRENON

STATE OF WISCONSIN)
) SS
COUNTY OF MILWAUKEE)

Dale R. Brenon, being first duly sworn on oath deposes and states as follows:

1. Affiant is the appellant in the above matter.

2. Attached hereto as Exhibit A is a true and accurate copy of affiant's Form W-2 received from Alpha Omega Corporation for the year 1998.

3. Affiant did not receive the Form W-2 from Alpha Omega Corporation until February 4, 1999.

4. Affiant has produced all of the earnings information he

has received or expects to receive for 1998.

Dated this 5th day of February, 1999 at Milwaukee, Wisconsin.

BY: Dale R. Brenon
Dale R. Brenon

Subscribed and sworn before me
this 5th day of February, 1999

Sharon R. Long
Notary Public
My Commission ~~expires~~ is permanent

SHARON R. LONG NOTARY PUBLIC STATE OF WISCONSIN

Copy B To Be Filed With Employee's FEDERAL Tax Return

a Control number 17	1 Wages, tips, other compensation 4081.00	2 Fed. income tax withheld 489.32
7 Soc. sec. tips	3 Social security wages 4081.00	4 Soc. sec. tax withheld 253.02
8 Allocated tips	5 Medicare wages and tips 4081.00	6 Medicare tax withheld 59.17

c
ALPHA OMEGA CORPORATION
312 E WISCONSIN AVE. SUITE 601
MILWAUKEE WI 53202

b Employer's identification number 39-1914555	d Employee's social security number 399-58-7465

9 Adv. EIC payment	10 Dependent care benefits	11 Nonqualified plans
12 Benefits included in box 1	13	14

15 Statutory employee ☐ Deceased ☐ Pension plan ☐ Legal rep. ☐ Deferred compensation ☐

e
Dale Brenon
8250 N. 46th Street #122
Milwaukee WI 53223-3746

16 State WI / Employer's state I.D. No. 562805-2	17 State wages, tips, etc. 4081.00	18 State income tax 197.58
19 Locality name	20 Local wages, tips, etc.	21 Local income tax

W-2 Wage and Tax Statement 1998
Department of the Treasury—Internal Revenue Service OMB No. 1545-0008

Copy 2 To Be Filed With Emp. State, City, or Local Income Tax Return

a Control number 17	1 Wages, tips, other compensation 4081.00	2 Fed. income tax withheld 489.32
7 Soc. sec. tips	3 Social security wages 4081.00	4 Soc. sec. tax withheld 253.02
8 Allocated tips	5 Medicare wages and tips 4081.00	6 Medicare tax withheld 59.17

c
ALPHA OMEGA CORPORATION
312 E WISCONSIN AVE. SUITE 601
MILWAUKEE WI 53202

b Employer's identification number 39-1914555	d Employee's social security number 399-58-7465

9 Adv. EIC payment	10 Dependent care benefits	11 Nonqualified plans
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Dale Brenon
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19 Locality name	20 Local wages, tips, etc.	21 Local income tax

W-2 Wage and Tax Statement 1998
Department of the Treasury—Internal Revenue Service OMB No. 1545-0008

Received — Thurs, 02/04/99

EXHIBIT A

STATE OF WISCONSIN PERSONNEL COMMISSION

DALE R. BRENON,

Appellant,

v. Case No. 96-0016-PC

PRESIDENT, UNIVERSITY OF WISCONSIN-SYSTEM,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN RESPONSE TO APPELLANT'S ASSERTIONS REGARDING MITIGATION OF DAMAGES AND THE EXCLUSION OF POST-TERMINATION WAGES

The appellant, Dale R. Brenon, by his attorneys, Gutglass, Erickson & Bonville, S.C., respectfully submits this brief as a reply to respondent's brief in response to appellant's assertions regarding mitigation of damages and the exclusion of post-termination wages.

The party which could and should have mitigated damages in this case is the respondent. On October 6, 1997, the Personnel Commission issued a Proposed Decision and Order stating that the respondent's decision to terminate the appellant is modified to a ten day suspension. On February 12, 1998, the Personnel Commission issued an Interim Decision and Order, signed by all members of the Commission, adopting the October 6, 1997 Proposed Decision and

Order with amendments. Despite this decision, respondent did not reinstate the appellant.

On July 9, 1998, appellant filed a motion with the Personal Commission seeking an order that would return Sgt. Brenon to his position at UWM which would halt the accumulation of back pay. The respondent **opposed** appellant's motion and has yet to reinstate the appellant. Reinstatement would cease the accumulation of back pay. Respondent has simply chosen not to put appellant back to work and mitigate its damages.

Respondent cannot argue that appellant did not make reasonable efforts to mitigate his damages while at the same time respondent has made no attempts to mitigate despite ample opportunity to do so. For nearly one year respondent has had the opportunity stop the accumulation of back pay by reinstating the appellant, but directly chose not to. Since it was respondent's decision not to reinstate the appellant, it is respondent who failed to mitigate.

Additionally, respondent's reliance on *State ex rel. Schilling v. Baird*, 65 Wis. 2d 394, 222 N.W.2d 666 (1974), and *Board of Education of Berwyn School District No. 100 Cook County v. Metskas*, 106 Ill. App.3d 943 (1982), is misplaced. Neither *Schilling* nor *Berwyn* address the situation currently before the Personnel Commission. In each of these cases, the analysis of the facts involved sources of income in addition to the employees' regular pay which had existed prior to the employees' suspension or termination. *Schilling* at 400, 222 N.W.2d at 670, *Berwyn* at 948. While the *Schilling* and *Berwyn* decisions employed quite disparate analyses of their respective situations, each determined that the

employer could not deduct such income from the back pay owed to the employees. According to *Schilling*,

> The appellants were entitled to credit for the earnings of Schilling from employment during his suspension **when such employment was unrelated to outside or part time employment held by Schilling prior to his suspension.** (emphasis added) *Schilling* at 401, 222 N.W.2d at 670.

Schilling's narrow scope does not reach Sgt. Brenon's situation. The *Schilling* decision specifically addresses the case of an employee who had previously received income from other sources, and that income's impact upon a back pay calculation. *Id.* Sgt. Brenon did not receive any earnings, beyond those received from UWM prior to his termination. The *Schilling* decision cannot logically extend itself to situations beyond its scope, and therefore is inapplicable to appellant's situation.

Furthermore, the Respondent's reliance upon the *Berwyn* decision of the Illinois Court of Appeals is misguided and misleading. In *Berwyn*, the Illinois Court of Appeals applied an "incompatibility" test in determining the effect of other earnings on a back pay analysis. *Berwyn* at 948. This "incompatibility" theory resulted in an analysis entirely foreign to the laws of Wisconsin. In the absence of the Wisconsin appellate courts or legislature adopting the "incompatibility" theory set forth in *Berwyn*, its holding is unpersuasive. Simply because the result in *Berwyn* was similar to that of *Schilling* does not mandate a Wisconsin tribunal's reliance upon the same.

Finally, the Respondent also relies upon *Unico, Inc. v. Acton Street Corporation*, 888 F.Supp. 103 (E.D. Wis. 1995). Again, the

reliance on this case is misplaced. *Unico* cited to the *Shilling* decision in determining that the employer was entitled to an offset for earnings received by the employee following his resignation. *Id.* However, the Unico decision involved a contractual claim brought by the employee, and the decision was rendered in light of a contractual tenet providing that, "[u]nder Wisconsin law, an injured party is not entitled to be placed in a better position because of a breach of contract." *Id.* As Sgt. Brenon's situation does not involve the innate limitations imposed by contract theory, the result of *Unico* is inapplicable, and *Unico's* citation to Schilling is of no significance to the matter before this Commission.

A determination was never made as to whether Sgt. Brenon's other employment was "incompatible". Further, Sgt. Brenon is not pursuing relief premised upon a contractual theory of recovery. Therefore, the application of the *Schilling*, *Berwyn*, and *Unico* decisions is inapposite to the situation before the Commission.

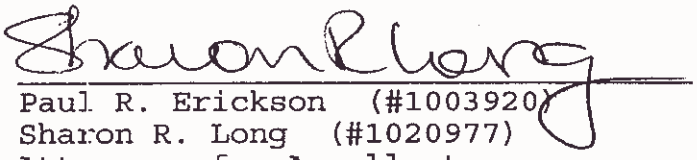
CONCLUSION

For the above stated reasons, respondent cannot be allowed to offset appellants' total back pay earnings with his earnings during the period of his unlawful termination and until his reinstatement. At a minimum, Sgt. Brenon should not be penalized for respondent's unreasonable refusal to reinstate him and end the accumulation of back pay by crediting the respondent with his earnings during that time period. The proper conclusion of this Commission should be that Sgt. Brenon is entitled to the full amount of his back pay

without an offset for his earnings.

Respectfully submitted this 3rd day of February, 1999.

Gutglass, Erickson & Bonville, S.C.



Paul R. Erickson (#1003920)
Sharon R. Long (#1020977)
Attorneys for Appellant,
Sgt. Dale R. Brenon

P.O. ADDRESS:
735 North Water Street
Suite 1400
Milwaukee, WI 53202
Phone: (414) 273-1144

1960

UNIVERSITY OF WISCONSIN MILWAUKEE

Office of Legal Affairs

RECEIVED
JAN 29 1999
PERSONNEL COMMISSION

January 27, 1999

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY
Commissioner Donald R. Murphy
Personnel Commission
131 West Wilson Street
Suite 1004
Madison, Wisconsin 53703

RE: *Brenon v. UW-Milwaukee*
Case No. 96-0016-PC

Dear Commissioner Murphy:

As you requested during our teleconference on January 11, 1999, enclosed please find: 1) a copy of a revised spreadsheet of Appellant's estimated back pay from February 11, 1996 through March 1999; and 2) Respondent's brief in response to appellant's assertions regarding mitigation of damages and the exclusion of post-termination wages.

Sincerely,

P.J. Boylan

P.J. Boylan
Senior University Legal Counsel

Encl.

c: Paul Erickson, Esq. (w/encl.)
Phillip Clark (w/encl.)
Donald Melkus (w/encl.)

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H:\123R23\PERSONEL\BRENON2.WK4

Estimated Back Pay (revised 1/21/99)
Brenon 2/11/96 to 3/27/99

A	B	C	D	E	E2	2	F	G	H	I	J	K	K2
Quarters	Hours	Base Hourly	B * C	7.95 % OF	Other	Fn	D+E+E2	Fringe	Total	Accum Total	Int 12%	Accum Int	Fn
1st Quarter 1996 2/11/96 - 3/16/96	200	$19.584	$3,916.80	$311.39			$4,228.19		$4,228.19	$4,228.19	$48.20	$48.20	(3)
2nd Quarter 1996 3/17/96 - 6/8/96	480	$19.584	$9,400.32	$747.33	$200.00	(1)	$10,347.65	$330.96	$10,678.61	$14,906.79	$447.20	$495.41	
3rd Quarter 1996 6/9/96 - 7/6/96	160	$19.584	$3,133.44	$249.11			$3,382.55	$330.96	$3,713.51	$18,620.30		$495.41	
3rd Quarter 1996 7/7/96 - 9/14/96	400	$19.829	$7,931.60	$630.56	$45.94	(2)	$8,608.10	$165.48	$8,773.58	$27,393.88	$821.82	$1,317.22	
Quarter 1996 9/15/96 - 12/7/96	480	$19.829	$9,517.92	$756.67			$10,274.59	$496.44	$10,771.03	$38,164.92	$1,144.95	$2,462.17	
Quarter 1997 12/8/96 - 3/15/97	560	$19.829	$11,104.24	$882.79			$11,987.03	$521.76	$12,508.79	$50,673.70	$1,520.21	$3,982.38	
2nd Quarter 1997 3/16/97 - 6/7/97	480	$19.829	$9,517.92	$756.67	$200.00	(1)	$10,474.59	$521.76	$10,996.35	$61,670.06	$1,850.10	$5,832.48	
3rd Quarter 1997 6/8/97 - 7/5/97	160	$19.829	$3,172.64	$252.22			$3,424.86	$173.92	$3,598.78	$65,268.84		$5,832.48	
3rd Quarter 1997 7/6/97 - 9/13/97	400	$20.424	$8,169.60	$649.48			$8,819.08	$347.84	$9,166.92	$74,435.77	$2,233.07	$8,065.55	
4th Quarter 1997 9/14/97 - 12/20/97	560	$20.424	$11,437.44	$909.28	$285.60	(2)	$12,632.32	$521.76	$13,154.08	$87,589.84	$2,627.70	$10,693.25	
1st Quarter 1998 12/21/97 - 3/14/98	480	$20.424	$9,803.52	$779.38			$10,582.90	$543.00	$11,125.90	$98,715.74	$2,961.47	$13,654.72	
2nd Quarter 1998 3/15/98 - 6/6/98	480	$20.424	$9,803.52	$779.38	$200.00	(1)	$10,782.90	$543.00	$11,325.90	$110,041.64	$3,301.25	$16,955.97	
3rd Quarter 1998 6/7/98 - 7/4/98	160	$20.424	$3,267.84	$259.79			$3,527.63	$181.00	$3,708.63	$113,750.28		$16,955.97	
3rd Quarter 1998 7/5/98 - 9/12/98	400	$21.037	$8,414.80	$668.98			$9,083.78	$362.00	$9,445.78	$123,196.05	$3,695.88	$20,651.85	
4th Quarter 1998 9/13/98 - 12/19/98	560	$21.037	$11,780.72	$936.57			$12,717.29	$572.70	$13,289.99	$136,486.04	$1,269.32	$21,921.17	(4)
1st Quarter 1999 12/20/98 - 3/13/99	480	$21.037	$10,097.76	$802.77			$10,900.53	$587.55	$11,488.08	$147,974.12	$1,376.16	$23,297.33	(5)
TOTALS.....	6,440	NA	$130,470.08	$10,372.37	$931.54	NA	$141,773.99	$6,200.13	$147,974.12	NA	$23,297.33	NA	

(1) Lump Sum Length of Service Pay

(2) Lump Sum Pay Plan Provision per DER negotiation

(3) 200/520=38% of a full quarter

(4) Oct A payment was for Primecare at $181/month, Nov A and Dec A payments were for Compcare at $195.85/month

Jan A payment was for Compcare @195.85/month and FebA and Mar A (still in 1 Quarter) will be at $195.85/month

RMU/TWL TOTAL PAY Calculation..... $171,271.45

GUTGLASS
ERICKSON
BONVILLE S.C.
LAW OFFICES

JAMES R. GUTGLASS
Court Commissioner
PAUL R. ERICKSON
KATHLEEN E. BONVILLE
Court Commissioner
MARK E. LARSON
COLLEEN M. FLEMING
SHARON R. LONG
SUSAN VAN SCHAIK
PETER W. McCOMBS

January 22, 1999

Commissioner Donald R. Murphy
Wisconsin Personnel Commission
131 West Wilson Street
10th Floor, Suite 1004
Madison, WI 53702

Re: Brenon vs. UW-Milwaukee
Case No.: 96-0016-PC
Our File: 796.01

Dear Commissioner Murphy:

I am in receipt of Ms. Boylan's unauthorized January 15, 1999 letter brief. As I recall our status conference you authorized Ms. Boylan to submit a brief on the issue whether or not Sergeant Brenon's part-time work can be used as an offset by UWM against back pay. As I previously indicated, Sergeant Brenon did not have an exclusive agreement with UWM. There is no evidence that Sergeant Brenon could not have made this part-time income even had he remained employed, as he should have, at UWM.

As I indicated at the status conference, Attorney Boylan stipulated to the procedure for calculation of back pay in this matter. In return for Sergeant Brenon's agreement to expedite a response to interrogatories and a document request as well as an agreement to voluntarily submit to a deposition, Ms. Boylan was to provide the commission with a calculation of back pay as of September 15. She <u>secretly</u> and <u>unlawfully</u> obtained my client's bank records by way of a subpoena that was returnable on September 10th, five days before the calculations were due. Ms. Boylan's September 15th submission makes no mention whatsoever to deposits made by my client to his bank account.

Moreover, Attorney Boylan now misrepresents the state of discovery in this matter. As you can see from page 54 of Sergeant Brenon's deposition he has attested to the truth and accuracy of the responses to interrogatories as required by Chapter 804. In fact, this attestation was made in the deposition transcript while

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under oath and subject to penalties of perjury. Further, Attorney Boylan represented to you during the status conference that my client had received no gifts nor loans during the relevant time period. You can see from page 46 of Sergeant Brenon's deposition that he specifically did take loans against credit cards. At no time were questions asked regarding Sergeant Brenon receiving gifts.

With respect to barter, at page 32 line 20 Sergeant Brenon attempted to put the barter question into a comprehensible form and answered that question on page 33 line 13 that he did not perform services in exchange for anyone else performing services. At page 34 line 7 Sergeant Brenon testified that he did not receive any products in return for services he performed. As appellant pointed out in it's response to UWM's calculations, it was anticipated that UWM would attempt to sandbag appellant by withholding arguments relating to mitigation until it's rebuttal submission. We anticipated this and moved to strike any such attempt in advance. In fact, that is exactly what UWM did and now is attempting to benefit by obtaining further delay in my client's reinstatement by suggesting a further hearing is necessary.

Respondent stipulated to the procedure relative to calculation of back pay. Respondent received all required discovery. UWM violated Wisconsin Statute section 805.07 by unilaterally subpoenaing my client's confidential financial information. UWM misrepresented that Sergeant Brenon consented to such a procedure. Nowhere in his deposition will you see Sergeant Brenon's consent to release of his bank records. Moreover, Section 805.07, Wis.Stat clearly indicates that notice must be provided Sergeant Brenon under these circumstances. Appellant makes a silly argument that only the bank can object to the subpoena process. Obviously, if appellant were to subpoena Ms. Boylan's private medical records she would have a stake in such information being disclosed publicly and would have a right to notice and a right to intervene. According to UWM's argument Ms. Boylan would be at the whimsy of the medical profession as to whether or not such records would be disclosed.

More importantly, UWM misrepresents the facts in this case. Sergeant Brenon disclosed that he borrowed money against his credit cards. Attorney Boylan failed to ask how much was borrowed on his credit cards. After illegally obtaining bank records Ms. Boylan now suggests that the deposits imply that my client has not made full disclosure. It is not Sergeant Brenon's fault that Ms. Boylan

failed to identify the amounts of loans obtained against his credit cards to match against any deposits my client may have made. Such a failure on Attorney Boylan's part is not an appropriate basis to relieve UWM from its stipulation to the back pay calculation procedure agreed to in August of 1998.

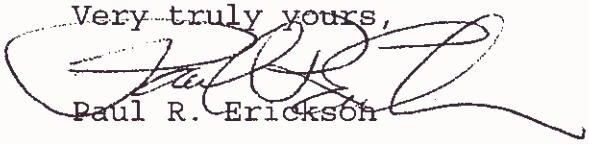
Attorney Boylan also argues about the UW Credit Union. The very testimony cited to by UWM on this issue indicates that Sergeant Brenon has turned over information to Attorney Boylan regarding the Credit Union. Presumably Attorney Boylan served the same sort of unlawful subpoena on the UW Credit Union that she did on Norwest and, therefore, knows the Credit Union information. Obviously, if there was any disparity we would have heard about it by now.

Justice delayed is justice denied. UWM has run out of excuses for delaying this process any further. We need a final order so that my client can be reinstated as he should have been years ago. It is the interim nature of this matter that has precluded my client from obtaining meaningful employment because he fully intends to return to work at UWM. It is difficult for him to obtain a highly compensated position when he must disclose that he has been reinstated but for technical reasons has not been able to return to the job that he worked at for over twenty four years.

As we have indicated previously, UWM stipulated to the back pay calculation procedure. Moreover, the entire mitigation argument was waived in UWM's initial submission regarding back pay. It is not appropriate to first enter in evidence of mitigation in rebuttal. We renew our motion to strike any of that evidence as procedurally improper. With respect to the illegally obtained bank records we also have moved to strike that information.

This is a very simple back pay calculation. My client has informed me that he is waiting for one last W-2 and I will forward that to you as soon as possible.

Very truly yours,

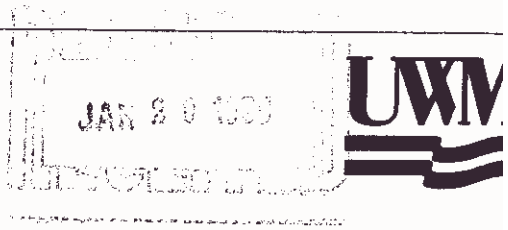


Paul R. Erickson

PRE/jmp
cc: Ms. P.J. Boylan
Sgt. Dale Brenon

UNIVERSITY OF WISCONSIN MILWAUKEE

Office of Legal Affairs



January 15, 1999

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY
Commissioner Donald R. Murphy
Personnel Commission
131 West Wilson Street
Suite 1004
Madison, Wisconsin 53703

RE: *Brenon v. UW-Milwaukee*
Case No. 96-0016-PC

Dear Commissioner Murphy:

As you requested during our teleconference on January 11, 1999, enclosed please find a copy of a deposition Respondent took of Appellant on August 28, 1998.

After your review of the deposition we hope you will conclude, as we have, that a hearing is imperative in this case because issues of material fact exist regarding wages earned from other sources. The following points demonstrate the factual incongruities that must be resolved at hearing.

•APPELLANT REFUSED TO COMPLY WITH DISCOVERY REQUIREMENTS.

a) Respondent requested financial account information from Appellant, including names of institutions and copies of financial records. (Interrogatory #8, Request for Production of Documents #8 - 7/24/98) Appellant initially responded that he had a checking account at Norwest but supplied no financial records. At his deposition Appellant supplemented his answer, admitting that he has an account at the UW Credit Union. (Page 47: 14-23) At his deposition, Appellant admitted he receives monthly financial statements from Norwest but still refused to provide them. (Page 49:7-17)

b) Appellant refused to sign his answers to discovery requests, as required by law.

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FAX 414 229-3919

•APPELLANT REFUSED TO PROVIDE COMPLETE ANSWERS DURING HIS DEPOSITION

a) Appellant refused to answer questions completely during his deposition about whether he bartered his services in exchange for services. (Pages 31-34)

•APPELLANT MISREPRESENTED HIS INCOME

a) Appellant stated at his deposition that all of his income was reported on his tax returns, which revealed relatively low amounts of income. (Page 30: 17-20; 37: 14-18) Yet, Respondent's subpoena of Appellant's bank records revealed that Appellant made approximately $80,000 in deposits from February 1996 through August 1998. (See page 46:7-12 which shows that Appellant did not take out loans during the period in question).

Respondent reasserts that its subpoena of Appellant's bank records was procedurally correct; Respondent had no duty to notify Appellant of the subpoena. In addition to the arguments Respondent has already made on this point (see Respondent's 10/12/98 submission), Respondent would like to point out that §6.56 of the Wisconsin State Bar's *Wisconsin Discovery Law and Practice* suggests that an objection to a subpoena to a non-party is made by the non-party. (A subpoena "requiring production of material may be considered unreasonable [if the time given to produce is inadequate]. The subpoena should be served in time for the witness to arrange his or her affairs and to assemble the specified documents.") (Chapter 6, page 50) Moreover, Appellant has cited no authority to support his allegation that the subpoena was improper.

In summary, Appellant's answers regarding back pay do not add up. It is interesting that Appellant vociferously objects to a hearing while not offering up any explanation for his violations of discovery obligations or any explanation of the source of the $80,000. A hearing is necessary for Appellant to explain his actions and provide information Respondent requested during the discovery process that was not provided. The income discrepancy is a material issue of fact needed to accurately determine back pay obligations on the part of the State of Wisconsin.

Sincerely,

P.J. Boylan
Senior University Legal Counsel

Encl.

c: Paul Erickson, Esq. (w/out encl.)
Phillip Clark (w/out encl.)
Donald Melkus (w/out encl.)

796.01

STATE OF WISCONSIN **PERSONNEL COMMISSION**

DALE R. BRENON,

Appellant,

v. Case No. 96-0016-PC

PRESIDENT, UNIVERSITY OF WISCONSIN-SYSTEM,

Respondent.

APPELLANT'S REPLY

The appellant, DALE R. BRENON, by his attorneys, Gutglass, Erickson & Bonville, S.C., respectfully submits this brief in reply to respondent's response to appellant's motion to strike. For the following reasons, appellant's motion to strike must be granted and sanctions imposed upon the respondent.

Respondent was required to submit to the Personnel Commission its calculation of appellant's back pay with its supporting documentation on September 15, 1998. Appellant's response to respondent's back pay calculation was submitted to the Personnel Commission on September 18, 1998. It was not until respondent's reply dated September 24, 1998 that respondent provided "evidence" to support its position. Respondent intentionally chose not to disclose its "evidence" until after appellant's opportunity to

address such information had passed. These ambush tactics are at best a waiver of respondent's mitigation claim.

Respondent would have this Commission overlook their concealed evidence by having the evidence classified as "rebuttal" evidence. Respondent ignores the plain meaning of rebuttal evidence. Rebuttal evidence is defined as:

> Evidence given to explain, repel counteract, or disprove facts given in evidence by the opposing party. That which tends to explain or contradict or disprove evidence offered by the adverse party. Black's Law Dictionary, Abridged Sixth Edition, 1991.

Moreover, the Wisconsin Court of Appeals has held that rebuttal evidence is only appropriate where new matters or new facts have been injected. "Rebuttal is appropriate only when the defense injects a new matter or new facts." Pophal v. Siverhus, 168 Wis. 2d 533, 484 N.W.2d 555, 563 (Ct. App. 1992). Appellant did not inject any new matters or facts in his response to the respondent's calculation of back pay. Therefore, respondent's classification of this new evidence as rebuttal is inappropriate and the evidence must be struck.

Respondent's conduct in this matter is grossly inappropriate. By its own admission, respondent unilaterally subpoenaed appellant's bank records without prior notification to the appellant. On September 3, 1998, respondent subpoenaed appellant's bank records requiring production by September 10, 1998. (Exhibit A, pp. 2-3). Appellant was not notified of the subpoena until he received respondent's reply dated September 24, 1998. Respondent first provided appellant's counsel with a copy of the subpoena on

September 30, 1998, twenty-seven days after its issuance and twenty days after the documentation was produced. (Exhibit A, p. 1). In the cover letter in which respondent finally provided appellant's counsel with a copy of the subpoena, respondent misrepresents that consent was given by appellant to provide the documents listed in the subpoena. (Exhibit A, pp. 1, 4).

Respondent's actions violate appellant's Constitutional rights to due process and protection from invasion of privacy. As this Commission is well aware, this is not the first time the respondent has trampled on the appellant's Constitutional rights.

In addition, respondent's actions are in violation of the rules of this Commission as well as the Wisconsin Statutes. Wisconsin Administrative Code, §PC 4.05(2) states:

> Subpoenas . . . requiring the production of material may be issued by a commissioner or the hearing examiner at the request of a party or on the commission's own motion, or may be issued by an attorney of record in a commission proceeding the same manner as provided in s. 805.07, Stats.

Wis. Stat. §805.07(2)(b) states:

> Notice of a third-party subpoena issued for discovery purposes **shall be provided to all parties <u>at least 10 days before the scheduled deposition</u> in order to preserve their right to object.** (Emphasis added.)

There is no doubt that the respondent violated the rules of this Commission as well as the Wisconsin Statutes by failing to provide appellant or his counsel with a copy of the subpoena at least ten days prior to production of the documents. Instead, it chose to provide the copy twenty days after the fact.

Respondent's actions are in blatant disregard of the appellant's rights, as is exhibited by its pattern and practice of continued violations of his Constitutional and statutory rights, let alone its continued disrespect for the authority of this Commission. Respondent's actions were willful and intentional as evidenced by its reference in its subpoena to the very statute and code that it violated.

Moreover, respondent deliberately withheld this information until such a time when appellant would be prejudiced. Respondent was in possession of the information requested in the subpoena five days prior to its submission to the Commission on September 15, 1998. Respondent made the conscious decision to withhold this information until after the appellant filed his objections with the Commission.

This Commission should not and must not tolerate respondent's actions in this matter. Consequently, appellant's motion to strike must be granted and this Commission should impose appropriate sanctions against the respondent. Appropriate sanctions are:

a. Striking respondent's reply brief;

b. Striking respondent's mitigation claim; and

c. Attorney's fees.

Respondent hoped that by submitting the bank deposit information and asking the Commission to speculate where deposited money came from, the burden of proof it has on mitigation has been satisfied. No admissible evidence has been provided to the Commission that appellant has earned any money he would not have earned if his employment at UW-M had not been unlawfully terminated. Whether

"rebuttal" or otherwise this Commission has received no competent evidence at all.

Dated at Milwaukee, Wisconsin this 6th day of October, 1998.

GUTGLASS, ERICKSON & BONVILLE, S.C.

Paul R. Erickson (#1003920)
Sharon R. Long (#1020977)
Attorneys for Appellant

P.O. ADDRESS:
735 North Water Street
Suite 1400
Milwaukee, WI 53202
Phone: (414) 273-1144

UNIVERSITY OF WISCONSIN MILWAUKEE

Office of Legal Affairs

September 30 , 1998

VIA FAX (414) 273-3821
Paul Erickson, Esq.
Gutglass, Erickson and Bonville
735 North Water Street
Suite 1400
Milwaukee, WI 53202-4267

RE: *Mr. Brenon's Norwest records*

Dear Mr. Erickson:

Enclosed please find a copy of UWM's subpoena to Norwest Bank for the above-referenced records. Also enclosed please find a copy of a page from Mr. Brenon's August 28, 1998 deposition. Please note page 49: 17 , where Mr. Brenon stated that he does not keep copies of said records but granted permission for access to said records.

Sincerely,

P.J. Boylan, Director
Legal Affairs

Mitchell Hall • PO Box 413 • Milwaukee, WI 53201
http://www.uwm.edu/Dept/LEGAL
414 229-4278
FAX 414 229-3919

EXHIBIT A p.1

STATE OF WISCONSIN PERSONNEL COMMISSION

DALE R. BRENON,

Appellant,

v. Case No. 96-0016-PC

UNIVERSITY OF WISCONSIN-MILWAUKEE,

Respondent.

SUBPOENA DUCES TECUM

TO: Norwest Bank
c/o Attorney Courtney Davidson
4015 North Oakland Avenue
Milwaukee, WI 53211

Pursuant to §805.07 of the Wisconsin Statutes and §PC 4.05(2) of the Wisconsin Administrative Code, you are hereby commanded to provide the following materials to the attorney for the University of Wisconsin-Milwaukee at 3203 North Downer Avenue, Mitchell Hall Room 239, Milwaukee, Wisconsin, 53211, by Thursday, September 10, 1998.

1. Statements for any and all Norwest Bank accounts held, jointly, solely or otherwise, by Dale R. Brenon for the period of February 12, 1996 through the present. Information that may help to identify accounts held by Mr. Brenon is listed below.

Code on check #2128 issued by Mr. Brenon on 2/23/96:
075911988|: 0020106892||' 2128

Address: 8250 North 46th Street, Apt. 122, Brown Deer, Wisconsin 53223-3748

Social Security Number: 399-58-7465

Failure to comply may result in punishment for contempt which may include monetary penalties, imprisonment and other sanctions.

Issued at Milwaukee, Wisconsin, this 3rd day of September, 1998.

Respectfully submitted,

UNIVERSITY OF WISCONSIN-MILWAUKEE

By:_____
P. J. Boylan (State Bar No. 1003899)

ATTORNEY FOR RESPONDENT

MAILING ADDRESS:
Office of Legal Affairs
Mitchell Hall Room 239
Post Office Box 413
Milwaukee, Wisconsin 53201-0413
(414) 229-4278

Page 49

1 Q Do you record your deposits in that checkbook?
2 A I record the deposits in the checkbook.
3 Q That would be within the scope of the records
4 request. So I would ask you to produce a copy of
5 that.
6 A A copy of my checkbook?
7 Q Yes. February 11, 1996 to the present. And you
8 receive monthly bank statements from Norwest,
9 don't you?
10 A Yes.
11 Q You reconcile your statement with the checkbook,
12 right?
13 A I do.
14 Q You keep those statements, don't you?
15 A No.
16 Q You don't?
17 A They are available at the bank any time.
18 Q You are not married, right?
19 A I am single.
20 Q Okay. Do you have a father or mother living?
21 A My father died October of '97. My mother is
22 living.
23 Q Have you given them or loaned them any amounts of
24 money during 1996, '97 or '98?
25 MS. LONG: Objection. Relevancy.

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1 MS. BOYLAN: Go ahead and answer.
2 THE WITNESS: Have I loaned them
3 money?
4 BY MS. BOYLAN:
5 Q Or given.
6 A Counselor, as you can tell from my statements,
7 I'm in no position to loan anyone any money.
8 Q All it takes is a yes or no.
9 A The answer is no.
10 Q Fine. Thank you. Now, just so we have a totally
11 complete and accurate record, are there any other
12 wages or income, benefits, whether in terms of
13 payments or in lieu of payments, that you
14 received during 1996, '97 or '98 that we have not
15 discussed?
16 A None to the best of my memory that I can recall.
17 Everything I can recall you have.
18 Q And there are no other jobs that you applied for
19 or interviewed for that we have not discussed?
20 A That's not true. I told you earlier I sent out
21 other resumes that I don't have records of, and I
22 don't recall where to, but there was a total of
23 25 to 30 resumes. I can't recall all of the
24 places and didn't keep records on all the places
25 I sent them to.

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1 Q Well, I'm going to -- I'm done with my questions
2 right now, but I am going to reserve the right to
3 recall this witness because the interrogatories
4 and requests for production of documents were not
5 adequately responded to, and we may file a motion
6 to compel after I have finished reviewing it
7 all.
8 MS. LONG: Feel free to file your
9 motion if you feel it's necessary. All the
10 information that you have Mr. Brenon has?
11 MS. BOYLAN: The way these things were
12 responded to, the interrogatories and the request
13 for production of documents, it appeared it was
14 an attempt to obfuscate. They were not
15 responding to the questions. There were illegal
16 objections.
17 MS. LONG: Illegal objections?
18 MS. BOYLAN: Well, improper
19 objections, and we haven't fully analyzed those
20 yet.
21 Have you had your client sign the
22 interrogatories and request for production of
23 documents, the responses?
24 MS. LONG: I am not being deposed
25 right now, so -- I mean no, we did not. We got

Page 52

1 your fax. We haven't had a chance to rerun them
2 or anything. All the information won't change.
3 You can ask him right now if everything is --
4 MS. BOYLAN: We would like to have a
5 signed copy, and the law allows us to have a
6 signed copy.
7 MS. LONG: If you would like us to get
8 together the signed copy, we can. It's not going
9 to change anything in there. You can ask him if
10 everything is true and accurate to help the
11 process along. We have a very tight schedule.
12 MS. BOYLAN: I want signed copies.
13 MS. LONG: As long as it's not going
14 to delay anything, delay the schedule.
15 MS. BOYLAN: The only delay would be
16 caused by you not producing the signed copy in a
17 timely fashion.
18 MS. LONG: You have got all the
19 information. That's why I am telling you it's
20 not going to change the information. This is
21 minor and trivial.
22 MS. BOYLAN: It's not minor and
23 trivial. It's his oath.
24 MS. LONG: He's under oath right now,
25 so you can go ahead --

GUTGLASS
ERICKSON
BONVILLE S.C.
LAW OFFICES

JAMES R. GUTGLASS
Court Commissioner
PAUL R. ERICKSON
KATHLEEN E. BONVILLE
Court Commissioner
MARK E. LARSON
COLLEEN M. FLEMING
SHARON R. LONG

September 18, 1998

Commissioner Donald R. Murphy
Wisconsin Personnel Commission
131 West Wilson Street
10th Floor, Suite 1004
Madison, WI 53702

Re: Brenon vs. UW-Milwaukee
Case No.: 96-0016-PC
Our File: 796.01

Dear Commissioner Murphy:

This letter is in reply to the back pay calculation submitted by UWM. Obviously, appellant does not have access to some of the information submitted and, therefore, hourly rates and certain lump sum payments we must accept as fact. Additionally, the premium, differential pay factor of 7.95% is accepted since appellant does not have access to the actual historical data. We are assuming that "premium/differential" (which is never defined) refers to overtime and shift differential for Sgt. Brenon's working third shift.

Using the hourly rates, fringe benefits, seniority pay and premium/differential provided by UWM, appellant has calculated the back pay on the attached Exhibit A. The personnel records will show that appellant, as a bachelor, would work holidays at 150% of his hourly rate which would then additionally entitle him to 16 hours of holiday time off or wages in lieu of such time off. Further, accumulated sick leave and vacation time must be restored because of its long term effect. Vacation time can be "stored" as sabbatical time which is routinely used near time of retirement when wages are higher. Further, unused sick time is doubled at the time of retirement when wages are higher and is used to pay for health insurance subsequent to the retirement date. Therefore, no presumption should be made that vacation and sick time would be

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used.

UWM makes a bizarre argument regarding mitigation. As this Commission is well aware, appellant has expeditiously and in good faith pursued a timely reinstatement. Appellant has worked in extremely unfavorable settings to try and put food on the table and pay his rent. He has worked undercover as a private investigator. Appellant had no way of anticipating that this matter would take this long. Further, appellant had no reason to believe that UWM would fail to mitigate its damages by failing to reinstate him even after he won his case.

UWM suggests that jobs posted in a publication appellant does not receive since he is not in law enforcement are possible jobs for him. We have repeatedly argued that UWM's mitigation argument has no legal basis. UWM unconstitutionally deprived Sgt. Brenon of work and should not now be allowed to make speculative arguments about mitigation. Even assuming there is a basis for such argument it is UWM's burden to prove, to a reasonable certainty, that Sgt. Brenon would have been hired and earned the wages argued. All materials supporting UWM's position on back pay were to be submitted by September 15, 1998. Despite harassing appellant with burdensome interrogatories and document requests and subjecting Sgt. Brenon to a lengthy deposition, no evidentiary materials were provided to the Commission to support UWM's mitigation argument. UWM failed to even provide Sgt. Brenon's actual earnings. Therefor, any such argument is waived or must be denied for failure to produce a shred of evidence. Further, appellant objects to UWM attempting to cure this obvious deficiency in reply to this letter because that would preclude appellant from responding. In advance appellant hereby moves to strike any such attempt to supplement the record.

Attached is a letter from Milwaukee County regarding Sgt Brenon's attempt at employment. As you can plainly see, UWM has made Sgt. Brenon unemployable in his chosen field. Critical to employment in law enforcement is the "back ground check". It is ludicrous to suggest that UWM would have provided positive information during a back ground inquiry. More importantly, most hiring entities take the position of Milwaukee County and refuse to even process an application of an individual terminated for cause

from a civil service position. Enclosed as Exhibit B is the correspondence relating to a job with the Milwaukee County Sheriff's department where it is plainly indicated that Sgt. Brenon would not be considered until there is a final order overturning UWM's termination.[1]

This Commission, which despite a finding that appellant's constitutional rights were violated, has already denied all or even any part of appellant's costs of his appeal. This cost exceeds $50,00 which is roughly what the UWM gross pay calculation will net to appellant. The Commission's failure to award costs previously is certain to chill employee's seeking redress through the personnel commission. Failure to award full back pay (as calculated on the attached Ex. A) will certainly tell employees that the personnel commission is not going to provide a forum for a fair hearing on legitimate grievances.

Exhibit A is appellant's calculation of back pay by quarter. UWM's calculations fail to use a 2080 hour (40hr x 52wks) work year. Exhibit A uses quarters commencing with the first day Sgt. Brenon was not paid through October 10,1998. Since the hourly rate changed in the second quarter there is an entry (2Q**A) for the hours worked prior to the increase and an entry (2Q**B) for the remaining hours of the quarter at the new rate. Fringe benefits are calculated using the amounts submitted by UWM, however, since the amounts changed at calendar year end, adjustments were made in the fourth quarter to reflect 1/3rd at the old figure and 2/3 at the new figure. This roughly corresponds to the dates of the fourth quarter appellant is using. The "total" in column H is a quarterly total. The amounts in column J are quarterly interest figures. The figures in column I are a running total of the accumulating back pay upon which interest (column J) is calculated. Column J is determined by multiplying the amount in column I by 12% and then dividing that result by four. Column K is a running total of column J. Column D includes the lump sum payments (length of service and grid) in the quarter corresponding to the dates of payment used by UWM. It should be noted that there was no grid

---

[1] In response to UWM's interrogatories and document request the documents in Exhibit B were enclosed

payment noted by UWM for 1998.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Paul R. Erickson

PRE/jmp
Encls.

cc: Ms. P.J. Boylan (w/enclosures)
Sgt. Dale R. Brenon (w/enclosures)

Exhibit A

A	B	C	D	E	F	G	H	I	J	K
Qtr/Yr	Hours	Base Hourly	B * C	7.95% of D	D + E	Fringe	Total	Accum Total	Int 12%	Accum Int
1Q 96	520	19.584	$10,183.68	$809.60	$10,993.28	$496.44	$11,489.72	$11,489.72	$344.69	$344.69
2Q 96-a	333	19.584	$6,721.47	$534.36	$7,255.83	$297.86	$7,553.69	$19,043.41		
2Q 96-b	187	19.829	$3,753.96	$298.44	$4,052.40	$198.58	$4,250.98	$23,294.39	$698.83	$1,043.52
3Q 96	520	19.829	$10,311.08	$819.73	$11,130.81	$496.44	$11,627.25	$34,921.65	$1,047.65	$2,091.17
4Q 96	520	19.829	$10,311.08	$819.73	$11,130.81	$513.32	$11,644.13	$46,565.78	$1,396.97	$3,488.15
1Q 97	520	19.829	$10,311.08	$819.73	$11,130.81	$521.76	$11,652.57	$58,218.35	$1,746.55	$5,234.70
2Q 97-a	333	19.829	$6,803.06	$540.84	$7,343.90	$313.06	$7,656.96	$65,875.31		
2Q 97-b	187	20.424	$3,819.29	$303.63	$4,122.92	$208.70	$4,331.62	$70,206.93	$2,106.21	$7,340.90
3Q 97	520	20.424	$10,906.48	$867.07	$11,773.55	$521.76	$12,295.31	$82,502.23	$2,475.07	$9,815.97
4Q 97	520	20.424	$10,620.48	$844.33	$11,464.81	$535.92	$12,000.73	$94,502.96	$2,835.09	$12,651.06
1Q 98	520	20.424	$10,620.48	$844.33	$11,464.81	$535.92	$12,000.73	$106,503.69	$3,195.11	$15,846.17
2Q 98-a	333	20.424	$7,001.19	$556.59	$7,557.79	$321.56	$7,879.35	$114,383.04		
2Q 98-b	187	21.037	$3,933.92	$312.75	$4,246.67	$214.36	$4,461.03	$118,844.06	$3,565.32	$19,411.49
3Q 98	520	21.037	$10,939.24	$869.67	$11,808.91	$535.92	$12,344.83	$131,188.89	$3,935.67	$23,347.16

Total Back Pay $131,188.89 + $23,347.16 = **$154,536.05**

1Q96=2/11/96-5/10/96
2Q96=5/11/96-8/10/96
3Q96=8/11/96-11/10/96
4Q96=11/11/96-2/10/97
1Q97=2/11/97-5/10/97
2Q97=5/11/97-8/10/97
3Q97=8/11/97-11/10/97
4Q97=11/11/97-2/10/98
1Q98=2/11/98-5/10/98
2Q98=5/11/98-8/10/98
3Q98=8/11/98-10/10/98

DEPARTMENT OF HUMAN RESOURCES

Milwaukee County

GARY J. DOBBERT • DIRECTOR
JOHN H. GIVENS, III • DEPUTY DIRECTOR

JAC R. AMERELL
Retirement
CYNTHIA A. BARNES
Policy Procedures
JAMES M. EGGERS
Compensation
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Information Systems
JERTHA RAMOS
Employment & Staffing
RONALD A. STANNY
Recruitment
PATRICIA A. VILLARREAL
Employment Relations
JOHN S. WOJTECKI
Budget

July 22, 1997

Dale R. Brenon
8250 N. 46th Street, Apt. 122
Milwaukee, WI 53223-3746

Dear Mr. Brenon:

We have received your application for the position of Investigator (Hourly). Milwaukee County Civil Service Rule II Section 7(1) provides that the Director of Human Resources may refuse to examine an applicant who:

(d) has been dismissed for good cause from the public service.

We are refusing to examine you because you were terminated for cause from the University of Wisconsin-Milwaukee.

You are also informed that in accordance with Commission Rule II, Section 7(2), you may, by petition to be filed within ten calendar days from the date of this notice, submit a written statement of the facts involved and ask for appropriate action by the Civil Service Commission. If you choose this appeal procedure, the Commission will investigate your position and enter into its minutes a finding thereon. If any further information is needed in order for the Commission to make an appropriate finding, you may be given an opportunity to supply such information orally or in writing.

Any appeal should be addressed to:
John H. Givens, Secretary
Milwaukee County Civil Service Commission
Courthouse, Room 210
901 North 9th Street
Milwaukee, WI 53233

Sincerely,

Gary J. Dobbert
Director of Human Resources

CC: Civil Service Commission, Certification, J. Givens, J. Ramos, S. Mathews

COURTHOUSE, ROOM 210 • 901 N. 9TH ST. • MILWAUKEE, WI 53233 • TELEPHONE (414) 278-4143 • FAX (414) 223-1379

Wednesday, July 30, 1997

COPY

John H. Givens, Secretary
Milwaukee County Civil Service Commission
Courthouse, Room 210
901 North 9th Street
Milwaukee, WI 53233

Secretary Givens:

I am in receipt of correspondence, dated July 22, 1997, from the Milwaukee County Department of Human Resources. This letter was signed by the Director, Gary J. Dobbert, and copies of same were noted as: "CC: Civil Service Commission, Certification, J. Givens, J. Ramos, S. Mathews".

The letter was to advise me that my application for the position of Investigator (Hourly) was rejected and that, pursuant to Milwaukee County Civil Service Rule II Section 7(1)(d),: "We are refusing to examine you because you were terminated for cause from the University of Wisconsin-Milwaukee."

This response to that letter is to comply with the directions contained therein as to an appeal procedure and petitioning for re-consideration by the Civil Service Commission. Therefore, via this reply, I am formally requesting that the decision to refuse to consider me for the position of Investigator (Hourly) be re-considered.

The application process did not allow for any further information to be relayed regarding my termination from the University Police Department at the University of Wisconsin-Milwaukee. Because the details of that personnel action are very pertinent to your re-consideration of my application for employment, I offer a brief synopsis of some of those important issues:

-That termination remains on appeal with the State of Wisconsin Personnel Commission. A thorough (3-Day) hearing was conducted by Commissioner Donald R. Murphy in early August of 1996.
His rulings and decision were due in early February of 1997. Same are, as of this writing, still pending.

-As a result of my complaint, the Federal Equal Employment Opportunity Commission is conducting an independent investigation of my termination.

As is very evident from the information I detailed within my application, I am very qualified for your advertised position of Investigator (Hourly) and would bring a wealth of experience and knowledge to my employment in that position.

I appreciate the Civil Service Commission's time and effort involved in this appeal procedure.

Sincerely,

Dale R. Brenon

Dale R. Brenon
8250 N. 46th St., Apt.#122
Brown Deer, WI 53223-3746
Phone: (414)354-4536

CC: Atty.'s Paul R. Erickson , Sharon R. Long

CIVIL SERVICE COMMISSION

Milwaukee County

CORRESPONDENCE TO:
John H. Givens III, *Secretary*
Courthouse - Room 210
901 North 9th Street
Milwaukee, Wisconsin 53233
(414) 278-4359

October 13, 1997

Dale R. Brenon
8250 N. 46th Street #122
Brown Deer, WI 53223-3746

Dear Mr. Brenon:

This letter will confirm that at its meeting on October 9, 1997, the Civil Service Commission, by a vote of 5-0, referred your issue back to the Director of Human Resources. You are to provide the Director with documentation of satisfactory settlement of your appeal against the University of Wisconsin-Milwaukee. At that time the Director will take appropriate action to dispose of this matter.

Sincerely,

John H. Givens, III
Secretary to the Commission

JHG/pal

cc: Certification, J. Ramos-Colon, G. Dobbert, S. Mathews,

Received Sat. 10/18/97

UNIVERSITY OF WISCONSIN MILWAUKEE

Office of Legal Affairs

RECEIVED
SEP 16 1998
UWM

September 15, 1998

VIA BADGER BUS DELIVERY SERVICE
Commissioner Donald R. Murphy
Personnel Commission
131 West Wilson Street
Suite 1004
Madison, Wisconsin 53703

RE: *Brenon v. UW-Milwaukee*
Case No. 96-0016-PC

Dear Commissioner Murphy:

This letter constitutes Respondent's calculation of Appellant's remedy for back pay and related fringe benefits for the period of February 11, 1996 through the present. Pursuant to Personnel Commission procedure, the back pay and interest calculations were computed on a calendar quarterly basis. See, Hollinger v. UW Milwaukee (Wis. PC 7/11/86).

The Appellant would have earned $114,628.54 in gross pay for the period in question; his earnings are listed below by quarter. For exact calculations of the back pay amount, please see Exhibit 1.

It has been long held in Wisconsin law that an injured party in an employment situation must make reasonable efforts to mitigate damages. See Klug v. Flambeau Plastics Corp., 62 Wis.2d 141, 155, 214 N.W.2d 281(1974) (requiring that the injured party in an employment situation "must make reasonable efforts to mitigate damages"); Gauf v. Milwaukee Athletic Club, 151 Wis. 333, 335, 139 N.W.207 (1912) (damages in a wrongful discharge case are "subject to mitigation by the amount the employee earn[s], or might by the exercise of reasonable diligence [earn]); Marten Transport v. DILHR, 171 Wis.2d 147, 155, 491 N.W.2d 96, (Ct. App. 1992); Hale v. Stoughton Hospital Ass'n Inc. 126 Wis.2d 267, 279, 376 N.W.2d 89 (Ct. App. 1985).

Respondent asserts that Appellant did not do enough to mitigate his damages. He applied for jobs that were not necessarily matched to his skills and background. Please see Exhibits 2 and 3: Respondent's First Set of Interrogatories to Appellant and Appellant's answers thereto (Exhibit 2) and Respondent's First Request for Production of Documents, Appellant's answers thereto and Appellant's Exhibit A to said answers (Exhibit 3). Please note that Appellant has not

Mitchell Hall • PO Box 413 • Milwaukee, WI 53201
http://www.uwm.edu/Dept/LEGAL
414 229-427
FAX 414 229-391

signed Exhibits 2 and 3 despite the fact that his signature on such documents is mandated by law and Respondent has requested him to do so. Respondent requests that the Commission compel Appellant to sign these documents. Appellant also applied for a minimal number of positions. Please see Exhibit 4, an excerpt from an August 28, 1998 deposition of Mr. Brenon in which he admits that he sent a total of 25 to 30 resumes in his job search, which spanned approximately 30 months. (Exhibit 4; p. 50, 20-25)

It is clear that Appellant did not make reasonable or good faith efforts to mitigate his damages. This is reinforced by the fact that Respondent found 40 jobs that are equal or better to Appellant's University position in pay and/or rank that were available during the period in question. Accordingly, Respondent made its own estimates about mitigated damages.[1]

The mitigation described below is based upon Exhibit 5, which shows a sampling of appropriate law enforcement jobs available to Appellant during the period in question yielded an average annual salary of $39,997 plus benefits. The specific jobs upon which the $39,997 figure was determined were posted in the February 1996 through August 1998 monthly editions of the Wisconsin Department of Justice Law Enforcement Bulletin. (Copies attached as Exhibit 6) Specifically, Exhibit 5 shows 40 jobs that were listed in said bulletin that are equal or better to Appellant's University position in pay and/or rank and Appellant meets the qualifications for all 40 jobs. Please note that there are numerous additional positions listed in said bulletins that Appellant could have obtained that are not included in the chart contained in Exhibit 5. Some of these positions did not list a salary while others paid almost as much as Appellant's University position and would have paid more after a few years. Respondent reserves the right to discuss mitigation of jobs other than those listed in the chart within Exhibit 5 in the future.

1st Quarter 1996

UWM Earnings[2]	4,228.19
Benefits[3]	
Health Insurance	0
Total Gross Back Pay and Benefits	4,228.19

Less Offsets:

[1] Respondent's estimates of damages do not take into account Appellant's admitted earnings for the period in question as they are less than Respondent's estimate of Appellant's potential earnings. Respondent has knowledge of Appellant's admitted earnings from discovery, including Mr. Brenon's 1996 tax return, 1997 amended tax return, June 12, 1998 pay stub from Alpha Omega Corporation (the last one issued to Appellant by Alpha Omega due to his resignation from Alpha Omega) and Appellant's August 31, 1998 pay stub from ISI Investigations (the most recent pay stub from ISI Investigations that Respondent received). Respondent reserves the right to alter its calculation of back pay based on the above-referenced information as well as any information Respondent receives from discovery concerning Appellant's income and earnings during the period in question, including any updates Appellant provides to Respondent in the future.

[2] All "UWM earnings" figures are derived from Exhibit 1.

[3] All "Benefits" figures are derived from Exhibit 6. Exhibit 6 indicates that the Appellant only paid the employee's share which he would have paid if he had been employed at UWM. Therefore, there is no differential for life insurance.

Mitigation		
Earnings	9,999.25	(39,997 divided by four quarters)
Total Mitigation:	9,999.25	
Net in favor of Appellant:	0	
Total 1st quarter 1996:	0	

2nd Quarter 1996

UWM earnings	10,347.65	
Health insurance	330.96	(2 months @ $165.48/month)
Total Gross Back Pay and Benefits	10,678.61	
Less offsets:		
Mitigation		
Earnings	9,999.25	
Insurance	330.96[4]	
Total Mitigation:	10,330.21	
Net in favor of Appellant:	348.40	
Interest on 348.40:	94.07	(348.40 * 12% * 2.25 years)
Total 2nd quarter 1996	442.47	

3rd Quarter 1996

UWM earnings	11,990.65	
Health insurance	496.44	(3 months @ $165.48/month
Total Gross Back Pay and Benefits	12,487.09	
Less offsets:		
Mitigation		
Earnings	9,999.25	
Insurance	496.44	

[4] Since all of the jobs listed in the chart in Exhibit 4 included benefits similar to those offered by the University, Respondent figured that Appellant would not have lost any money on health insurance and has supplied the same figure for health insurance as Appellant paid for from the University.

Total Mitigation:	10,495.69	
Net in favor of Appellant:	1,991.40	
Interest on net	477.94	(1991.4 * 12% *2.0 years)
Total 3rd quarter 1996	2,469.34	

<u>4th Quarter 1996</u>

UWM earnings	10,274.59	
Health insurance	496.44	(3 months @ $165.48/month)
Total Gross Back Pay and Benefits:	10,771.03	
Less offsets:		
Mitigation		
Earnings:	9,999.25	
Health insurance	496.44	
Total Mitigation:	1,0495.69	
Net in favor of Appellant:	275.34	
Interest on net:	57.82	(275.34 * 12% *1.75 years)
Total 4th quarter 1996	308.16	

<u>1st Quarter 1997</u>

UWM earnings	11,987.03	
Health insurance	521.76	(3 months @ $173.92/month)
Total back pay and benefits:	12,508.79	
Less offsets:		
Mitigation		
Earnings	9,999.25	
Health insurance	521.76	
Total mitigation:	10,521.01	
Net in favor of Appellant:	1,987.78	
Interest on Net	357.80	(1987.78 * 12% * 1.5 years)
Total 1st quarter 1997	2,345.58	

2nd Quarter 1997

UWM earnings	10,474.59	
Health insurance	521.76	(3 months @ $173.92/month)
Total back pay and benefits	10,996.35	
Less offsets:		
Mitigation		
Earnings	9,999.25	
Health insurance	521.76	
Total mitigation	10,521.01	
Net in favor of Appellant:	475.34	
Interest on net:	71.30	(475.34 * 12% * 1.25 years)
Total 2nd quarter 1997	546.64	

3rd Quarter 1997

UWM earnings	12,243.95	
Health insurance	521.76	(3 months @ $173.92/month)
Total back pay and benefits	12,765.71	
Less offsets:		
Mitigation		
Earnings	9,999.25	
Health insurance	521.76	
Total mitigation	10,521.01	
Net in favor of appellant:	2,244.70	
Interest on Net:	269.36	(2244.70 * 12% * 1 year)
Total 3rd quarter 1997	2,514.06	

4th Quarter 1997

UWM earnings	9,104.68	
Health insurance	521.76	(3 months @ $173.92/month)
Total back pay and benefits	9,626.44	
Less offsets:		
Mitigation		
Earnings	9,999.25	
Health insurance	521.76	
Total mitigation:	10,521.01	
Net in favor of Appellant:	0	
Total 4th quarter 1997	0	

1st Quarter 1998

UWM earnings	10,582.90	
Health insurance	543.00	(3 months @ $181.00)
Total back pay and benefits	11,125.90	
Less offsets:		
Mitigation		
Earnings	9,999.25	
Health insurance	543.00	
Total mitigation	10,542.25	
Net in favor of Appellant	583.65	
Interest on net:	35.02	(583.65 * 12% * .5 year)
Total 1st quarter 1998	618.67	

2nd Quarter 1998

UWM earnings	10,782.90	
Health insurance	543.00	(3 months @ $181.00)

Total back pay and benefits	11,325.90	
Less offsets:		
Mitigation		
Earnings	9,999.25	
Health insurance	543	
Total mitigation:	10,542.25	
Net in favor of appellant:	783.65	
Interest on net:	23.51	(783.65 * 12% * .25 year)
Total 2nd quarter 1998	807.16	

<u>3rd Quarter 1998</u>

UWM earnings	12,611.41	
Health insurance	724.00	(4 months @ $181.00 as paid through 10-98)
Total back pay and benefits	13,335.41	
Less offsets:		
Mitigation		
Earnings	9,999.25	
Health insurance	724.00	
Total mitigation:	10,723.25	
Net in favor of Appellant:	2,612.16	
Interest on net:	0	(212.16 * 12% * 0 years as quarter isn't over yet)
Total 3rd quarter 1998	2,612.16	

Total owed to appellant:

Total 1st quarter 1996:	0
Total 2nd quarter 1996	442.47
Total 3rd quarter 1996	2,469.34
Total 4th quarter 1996	308.16
Total 1st quarter 1997	2,345.58
Total 2nd quarter 1997	546.64

Total 3rd quarter 1997		2,514.06	
Total 4th quarter 1997		0	
Total 1st quarter 1998		618.67	
Total 2nd quarter 1998		807.16	
Total 3rd quarter 1998		2,612.16	
TOTAL BACK PAY OWED TO APPELLANT			12,664.24
Taxes taken out:	Federal income tax	28%[5]	3,545.99
	State income tax	6.93%[6]	877.63
	FICA	7.65%	968.81
Total			5,392.43
TOTAL PAYMENT TO APPELLANT			**$7,271.81**

Sick leave, vacation time and pension earnings would be recredited to Appellant upon his pending return to employment with the University and thus do not enter the calculations described herein, which are specifically tailored to a cash payment to Appellant.

In the event that the Respondent's proposal for its total payment to Appellant is refuted or challenged, Respondent reserves the right to present information about Appellant's earnings during the period in question (including information as described in footnote 1), Appellant's efforts to mitigate his damages, and Appellant's rejection of employment offers during the period in question. Respondent also reserves the right to update its calculation based on updated earnings information received from Appellant.

Sincerely,

P.J. Boylan
Senior University Legal Counsel

Encl.

cc: Paul Erickson, Esq. (via FedEx w/exhibit 1, 4-7)
Phillip Clark (w/exhibit 4-5, 7)
Donald Melkus (w/exhibit 4-5, 7)

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[5] Internal Revenue Service Publication 15, Circular E provides that lump sum payments may be taxed at the flat rate of 28%.

[6] Wisconsin Department of Revenue, Wisconsin Employer Withholding Tax Guide, Publication W166 provides that lump sum payments may be taxed at the flat rate of 6.93%.

GUTGLASS
ERICKSON
BONVILLE S.C.
LAW OFFICES

JAMES R. GUTGLASS
Court Commissioner
PAUL R. ERICKSON
KATHLEEN E. BONVILLE
Court Commissioner
MARK E. LARSON
JUDITH P. SULLIVAN
COLLEEN M. FLEMING
SHARON R. LONG

July 28, 1998

Commissioner Donald R. Murphy
Wisconsin Personnel Commission
131 West Wilson Street
10th Floor, Suite 1004
Madison, WI 53702

Re: Brenon vs. UW-Milwaukee
Case No.: 96-0016-PC
Our File: 796.01

Dear Commissioner Murphy:

This letter is to memorialize the discussion held at the telephonic status conference on July 28, 1998. Attorney Boylan and I agreed to the following schedule:

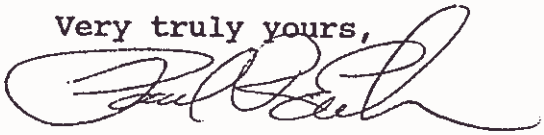
1. Appellant will respond to the written discovery requests of UWM by August 7, 1998;
2. A deposition has been scheduled of Appellant for August 28, 1998 at 1:00 p.m.;
3. UWM shall submit a calculation of Appellant's remedy for back pay and related fringe benefits, etc., by September 15, 1998;
4. Appellant's objections, if any, to such calculation shall be submitted by Friday, September 18, 1998; and
5. UWM's reply to Appellant's objections shall be made by Friday, September 25, 1998.

Based on the submissions, the Commission shall make a finding as to the remedy. If in the interim there are discovery objections, such objections shall be telephoned to you for immediate ruling. If there is no objection to UWM's calculation, than the Commission shall adopt that as the remedy in this matter. If there are objections or further submissions, the Commission shall make finding on the submissions of the parties.

I have submitted a copy of this letter to Attorney Boylan prior to mailing it to you. She has indicated her agreement to its content and has authorized me to communicate that to you.

Thank you for your attention to this.

Very truly yours,



Paul R. Erickson

PRE/slz

cc: Ms. P.J. Boylan

STATE OF WISCONSIN

PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Milwaukee),
Respondent.

Case No. 96-0016-PC

INTERIM RULING ON APPLICATION FOR FEES AND COSTS AND REQUEST TO CONDUCT DISCOVERY

This matter, arising from an appeal pursuant to §230.44 (1)(a), Stats., of a suspension without pay and discharge, and the Commission's interim decision and order rejecting respondent's disciplinary actions against appellant, is before the Commission on a petition by appellant for costs, §227.485, Stats., and a request by respondent for leave to conduct discovery on the issue of remedy.

The appellant, a police sergeant, began employment with respondent at the University of Wisconsin-Milwaukee Police Department (UWMPD) in October of 1974. On December 20, 1995, appellant received a written notice of suspension for ten days without pay, effective January 22, 1996. Later, on February 11, 1996, appellant was discharged. Appellant appealed both actions to this Commission.

In its interim order, dated February 12, 1998, based on a hearing on the merits, the Commission rejected the ten day suspension because "appellant was denied due process prior to his suspension" and concluded the discharge was excessive.

As the prevailing party, appellant argues that he is entitled to fees and costs pursuant to §§227.485, 814.245, Stats., and PC 5.05, Wis. Adm. Code. Section PC 5.05 (3), Wis. Adm. Code, provides that a motion for fees and costs raised under §227.485, Stats. shall be addressed under the standards and procedures of that statute. Sections 227.485 (3), (5) and (6), Stats., authorize the Commission to determine and award costs using the criteria in §814.245, Stats. Section 814.245 (3) provides:

> If an individual . . . is the prevailing party in an action by a state agency or in any proceeding for judicial review under §227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position.

The Commission must determine then whether respondent's position was "substantially justified." *Sheely v. DHSS*, 150 Wis. 2d 320, 442 N.W.2d 1 (1989). Under *Sheely*, to satisfy the "substantially justified" burden respondent must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.

In regard to the ten-day suspension, the Commission's decision that just cause had not been demonstrated hinged on its conclusion that the pre-disciplinary process followed by respondent was not sufficient to satisfy due process requirements. The sufficiency of this pre-disciplinary process is thus the proper focus of our inquiry here. In *Arneson v. UW*, 90-0184-PC, 5/14/92, the Commission stated as follows:

> In Showsh v. Wisconsin Personnel Commission, No. 90-1985 (Ct. App., 1991) (unpublished), the Court of Appeals upheld a Circuit Court decision reversing the Commission's decision that the predisciplinary proceeding followed there had been adequate. The Circuit Court had pointed out that, at a minimum under Loudermill, the employe is entitled to notice of the charges against him or her and is entitled to an opportunity to respond prior to the disciplinary action. Showsh v. Wisconsin Personnel Commission, Brown Co. Circuit Court No. 89CV445 (6/39/90). The Court of Appeals held:
>
> > Before a person may be deprived of a protected property interest, he must be given notice of the charges against him and a meaningful opportunity to respond. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985).
>
> The Court observed that a key reason why adequate notice is important is that it gives the employe an opportunity not only to respond to the substance of the alleged misconduct, but also to try to persuade the employer to impose a lesser penalty.

Under the facts present here, appellant was given notice of the specific allegation against him, i.e., the Million Man March joke he had repeated; was given an opportunity to answer the allegation during his meeting with Mr. Sroka; was made aware as a part of his meeting with Mr. Sroka that the purpose of the meeting was to discuss this particular allegation and what consequence should follow; was provided notice, although not until the end of his meeting with Mr. Sroka, of the fact that a ten-day suspension was being contemplated; and was provided an opportunity, through his meeting with Chief Clark, to persuade the employer to impose a lesser penalty. The Commission concludes that this pre-disciplinary process possessed enough of the attributes of a sufficient due process proceeding to support a conclusion that respondent had a reasonable basis in law and fact for contending that the just cause standard had been met in this regard. As a result, the application for fees and costs must fail as it relates to the ten-day suspension.

In regard to the discharge, it was reasonable for respondent to have relied upon representations made by appellant's co-workers to the effect that he was continuing to engage in the type of behavior cited as the basis for his previous discipline. In addition, since discharge was the next step in the progressive discipline process, it was reasonable for respondent to have decided to discharge appellant based on these representations by co-workers. Although, at hearing, certain of these representations were not corroborated, respondent had no reason to doubt the reliability of these representations at the time that discharge was imposed, i.e., not only did they come from several apparently independent sources but they were also consistent with a pattern of behavior that appellant had exhibited over a period of time. As a result, the application for fees and costs is denied as it relates to the subject discharge.

Finally, respondent has requested leave to conduct discovery relating to the issue of remedy. Appellant has objected based on the contention that the hearing already conducted in this matter was a plenary hearing, i.e., the issues of liability and remedy have not been bifurcated, and no further proceedings should be permitted. However, the record here shows that the hearing examiner indicated during the course

of the hearing that the remedy phase of these proceedings would be conducted separately from the liability phase, if necessary, and, as a result, leave to conduct discovery is hereby granted.

ORDER

The application for fees and costs relating to the liability phase of these proceedings is denied. Leave to conduct discovery relating to the issue of remedy is hereby granted.

Dated: _____, 1998.

STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

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_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

FEB 1 2 1998

STATE OF WISCONSIN PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Milwaukee),
Respondent.

Case No. 96-0016-PC

INTERIM DECISION AND ORDER

A Proposed Decision and Order (PDO) was issued on October 6, 1997. Both parties filed written arguments, with the final argument received by the Commission on December 8, 1997.

The Commission consulted with the hearing examiner and considered the arguments raised by the parties. The Commission adopts the PDO as its final decision with the amendments noted below. This decision is issued as an Interim Decision and Order to enable the Commission to consider an application for fees and costs under 227.485, Stats.

Amendments

The amendments are made to clarify the record and/or to clarify the Commission's decision rationale. The Commission agreed with the examiner's credibility determinations and, accordingly, none of the amendments reflect disagreement on credibility issues.

1. The first paragraph on page 13 of the PDO is amended to clarify that "Holmes" is a male, as shown below:

> Allegation three: Again during the Clark investigation on January 12, 1996, Brenon initially denied discussing his sex

organs in front of any officers while on duty. Moments later he said he "may have" made the statement "I'm going to drain 'Lucky'," or similar words in reference to urination, but "probably" only in from of Sorrel or Peter Holmes (a male). With Boswell, on January 18, 1996, Brenon said he did not recall ever saying that in front of Panas or Neuman or any females. Panas signed a summary, by Hodermann, of an interview held by Hodermann, on January 10, 1996, which provides, "Sgt. Brenon talks about his penis, its size, it's 'lucky'. He talks about how he's got to drain 'Lucky'." But Panas testified that she had never heard Brenon say anything about the size of his penis.

2. The first full paragraph on page 14 of the PDO is amended to clarify that "Klobukowski" is a male, as follows:

The evidence supports the conclusion that Brenon simulated masturbation, while joking about Esler, on at least one occasion. Gregory Klobukowski (a male), Sorrell and Panas testified to being present when this occurred. Of the three witnesses, Klobukowski was the most credible. Sorrell admitted to imitating Esler, along with others, bet he denied simulating masturbation. Allegations that Brenon simulated masturbation never appear in Panas' signed interview summaries, or Hodermann's notes of her interviews with Panas, until after Sorrell alleged it occurred "in front of Panas." (R #73, A##21 & 22)

3. Amend the third full paragraph on page 11 of the PDO to read as follows (underlined text shown below is new):

During his testimony, Brenon, who is Irish, said that he may have told a joke about an Irishman buying a chain saw and returning it because it didn't work, after notification of the ten day suspension. Panas testified she heard Brenon tell jokes substituting Irishmen for Blacks. Panas did not otherwise identify these jokes or explain how she knew the original joke was about Blacks. Respondent presented no other evidence regarding these alleged Black jokes. The Commission concludes

that Brenon's telling Irish jokes about his own ethnic background was well within the parameters of joking at the workplace which had occurred without reprisal for a long time. Accordingly, respondent failed to show just cause for imposing discipline regarding this allegation.

4. Amend the first partial paragraph on page 12 of the PDO, as shown below:

. . . The two other complaints by Sorrell of retaliation were based upon and related to Sorrell's ~~need no comment, except to observe, based on the record, that Sorrell had enjoyed a~~ personal friendship with Brenon~~, prior to his complaint to Hodermann~~. The Commission concludes that respondent failed to show just cause for imposing discipline regarding the retaliation allegations.

5. Amend the third full paragraph on page 14 of the PDO, as shown below:

However, respondent has established there was just cause for disciplinary action. While most of the alleged misconduct occurred prior to the investigation linked with the ten day suspension, respondent only became aware of them after that initial investigation. Yet, as previously determined, respondent failed to present evidence sufficient to establish just cause for imposing discipline regarding two of the three principal allegations of misconduct.

6. Amend the second full paragraph on page 16 of the PDO, as shown below:

Based on the evidence presented, the Commission finds that there was not just cause for Brenon's discharge. Respondent failed to prove all the allegations of misconduct resulting in its discharge of Brenon. The evidence does not support a conclusion that Brenon told jokes about African-Americans~~ or other minorities~~ after notice of his suspension. Furthermore, respondent failed to show that the Irish jokes told by Brenon were outside the parameter of long-standing accepted behavior in the workplace. Respondent failed to present evidence regarding

> departmental policy or guidelines on jokes. The evidence established that banter was common in the workplace. Brenon was not alone in telling jokes, teasing and mimicking co-workers, and sometimes he was the butt of such activity. Here there is no evidence of any rules, policies or guidelines addressing this subject matter.

The Loudermill and Gilbert Case

The U.S. Supreme Court discussed due process concerns when a property right existed in regard to the disciplinary action of termination in the case of *Cleveland Bd. Of Educ. v. Loudermill*, 470 US 532, 105 S Ct 1487 (1985). The facts of *Loudermill*, briefly, are that Mr. Loudermill was dismissed for being dishonest in filling out his employment application wherein he indicated he had never been convicted of a felony. He was not afforded an opportunity to respond to the charge or to challenge his dismissal. He argued to the court that he thought his prior conviction was a misdemeanor rather than a felony.

The *Loudermill* court started with the proposition that before termination could be imposed due process required that the employee have "an opportunity for hearing appropriate to the nature of the case." *Loudermill*, 470 US 542. The court further explained that the required hearing has two basic components: 1) an investigation where the employe is allowed to present his/her side of the story in an attempt to clarify the facts, and 2) an opportunity to attempt to influence the decision-maker's exercise of discretionary action prior to the imposition of discipline.

> [S]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involved factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision-maker is likely to be before the termination takes effect.

Loudermill, 470 US 543. (Citations omitted.)

Respondent contends the Supreme Court over-ruled *Loudermill* with respect to disciplinary suspensions in the case of *Gilbert v. Homar*, 117 S Ct 1807 (1977). (See respondent's brief filed on November 17, 1997, pp. 16-17.) The *Gilbert* case does not conflict with, supersede or overrule *Loudermill*. The facts of *Gilbert*, briefly, are that Mr. Gilbert was employed as a police officer. He was arrested in a drug raid and charged with related felony offenses. The employer suspended Mr. Gilbert pending an investigation of the matter and held no fact-finding hearing prior to the suspension. The *Gilbert* court found the suspension did not violate due process principles because the felony arrest provided the employer with a reasonable basis for believing the alleged conduct occurred and the employer had a significant interest in suspending Mr. Gilbert due to the felony charges and his status as a police officer, a position which involved great public trust and high public visibility. The *Gilbert* court emphasized, however, that its holding was based on the presumption of a post-suspension hearing where the employee could provide his side of the story and attempt to influence the decision maker's discretionary choice of what discipline to impose:

> . . . Unlike in the case of a termination, where we have recognized that "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect" (citing *Loudermill*) in the case of a suspension there will be ample opportunity to invoke discretion later—and a short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. . . .

Gilbert, 138 L. Ed. 130.

Mr. Brenon's situation is unlike the circumstances presented in *Gilbert* in at least two significant ways. First, while Mr. Brenon is a police sergeant, his telling jokes about the "million man march", while inappropriate, are not akin to felony charges. Also, the suspension in Mr. Brenon's case was the discretionary discipline imposed rather than an interim step pending investigation prior to deciding what

discipline to impose. Respondent's arguments fail to acknowledge these differences between Mr. Brenon's case and the circumstances presented in *Gilbert*.

The Commission now turns to the question of whether due process requirements were met in Mr. Brenon's case. Mr. Brenon admitted to Sroka that he told "Million Man March" jokes which may be viewed as a sufficient factual basis for suspension pending investigation per *Gilbert*, to be followed by a due process hearing. What occurred, however, is Mr. Brenon's admission was, in effect, improperly treated by respondent as absolving respondent from according any further due process protections. Respondent's failure to provide further due process protections violates not only the *Louderman* and *Gilbert* decisions but further is subject to criticism where, as in Mr. Brenon's situation, the admission occurred in the context of the following notice defects: a) Mr. Brenon was asked to attend the meeting with Sroka without first being told of the nature of the complaints, b) Sroka failed to disclose either prior to or during the meeting the potential that respondent might view the charges as serious, and c) Sroka failed to disclose either prior to or during the meeting the potential that suspension or some other serious form of discipline could result. (See, PDO ¶¶18 and 19, and related discussion on pp. 8-9.) Clark then directed Sroka to impose a ten day suspension and Clark made this decision without first providing Mr. Brenon with an opportunity to at least attempt to influence Clark's discretionary exercise of determining what discipline to impose, thus failing to meet the due process requirements of *Loudermill* and *Gilbert*. As noted in the PDO (pp. 9-10), Clark's discretionary imposition of a ten-day suspension was excessive even when the due process considerations are put aside, meaning even when due process is not considered as part of the analysis. This finding underscores the importance of providing employes with an opportunity for input as to what discipline should be imposed prior to the decision being made. The most informed exercise of discretion would occur with full input, including input from the employe. An additional potential danger exists when the decision is made (as occurred in Mr. Benon's case) prior to obtaining input from

the employe in that the decision maker may be reluctant for a variety of reasons (such as to "save face") to change the initial decision despite persuasive arguments to the contrary.

Respondent further argued as noted below (from p. 21 of brief filed on 11/17/97):

> Even if the Commission finds that Sroka's meeting with Brenon did not comport with due process as provided by Commission precedent, any such defect was cured when Brenon met with Chief Clark. At the meeting with Chief Clark, Brenon was apprised of the seriousness of the charges, was given the opportunity to tell his side of the story and received notice that Sroka's "oral reprimand" was not the discipline he was being given.

The problem with the above-noted recitation of "facts" is they are unsupported by the record. At hearing, Clark could not recall what occurred during the conference, whereas Mr. Brenon could recall what occurred and had taken notes contemporaneous to the meeting. Mr. Brenon testified he told Clark he (Mr. Brenon) was shocked and surprised that a 10-day suspension would be imposed and he (Brenon) felt the level of discipline was wrong and too severe. According to Mr. Brenon's testimony, Clark replied that the decision was a "done deal" and he (Mr. Clark) would not reconsider it. According to Mr. Brenon's testimony, Clark further said if the discipline were overturned, then it would be overturned. In short, respondent did not establish that the due process defects previously discussed were "cured" during Mr. Brenon's conference with Clark.

ORDER

The Proposed Decision and Order as amended is adopted as the Commission's decision in this matter. Jurisdiction is reserved to consider a request for fees and costs.

Dated: February 12, 1998. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JMR/DRM
960016Adec3.doc

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:
Dale R. Brenon
8250 N 46th St Apt 122
Brown Deer WI 53223

Katharine Lyall
President, UW System
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Madison WI 53706

STATE OF WISCONSIN | PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM [Milwaukee],
Respondent.

Case No. 96-0016-PC

PROPOSED DECISION AND ORDER

This as an appeal pursuant to §230.44 (1)(c), Stats., of a suspension without pay and discharge.

FINDINGS OF FACT

1. Appellant, Dale Brenon, began employment at the University of Wisconsin-Milwaukee (UWM) Police Department, in October, 1974, as a police cadet.

2. At all relevant times Brenon served with permanent status in class as a police sergeant and was supervised by Lieutenant Richard Sroka.

3. On December 20, 1995, Brenon received a letter advising him that he was suspended for ten days without pay, effective January 22, 1996.

4. The suspension letter, dated December 19, 1995, provided the following:

> This disciplinary action is based on your conduct, as related by four officers of this Department, that during the first week of November, 1995, you related racially demeaning jokes to them while in the performance of your duties as a police sergeant. Regardless of the motivation for relating such jokes, this conduct exhibits unprofessional behavior, demonstrates a lack of sensitivity and creates a hostile environment within a diverse workplace.
>
> This conduct constitutes violations of University of Wisconsin System Work Rules IV., B and J, which states:
>
> B. Threatening, intimidating, interfering with, or using abusive language towards others.

> J. Failure to exercise good judgment, or being discourteous in dealing with fellow employees, students or the general public.
>
> These actions violate University Police Rules and Regulations, Article 1-Conduct, Section 4, which states:
>
> 4. When dealing with any person, employees shall at all times conduct themselves in a courteous and helpful manner.

Also, it included a warning of possible discharge for "any further work rule violation."

5. The four officers who made complaints against Brenon were Kenneth Peters (Hispanic), James Learman (Caucasian), David Boyke (Caucasian) and John Jensen (Caucasian). Jensen was the only one of the four officers supervised by Brenon.

6. On two occasions in November, 1995, Officer Peters approached Lieutenant Pamela Hodermann, Special Assignments, alleging Brenon had been telling inappropriate jokes, but that he feared retaliation if he went to Sroka. Hodermann advised Peters that his case would be stronger if he had witnesses and that she would make every effort to prevent retaliation if he filed a complaint.

7. By memorandum, dated November 25, 1995, to Hodermann, Peters claimed that about the first week in November, 1995, Brenon told him the following jokes:

> What do you get when one million lesbians show up at the million man march? Two million people that don't do dick.
>
> What was the best thing about the million man march? Only four people missed work.

While delivering this memorandum to Hodermann, Peters provided her with the names of Officers James Learman and David Boyke as other witnesses to Brenon's jokes.

8. As a part of her investigation of this matter, Hodermann interviewed Officers Learman, Boyke and Linda Swenson.

9. Swenson stated she had not heard Brenon tell any inappropriate jokes. Learman and Boyke stated that they had, and provided Hodermann with written reports.

10. Learman's written report to Hodermann, dated Tues, 28 Nov 1995 17:24:01 CDT states:

> During the first week off (sic), November, 1995 (exact date unknown), Sgt. Brenon related a joke to me. This was at approximately 11:50 p.m. while I was in the Sgts. Office to hang up my keys and radio. Sgt. Brenon told me a joke about "The Million Man March." The joke was as follows: "What was the best thing about the Million Man March? Only 3 or 4 people missed work." I don't recall there being any other people present in the office when he told me this.

11. Boyke's report, dated Tues, 28 Nov 1995 15:24:05 CDT stated:

> On or about the first week of November, I was approached by Sgt. Brenon prior to the start of the third shift and nearing the end of my second shift tour. Sgt. Brenon asked if I wanted [to] hear a joke, this is not unusual as he often has done so. Although I can not specifically remember those jokes. There is one joke that I remember he told at or about the time given above. At the time I did not know if this would be a joke of racial overtones and slurs.
>
> The joke included well known Americans and their known quotes. These people included John F. Kennedy, Martin Luther King and Retired Detective Mark Furman, the joke included terms and language which are derogatory to African Americans, such as "Fucking Niggers."

12. Hodermann also interviewed Officers John Jensen and Paul Sorrell.

13. In a memorandum to Hodermann, dated December 5, 1995, Jensen alleged (1) a fellow officer told him Brenon had made a negative comment that he "was on Hodermann's lap," potentially causing problems between him and other officers, (2) that in June, Brenon criticized him for not making a sick call sooner, and (3) that in November, Brenon criticized Neuman for calling in sick early. About jokes, Jensen wrote:

> Also in November of 1995, shortly after the Million Man March, Sgt. Brenon brought some pages to roll-call and said that they were jokes that he had. He told one of them, which partly said, to the effect of, the good news was that none of the marchers missed work that day.

14. In response to his interview with Hodermann, on December 4, 1995, Sorrell P-mailed[1] Hodermann the next day and complained that Brenon had made many "demeaning statements" to him in front of his peers. Regarding jokes, Sorrell said, "I think there is a place for some fun and humor while at work, but [I] believe that Sgt. Brenon has stepped over the line and may cause some people to be offended by his words or actions." During the interview, Sorrell told Hodermann that he had not heard Brenon tell any racial jokes.

15. Dispatcher T. Howard, a female African-American, in a memorandum to Hodermann, dated November 28, 1995, stated that she was "hurt" and "insulted", when "[she] was told of Sgt. Brenon's joke regarding the Million Black Man March." The source of Howard's information was never revealed.

16. Lt. Sroka was first advised of the investigation in a meeting with his supervisor, UWM Police Chief Phillip Clark and Lt. Hodermann on December 4, 1995.[2] Sroka was directed by Clark to continue the Brenon investigation. Hodermann provided Sroka with memorandums from Peters, Learman, Boyke, Jensen, Sorrell and dispatcher T. Howard.

17. Sroka met again with Chief Phillips on December 5, 1995, and was directed by Clark to meet with Brenon to "get his side of the story."

18. The following is the P-mail message, to Brenon from Sroka, scheduling a meeting on December 8, 1995:

> Dale, I need to meet with you on Friday morning 12/08/95, regarding some recent personnel issues that I have just been made aware of . . . No big deal, won't take up much of your time, but; please wait.

19. On the morning of December 8, 1995, Sroka met with Brenon, and advised him of the memoranda regarding the "Million Man March" jokes. Brenon admitted to telling some of the "Million Man March" jokes and said he was sorry. Sroka reprimanded Brenon, said that such conduct was not satisfactory and directed him to cease

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[1] Respondent's electronic mail system.

[2] Lt. Sroka had been on vacation from November 23, 1995 (Thanksgiving Day) to December 4, 1995.

and desist. Brenon agreed to stop. Sroka told Brenon he believed the matter was closed.

20. While Brenon waited, Sroka reported his meeting with Brenon, including the oral reprimand, to Clark. Clark directed Sroka to prepare a ten day suspension letter. Sroka returned to Brenon and informed him of Clark's directive to prepare a suspension letter.

21. Immediately afterward, at Brenon's request, Clark met with Brenon. Clark did not change his directive to Sroka.

22. By an Interoffice Memo, dated December 23, 1995, to Chief Clark and Lt. Sroka, Police Cadet Lisa Panas alleged that she had been "subjected to numerous jokes told by Sgt. Brenon that contained sexist implications, and remarks, as well as racist," that Brenon had made "remarks about [employes] engaging in sexual activity, and demonstrating the type of sounds that they may make" and that she "[felt] that Sgt. Brenon ha[d] been dishonest with his duties."

23. On December 28, 1995, Officer Dawn Neuman, during an interview, with Adm. Program Specialist Boswell at the UWM Office of Diversity and Compliance (ODC), reported that she and Officer Panas had been harassed by Sgt. Brenon. Allegedly, Brenon thought she was stupid, never assigned her as Officer In Charge (OIC), talked dirty in front of her and never assigned her to work with Panas - only with male officers. Also, Neuman alleged Brenon told sexual jokes and made sexual remarks in the presence of Panas, and that Officer Klobukowski told "dumb blonde" jokes.

24. On January 3, 1996, Boswell, with her supervisor, Asst. Chancellor Charmaine Clowney, met with Chief Clark to discuss the Neuman allegations against Brenon. A joint investigation was contemplated by the two units. Later, Clark participated with Boswell during the first day of interviews, but afterward, Clark's participation was discontinued, because it was believed Clark's presence had a "chilling effect" on the interviewees. However, subsequently, the police department conducted interviews of some of the officers, immediately preceding interviews by ODC.

25. Brenon was placed on suspension with pay pending another investigation on January 3, 1996, and was directed not to contact any UWM police personnel except Sroka or Clark.

26. Hodermann was directed by Clark to conduct the investigation. In the course of her investigation, she interviewed Officers Sanchez, Panas, Klobukowski, Neuman, Holmes, Jensen, Sorrell, Breit and Price. Hodermann wrote summaries of the recorded interviews, which were signed by the interviewee. (R#67-74 & A#18)

27. On January, 12, 1996, Clark, with Shannon Bradbury, UWM Labor Relations Manager, interviewed Brenon regarding his conduct both before and after December 8, 1995. Brenon admitted mimicking Officer George Esler's speech pattern, making some variant of the statement "I'm going to drain 'Lucky'," printing jokes off the Internet, passing out copies of jokes when asked, but he denied telling racial jokes after notification of his suspension."

28. On January 31, 1996, Clark notified Brenon to report to a pre-disciplinary hearing on February 5, 1996. The notice identified the hearing subject matter as "allegations of [Brenon] making sexually explicit and demeaning comments and jokes to subordinates, . . . allegations of retaliation against subordinates in violation of UW System Work Rules and the University of Wisconsin-Milwaukee Sexual Harassment Policy, and continuing inappropriate activity subsequent to his suspension.

29. At the meeting on February 5, 1996, also attended by Bradbury, Clark explained the meeting to Brenon as follows, "This is an investigative type interview and this is a predisciplinary hearing." Next, Clark apprised Brenon of allegations by employes that he had told racial and sexual jokes after his suspension notice, created a hostile work environment, talked about "[his] sex organ," and retaliated against employes who had filed complaints against him. Clark informed Brenon that they were considering a disciplinary action ranging from thirty days without pay to termination.

30. By letter, dated February 9, 1996, UWM terminated Brenon's employment with them, effective February 11, 1996. The termination letter in part states:

> On December 19, 1995, you were given a 10 day suspension for telling inappropriate ethnic and racially demeaning jokes to your subordinates during November, 1995 . . .This termination is based on other complaints of your conduct, untruthfulness uncovered in the course of the investigation of those complaints and your retaliation against subordinates who cooperated in those investigations. Specifically, complaints were received that subsequent to your learning of your 10 day suspension, you continued to tell jokes to subordinate officers substituting "Irishman" for other ethnic groups. Additionally, new complaints were received about your making sexually explicit and demeaning comments, telling ethnically and sexually demeaning jokes.
>
> In November of 1995, while talking to Officer Sorrell about his stay in a motel, you made a comment to the effect that Sorrell was too cheap to get two beds and that the three of them (Sorrell, his wife and infant son), probably slept in the same bed. You then made reference to them having sex or a menage a trois. You then said that, "No, it was really (Security Officer) George Esler" or words to that effect (Esler, Sorrell and wife having sex) and made noises mimicking as if they were all having sex. This eventually became just Esler masturbating, you would do this "joke" grunting and making masturbating motions in front of both male and female employees. On other occasions, you referred to your penis as "Lucky," describing its size and making comments such as, "I'm going to drain Lucky," to both male and female employees.

31. Other allegations in the letter were that Brenon changed his pattern of appointing Sorrell as Officer in Charge after Sorrell's written statement, dated December 5, 1995, regarding Brenon's conduct, and that Brenon returned a Christmas card sent to him by Sorrell.

32. In addition to UW System Work Rule IV., B and J (See ¶ 4), the letter stated that Brenon had violated Work Rules I. E (Failure to provide accurate and complete information whenever such information is required by an authorized person), IV. D (making false or malicious statements concerning other employees, supervisors, students or the University) and Police Rules & Regulations, Art. 1-Section 4 (when dealing with any person, employee shall at all times conduct themselves in a courteous and helpful manner).

33. Appellant Brenon made a timely appeal of his suspension and termination to this Commission.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.44 (1)(c), Stats.

2. Respondent has the burden of proof. *Reinke v. Personnel Board*, 53 Wis. 2d. 123, 191 N.W. 2d. 833 (1971).

3. Respondent failed to provide appellant the due process rights of an adequate predisciplinary hearing prior to imposing the ten day suspension. Therefore, this disciplinary action must be rejected.

4. With respect to the termination, respondent satisfied its burden of proof with respect to just cause for imposition of some discipline, but failed to establish that an appropriate degree of discipline was imposed.

5. The imposed discipline should not have been more than a ten day suspension.

OPINION

The issues are whether UWM had just cause to suspend Dale Brenon for ten days without pay, on January 22, 1996, and later, on February 11, 1996, whether UWM had just cause to discharge Brenon. The precepts set forth in *Mitchell v. DNR*, 83-0228-PC, 8/30/84, are utilized here in considering the just cause questions.

Ten Day Suspension

Brenon claims that UWM violated his right of due process by failing to provide him proper notice and hearing prior to his suspension, as established in *Cleveland Board of Education v Loudermill*, 470 US 532, 105 S.Ct. 1487 (1985). We agree. Pertinent facts in this case (F.O.F. ##18-24) are similar to those in *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 5/28/87, where the appellants did not receive adequate

notice of the charges against them and as in *Paul* were led to believe no serious discipline was being considered.

In *Showsh v. Wisconsin Personnel Commission*, Case No. 89-CV-445 (Brown Co. Cir. Ct., 6/29/90); affd., 90-1985 (Ct. App. 4/2/91) (unpublished); the Court reversed a Commission decision which had concluded that a predisciplinary hearing prior to a five day suspension had been adequate. The Court held:

> While the *Loudermill* case requires something less than a full evidentiary hearing in a predisciplinary hearing, it does require the basic requirement of notice of the charges against the employe. No such notice was given to Dr. Showsh. Neither the memo requesting information on the events in June and July nor the supervisor in the meeting with Dr. Showsh gave any notice of any charges pending against Dr. Showsh. He was informed only that 'there was a possibility that disciplinary action would ensue,' although he [Mr. Dennison] did not state specifically that appellant was the target of the possible discipline. Mr. Dennison told appellant that it was a meeting to gather as much information as possible . . . (Finding No. 21). While he had an opportunity to tell Mr. Dennison what he knew about the 'situations around the June 29th and July missed inspections,' he did not have any idea that there were charges being considered against him or what they were, nor was he given any explanation of the employer's evidence. At no time was he informed that this was a predisciplinary hearing or that he had a right to an attorney.
>
> Based on these facts the hearing examiner correctly concluded that the petitioner was denied due process. Dr. Showsh did not receive notice of the charges against him, therefore he was deprived of any meaningful opportunity to respond to the charges prior to his suspension. Slip opinion, pp. 4-5.

In *Arneson v. UW-Madison*, 90-0184-PC, 2/6/92, the Commission concluded that the employe had not been given an adequate predisciplinary hearing prior to a suspension and demotion, where the employe was only informed about parts of the allegations against him, and was not informed that discipline was possible until near the end of the meeting.

Consistent with the foregoing authorities, the commission concludes that appellant was denied procedural due process prior to his suspension. Respondent's citations

to *Showsh v. DATCP*, 87-0201-PC, 11/28/88, and *Letzing v. DOD*, 88-0036-PC, 1/25/89, are unavailing, because *Showsh* was reversed in the above-cited court decisions and *Letzing*, which relied significantly on the Commission's decision in *Showsh* was issued prior to the reversal of *Showsh*.

Because of this conclusion of a violation of due process, the suspension must be rejected, *see e.g., Arneson, Id.* However, because there was a plenary hearing and this decision is being issued initially as a proposed decision pursuant to §227.46(2), Stats., the merits of the suspension also will be addressed.

The first question is whether Brenon engaged in the alleged conduct in violation of UW System Work Rules IV., B & J and UWM Police Rules and Regulations Art. 1, Section 4 (F.O.F. #4). Brenon admitted to telling jokes about the Million Man March. Contrary to respondent's contention, UWM Labor Relations Manager Bradbury testified that, "a racial or ethnic joke is a IV J violation" and "is only a IV B violation if somebody actually feels threatened, intimidated or abused." Respondent presented no evidence establishing that complainants Peters, Boyke, Learman or Jensen felt threatened, intimidated or abused by this conduct of Brenon. Brenon did not "exercise good judgment" and thus violated Work Rule IV, but the evidence falls short of establishing that he otherwise violated the work rules, as alleged.

The next question is "whether some deficiency has been demonstrated which can reasonably be said to have *a tendency to impair* his performance of the duties of his position or the efficiency of the group with which he works." *Safransky v. Personnel Board*, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974) (emphasis added). The Commission agrees with respondent that Brenon's choice of jokes lacks good judgment and perhaps affected perceived views of a "supervisor." While no evidence was presented concerning work performance impairment caused by Brenon's jokes, the record supports a conclusion it would have a tendency to do so. The evidence does support a conclusion that Brenon's conduct, violating Work Rule IV. J, was sufficient to warrant some disciplinary action.

The remaining substantive question is whether the imposed ten day suspension without pay was excessive. The evidence here establishes that appellant violated not three work rules as alleged, but one – a rule involving the failure to exercise good judgment. Respondent argues that Brenon was given notice on other occasions not to tell racially demeaning, or offensive jokes. As examples, respondent cites Brenon's May 1991-May 1992 performance evaluation; Hodermann's response to Brenon as to an incident in June 1993 involving Officer Peters, a Hispanic, and his wife; and Hodermann's response in January 1993, to Brenon regarding a complaint by Officer John Bach, a non-Catholic, about a joke Brenon told about nuns. The record shows that no comments regarding jokes are on Brenon's May 1991-1992 performance evaluation (R #64); and that the Peters incident took place at a wedding reception. Brenon's comments were not racial in nature, and Peters withdrew his complaint after Brenon apologized to Peters' wife. None of these examples involved racial jokes.

Also, the evidence was that Officer Sorrell initially brought the Million Man March jokes to the work place, discussed them with Brenon, who repeated them to various officers on cigarette breaks or shift changes.

Given the circumstances, the Commission concludes the imposed discipline was excessive. A more appropriate sanction would have been an oral or written reprimand.

Termination

In summary, respondent's letter of termination to Brenon says he was terminated for several reasons: continuing to tell jokes to subordinates substituting "Irishman" for other ethnic groups, retaliating against subordinates who cooperated in the suspension investigation, a new complaint about Brenon telling ethnically and sexually demeaning jokes, making sexually explicit and demeaning comments, and for being untruthful in the course of an investigation.

During his testimony, Brenon, who is Irish, said that after notification of the ten day suspension ,he may have told a joke about an Irishman buying a chain saw and returning it because it didn't work. Panas testified she heard Brenon tell jokes substituting Irishmen for Blacks. Panas did not otherwise identify these jokes or explain how

she knew the original joke was about Blacks. Respondent presented no other evidence regarding these alleged Black jokes.

Regarding the claim of retaliation, respondent claims Brenon retaliated against Sorrell by changing his pattern of appointing Sorrell as Officer In Charge (OIC), refusing to accept a Christmas card from Sorrell after he became aware that Sorrell complained against him, and treating Sorrell less friendly. Initially, Sorrell claimed Brenon never made him OIC subsequent to his notice of suspension. After investigating the matter respondent modified the retaliation charge, claiming Brenon changed his pattern of appointing Sorrell as OIC, beginning on December 11, 1995. Documentary evidence (R. 21) shows the OIC rotation pattern changed on December 4, 1995, when Brenon first assigned Klobukowski as OIC. The testimony of Klobukowski and Brenon was that prior to the December 4 assignment, they had engaged in discussions about Klobukowski being ready for assignment as OIC. Brenon's assignment of Klobukowski as OIC occurred days before Sorrell's complaint to Hodermann, on December 4, 1995. The two other complaints by Sorrell of retaliation need no comment, except to observe, based on the record, that Sorrell had enjoyed a personal friendship with Brenon, prior to his complaint to Hodermann.

Respondent argues that Brenon's untruthfulness during the investigation, which resulted in his discharge. In support, respondent cites four instances: (1) that on January 12, 1996, Brenon told Clark he had not told any jokes after his notice of suspension, but on February 5, 1996, Brenon changed his opinion and told Clark he had; (2) that on January 12, 1996, Brenon told Clark he had invited Panas to Fuzzy's Bar and also admitted the same during a January 12, 1996, interview with Boswell, but denied doing so to Clark on February 5, 1996; (3) that on January 12, 1996, during Clark's investigative interview, complainant first denied he referred to his penis as "Lucky," then admitted it, but denied doing so in the presence of female officers (Panas testified Brenon made the comment in her presence); and (4) that Brenon consistently denied making gestures simulating masturbation.

Regarding each allegation of untruthfulness, the record reflects the following:

Allegation one: On January 18, 1996, Brenon told Boswell that previously, in an interview with Clark, he had denied telling any jokes after his notice of suspension, but later remembered telling an Irish joke. Later on February 5, 1996, Brenon told Clark about his conversation with Boswell.

Allegation two: During the Boswell interview, Brenon was asked whether he had invited Panas to Fuzzy's. Brenon said Panas initiated the discussion, told him she lived near Fuzzy's and maybe was going out that night. Brenon said he replied, "Well hey, you and your boyfriend want to join me, fine. Come on down." On February 5, 1996, Clark again asked Brenon, "Did you ask Cadet Panas to meet you at Fuzzy's...", and Brenon replied, "that is something you asked me at the last conference we had here . . . I'll explain it to you the same way I did then . . . No. I did not ask her to join me."

Allegation three: Again during the Clark investigation on January 12, 1996, Brenon initially denied discussing his sex organs in front of any officers while on duty. Moments later he said he "may have" made the statement "I'm going to drain 'Lucky'," or similar words in reference to urination, but "probably" only in front of Sorrell or Holmes. With Boswell, on January 18, 1996, Brenon said he did not recall ever saying that in front of Panas or Neuman or any females. Panas signed a summary, by Hodermann, of an interview held by Hodermann, on January 10, 1996, which provides, "Sgt. Brenon talks about his penis, its size, it's 'Lucky'. He talks about how he's got to drain 'Lucky'." But Panas testified that she had never heard Brenon say anything about the size of his penis.

Allegation four: Throughout the investigations by Clark and Boswell, Brenon consistently denied making motions simulating masturbation when imitating Esler's speech pattern. However, in January 1996, Klobukowski, Sorrell and Panas signed summaries of their interviews with Hodermann, indicating they had observed Brenon making masturbation motions while imitating Esler's speech pattern.

The evidence presented shows that Brenon's statements to Clark and Boswell during their investigations about telling jokes after notice of suspension, inviting Panas

to Fuzzy's bar, and referring to his penis as Lucky were consistent. Contrary to respondent's argument, Brenon never admitted to telling any ethnic jokes after his notice of suspension, except for Irish jokes he believed were harmless because he is Irish. Also contrary to respondent's argument, Brenon did not deny using the term 'Lucky' while females were present. During his January 18, 1996, interview with Boswell, in answer to that question, he states:

> I cannot recall a single incident . . . especially since this came up last Friday . . . I've been trying to pull my memory . . . to find out if I'd ever said that in general in a general area where one of them [Panas or Neuman] might of heard and I don't believe I did.

Regarding whether Brenon invited Panas to Fuzzy's bar, Panas said he did. But even if we accept Brenon's recount, it appears to be a semantics question. There were also several inconsistencies between Hodermann's notes, rough draft and signed summaries of Panas' interview and her testimony. For instance, Panas signed an interview summary in which she states Brenon talked about the size of his penis, but during cross examination, she recanted. Panas also signed an interview summary, wherein she quotes a statement made by Brenon about Hodermann, and again, during testimony, she recanted.

The evidence supports the conclusion that Brenon simulated masturbation, while joking about Esler, on at least one occasion. Klobukowski, Sorrell and Panas testified to being present when this occurred. Of the three witnesses, Klobukowski was the most credible. Sorrell admitted to imitating Esler, along with others, but he denied simulating masturbation. Allegations that Brenon simulated masturbation never appear in Panas' signed interview summaries, or Hodermann's notes of her interviews with Panas, until after Sorrell alleged it occurred "in front of Panas." (R #73, A ##21 & 22)

In conclusion, the evidence presented by respondent establishes that Brenon, contrary to his claim, did simulate masturbation, but fails to establish that he told derogatory ethnic jokes after notification of the ten day suspension, that he retaliated against Sorrell or that he was otherwise untruthful during the investigation.

However, respondent has established there was just cause for disciplinary action. While most of the alleged misconduct occurred prior to the investigation linked with the ten day suspension, respondent only became aware of them after that initial investigation. Yet, as previously determined, respondent failed to present evidence sufficient to establish two of the three principal allegations of misconduct.

Clearly, the Esler masturbation joke is a vulgarity that need not be tolerated in the work place. But as to the other general allegations against Brenon of insensitivity toward subordinates, they should be considered based on the circumstances. Evidence shows that some levity was common during third shift, shift changes and roll call. Jokes, quips, snipes and gibes were tossed back and forth: Brenon was teased about his weight, size and roll call mannerisms; Sorrell was heckled about being stingy with money; Sorrell and others mimicked Esler's speech pattern; and profanity was not uncommon. In a P-Mail, dated December 5, 1995, to Hodermann, Sorrell wrote, "I think there is a place for fun and humor at work, but I believe that Sgt. Brenon has stepped over the line and may cause some people to be offended by his words and or actions." About alleged comments, by Brenon, to him, he believed were demeaning, Sorrell wrote:

> It was brought to your attention that Sgt. Brenon made a comment when I asked where my finger print cards were, I had them attached to the IQ's, Sgt. Brenon responded to me, stating, "I don't have an I.Q." . . . when I was injured responding to the man with a knife, 10-26-95 (slipped and fill on wet floor), Sgt. Brenon was making fun of the situation, playing like it was my fault . . . and complaining that if I went to the hospital . . . he would have to do hours of paper work . . . Sgt. Brenon recently made comments when I returned from two sick days off, something to the affect that "sick-o is back to work."

The response to Hodermann by Sorrell exemplifies allegations of others regarding "demeaning" comments made by Brenon to other officers and subordinates. Respondent's argument in support of its decision is that Brenon, a 21 year veteran of UWMPD has a history of disciplinary problems, since 1979, concerning "poor relations with his superiors, colleagues and subordinates" and "that has impaired the per-

formance of his duties as well as impairing the operations and personnel of the UWM Police Department."

Brenon's disciplinary record, excluding those at issue, is as follows: March 7, 1979, a four day suspension for being disrespectful to the OIC; November 10, 1991, a written warning from Hodermann for intimidating employes by telling them there are going to be some changes; February 18, 1992, a letter of reprimand from Hodermann for being unprofessional and rude to a female student; April 7, 1992, a two day suspension, by Hodermann, for yelling at a subordinate who refused to critique a complaint against Brenon, sending an officer recovering from pleurisy outside on patrol without a winter jacket and making some remark to an officer in the summer of 1991 about uselessness of keeping a list of grievances; January, 1993, an oral warning by Hodermann for telling a joke about nuns dressed as altar boys; November 10, 1993, a written warning from Hodermann for sarcastic remarks when an officer called in sick; and December 19, 1995 reassignments to non-supervisory duties based on Labor Management minutes. (In a letter, dated February 2, 1994, Clark said this change was not considered discipline.)

Without question, this record indicates that Brenon had poor relations with Hodermann and some subordinates and exercised poor judgment with some of his comments and attempts at humor. But the evidentiary record also shows that Brenon's current immediate supervisor and the majority of the subordinates under his supervision respected his competency as a police officer and enjoyed a good relationship with him. As to this matter, most of those who made complaints against Brenon did not work on third shift and were not supervised by him. The record reflects the existence of two distinct factions operating in a fractious department, fraught with concerns of retaliation from various quarters.

Based on the evidence presented, the Commission finds that there was not just cause for Brenon's discharge. Respondent failed to prove all the allegations of misconduct resulting in its discharge of Brenon. The evidence does not support a conclusion that Brenon told jokes about African-Americans or other minorities after notice of his

suspension. Respondent failed to present evidence regarding departmental policy or guidelines on jokes. The evidence established that banter was common in the workplace. Brenon was not alone in telling jokes, teasing and mimicking co-workers, and sometimes he was the butt of such activity. Here, there is no evidence of any rules, policies or guidelines addressing this subject matter.

The evidence supports respondent's allegations that Brenon, on at least one occasion, simulated masturbation while telling the "Esler joke" and that he misrepresented the truth about the incident to Chief Clark.

Without question, Brenon's pantomime was vulgar and his method of announcing his departure to the men's room tacky. Such behavior need not be tolerated.

After consideration of facts and circumstances in this case, the Commission concludes the discharge was excessive. Brenon was suspended for ten days for telling racial jokes. But respondent failed to prove Brenon engaged in that activity subsequent to his notice of suspension. Also respondent failed to prove that Brenon retaliated against Officer Sorrell. With the exception of the untrue statement Brenon made to Chief Clark, respondent's allegations of misconduct by Brenon occurred prior to his suspension. This particular conduct, as discussed, does not warrant a discharge. No evidence was presented establishing that Brenon did not otherwise perform the duties and responsibilities of his position.

ORDER

Respondent's decision imposing a ten day suspension without pay against appellant is rejected.

Respondent's decision terminating the employment of appellant is modified to a suspension of ten days without pay.

This matter is remanded to respondent for action in accordance with this decision.

Dated: _____, 1997.

STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

DRM:rjb
960016Adec2.2

_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

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Case Name
Brenon v. UW System (Milwaukee)
Case Number
96-0016-PC

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
)
DANE COUNTY) ss.

Roberta J. Bushéy, being first duly sworn, states that she is a Legal Secretary of the State Personnel Commission and that on February 12, 1998, she mailed a copy of an Interim Decision and Order, with attached thereto an unexecuted copy of the affidavit of mailing showing the date of mailing, addressed to:

Paul Erickson
Gutglass Erickson & Bonville
735 N Water St Ste 1400
Milwaukee WI 53202

P.J. Boylan
UW-Milwaukee
Mitchell Hall, Room 239
PO Box 413
Milwaukee WI 53201-0413

which she securely enclosed in envelopes and that she deposited said envelopes in the United States mails in the City of Madison, Wisconsin.

Dated _____

_____
Roberta J. Bushéy

Subscribed and sworn before me

_____
Notary Public, Dane County, Wisconsin
My commission is permanent/expires _____.

State of Wisconsin \ PERSONNEL COMMISSION

131 West Wilson Street
Suite 1004
Madison, Wisconsin 53703
(608) 266-1995

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OCT 7 1997

October 6, 1997

Paul Erickson
735 N Water St Ste 1400
Milwaukee WI 53202-4267

PJ Boylan
UW-Milwaukee
Mitchell Hall, Room 239
PO Box 413
Milwaukee WI 53201-0413

Laurie R. McCallum
Chairperson

Donald R. Murphy
Commissioner

Judy M. Rogers
Commissioner

Re: *Brenon v. UW-Milwaukee*
Case No. 96-0016-PC

Dear Parties:

Enclosed is a proposed decision and order in this case pursuant to §227.46(2), Stats., which provides in part:

> Each party adversely affected by the proposed decision shall be given an opportunity to file objections to the proposed decision, briefly stating the reasons and authorities for each objection, and to argue with respect to them before the officials who are to participate in the decision. The agency may direct whether such argument shall be written or oral.

If you believe that oral argument would be appropriate in this case, you may request oral argument. You should state the reasons for your request. Please file any objections with written arguments or with a request for oral argument, and serve a copy on the other parties no later than November 5, 1997. In the event written objections are filed, the opposing parties are provided ten days to file any written response to the objections unless, upon application, the hearing examiner or the Commissioner concludes that some other period is more appropriate. §PC 5.06(1), Wis. Adm. Code.

As provided in §227.485, Stats., the prevailing party in cases before the Commission may, under certain circumstances, submit a motion for costs. In those cases in which a party other than a state agency is the prevailing party, the Commission will issue its decision on the merits as an interim decision and will then provide the prevailing party an opportunity to file a motion for costs.

Sincerely,

Donald R. Murphy /RJB

Donald R. Murphy
Commissioner

rjb:960016Alet1
Enclosure

1 MS. BOYLAN: It goes to credibility
2 and also to remedy in mitigation.
3 COMMISSIONER MURPHY: Credibility?
4 MS. BOYLAN: Yes.
5 MR. ERICKSON: I'd like to be heard on
6 this. There's an action pending in circuit court
7 with respect to return of certain records to UW-M
8 that we attempted to have handled by this
9 commission.
10 COMMISSIONER MURPHY: What's the
11 question again?
12 MS. BOYLAN: When you worked as a
13 sergeant --
14 COMMISSIONER MURPHY: No. No. She
15 can read it.
16 (The last question was read.)
17 COMMISSIONER MURPHY: What's the
18 relevance of that in terms of remedy?
19 MS. BOYLAN: It goes to remedy in
20 terms of the mitigation of damages. We are going
21 to show through proof of this witness and another
22 witness that this man would have been terminated
23 prior to -- well, around the time of his June
24 deposition, 1996, for misconduct.
25 COMMISSIONER MURPHY: I'm not going to

1 that --

2 MS. BOYLAN: I would like to make an

3 offer of proof for the record.

4 COMMISSIONER MURPHY: You may do

5 that.

6 MS. BOYLAN: The questions that we

7 would have asked this witness would have been

8 verified by answers he gave in his deposition in

9 June -- June 24, 1996 in which he was asked about

10 records he had removed from The University of

11 Wisconsin-Milwaukee that were produced in -- by

12 him in discovery in the case on the merits.

13 Records that he was not entitled to

14 have at home -- He took it home. He made copies

15 of confidential records of investigative files.

16 That was first discovered in his response to our

17 request for production of documents.

18 Chief Clark when he saw these

19 responses was upset that these records had been

20 removed from the campus, and he called Hector de

21 la Mora in our office to get legal advice, and

22 Hector de la Mora contacted the Attorney General's

23 office. The Attorney General's office filed a

24 civil lawsuit, a replevin action to get documents

25 returned from Brenon which has not occurred to

1 Supreme Court case.
2 COMMISSIONER MURPHY: I just want to
3 be clear in that you would be at this particular
4 point in our proceeding attempting to then prove
5 that he would have been discharged at that time?
6 MS. BOYLAN: Yes. In June --
7 COMMISSIONER MURPHY: You would
8 have -- Just a moment so you're clear. And that
9 in fact he would have been presenting -- It was
10 your intent to present evidence to show just cause
11 for terminating the Appellant at that time? Is
12 that -- Was that your intent today?
13 MS. BOYLAN: To show that misconduct
14 had occurred, that Brenon had admitted to that
15 misconduct.
16 COMMISSIONER MURPHY: But my question
17 was just cause. That was the question.
18 MS. BOYLAN: Yes. There was
19 sufficient --
20 COMMISSIONER MURPHY: You intended
21 to --
22 MS. BOYLAN: -- cause for
23 termination. Yes. And we would have --
24 COMMISSIONER MURPHY: And that was
25 your intent is present evidence of that kind

1 training for Wisconsin?
2 A I have since 1974. I was first employed there as
3 an assistant director, and so I have -- either as
4 assistant director or director have had a role in
5 both recommending legislation and in recommending
6 administrative rules which have been adopted by
7 the board.
8 Q And prior to being director, what was your title?
9 A Assistant director.
10 Q At the bureau?
11 A Yes.
12 Q And what were your job duties then?
13 A I supervised a certain section of the bureau and
14 mainly was responsible for running the specialized
15 training program and also developing training
16 guides for basic training.
17 Q And prior to that position, where were you
18 employed?
19 A I was a grants administrator, State of Wisconsin
20 with what is now the Office of Justice Assistance.
21 Q And what did you do there?
22 A I administered about 3 and a half million dollars
23 worth of law enforcement grants in the
24 communications area.
25 Q And can you give us your educational background?

1 A I have a master of arts degree from University of
2 Wisconsin-Madison in public policy and
3 administration.
4 Q When did you get that?
5 A 1972.
6 Q Okay. Anything else?
7 A A bachelor of science degree from the University
8 of Wisconsin in psychology.
9 Q And when did you get that?
10 A In 1970.
11 Q Do you belong to any professional associations?
12 A I belong to the International Association of
13 Chiefs of Police and The International Association
14 of State Directors of Law Enforcement Training.
15 MS. WESLOW: I'd like to qualify this
16 witness as an expert witness in the field of
17 employment and hiring standards for Wisconsin law
18 enforcement positions.
19 COMMISSIONER MURPHY: Well, is there
20 any objection?
21 MR. ERICKSON: I don't think so. I
22 haven't heard the questions yet.
23 MS. WESLOW: Okay. We'll proceed?
24 COMMISSIONER MURPHY: Proceed.
25 BY MS. WESLOW:

1 Q Can you tell us what information UW-M provided to
2 you as background regarding Mr. Brenon's
3 employment at UW-M?
4 A When they employed him in 1974, they filed
5 paperwork to inform the law enforcement standards
6 board that he had been employed. And they
7 verified that the training and employment
8 standards of the board had been met at that time.
9 Then they also informed the board from
10 time to time that training requirements had been
11 met in terms of recertification training which
12 applied to him.
13 And then finally the employer informed
14 the standards board that he had been terminated
15 from employment there.
16 Q And did you get that information from his file at
17 the bureau?
18 A From -- There's a standard form that employers
19 file telling us for the board's records of the
20 employment status of any employee, and they
21 followed through with that. Filed the form, yes.
22 Q Okay. Are you aware of what rank Mr. Brenon held?
23 A I believe he was a sergeant at the time he was
24 terminated.
25 Q And do you know why he was terminated?

1 officers in Wisconsin?
2 A Yes, I do, from administering employment and
3 training standards of the law enforcement
4 standards board.
5 COMMISSIONER MURPHY: All right. You
6 may proceed.
7 BY MS. WESLOW:
8 Q Thank you. Please describe for us the job market
9 in the law enforcement field from February of 1996
10 to the present.
11 A It's a very active market.
12 COMMISSIONER MURPHY: Just a little
13 slower.
14 MS. WESLOW: Oh, sorry. February 1996
15 to the present.
16 THE WITNESS: It's a very active
17 market. And the reason is that for 15 years, the
18 law enforcement standards board has allowed
19 civilians who have 60 college credits to attend
20 basic law enforcement training at their own
21 expense.
22 Therefore when they come into the
23 employment market, they come in as certifiable
24 applicants. That is to say, if they're employed
25 by an employer, they need a minimum amount of

1 from these things. I think these are part of the
2 record. I might be able to clean this up a little
3 bit because I think certain things may be
4 duplicated. And I --
5 COMMISSIONER MURPHY: Should I go off
6 the record for a moment?
7 (Discussion off the record.)
8 COMMISSIONER MURPHY: We're back on
9 the record after taking time to look over some
10 materials. Mr. Erickson?
11 MR. ERICKSON: I'd offer A, B, C and F
12 and withdrawing -- Do I need to identify the ones
13 I'm withdrawing?
14 COMMISSIONER MURPHY: No. You don't
15 have to do that. So that's what you want to be
16 entered into the record. And I'm not sure, but my
17 question really -- I haven't really read these.
18 I haven't read them because I didn't know how they
19 were going to be used.
20 And this -- I'm looking at A now.
21 Let me just go off the record. Let me just look
22 at these for a moment.
23 MR. ERICKSON: Can I just explain why
24 I want them in, and then maybe it will make more
25 sense?

1 COMMISSIONER MURPHY: All right.
2 Fine.
3 MR. ERICKSON: The -- As you know,
4 it's been our position that originally UW-M
5 stipulated to a procedure to be used. Exhibit A
6 and B relate to the originally stipulated
7 procedure, and I want this in evidence or at least
8 as part of your record so that if this matter is
9 appealed for any reason that I've made an
10 appropriate record.
11 Exhibit C is a further description of
12 the procedure in this matter leading up to
13 ultimately F which is another letter brief that I
14 submitted to you on the issue of how this matter
15 is developed into this last stage which is now a
16 hearing, and I want the record to reflect how we
17 go here.
18 Whether it's part of your file -- I'm
19 satisfied with that. If I need to mark them as
20 exhibits which is what I was inquiring about at
21 the status conference, and you thought I should --
22 I better do that if I want to make sure they get
23 in. That's what I've done.
24 But I think that it's crucial
25 ultimately to a review of this case if it occurs

1 MR. ERICKSON: I'm sorry, did you say 26 or
2 25?
3 A 25, 825. And on, in part B, which would be page XVI,
4 it says that, under No. 11, that you need extensive
5 skill and effective human relations and communications.
6 BY MS. BOYLAN:
7 Q Okay. Now, you are aware that Brenon was suspended for
8 ten days in early 1995, aren't you?
9 A Yes, I am.
10 Q And who was Brenon's supervisor at the time?
11 A Lieutenant Sroka.
12 Q Okay. If you could, briefly describe your
13 participation, if any, in the events leading up to that
14 suspension or the inclusion of the suspension?
15 A I was approached by an officer who told me that
16 Sergeant Brenon had been making or telling
17 inappropriate jokes and that he wasn't sure that he
18 wanted to complain about them. He was concerned that
19 he would be retaliated against.
20 I told him that he should talk to Lieutenant
21 Sroka. And he was concerned that Lieutenant Sroka
22 wouldn't do anything about it and that he would be, in
23 fact, retaliated against and therefore nothing would
24 come of it, that he would make the complaint and he
25 would be the one who was retaliated against and that

officer in charge?

Q. Well, the pattern had been for Officer Holmes or Officer Sorrell to be the OIC, so if Sgt. Brenon wasn't present; true?

A. Most of the time, yes.

Q. And on December 4th for the first time Officer Klobukowski went into the rotation as--for OIC; true?

A. That's true.

Q. And you know that the memo that was sent to you by Officer Sorrell was not even created until December 5th, the day after that; isn't that true?

A. That's true.

Q. And the assignment making Officer Klobukowski OIC on December 4th was made presumably sometime prior to that?

A. Yes, those are usually made up, uh, days ahead of time.

Q. And just so Commissioner Murphy can understand, exhibit 13 and exhibit 14 are not documents that came from the UWM P.D. files; true?

A. True.

Q. That's the 1995 projected work schedules that

Q. And you were inviting Officer Peters to go out and make a stronger case against Sgt. Brenon; true?

A. I didn't invite him to do anything.

Q. Isn't that the clear implication of what you were telling him by getting others to corroborate his story?

A. That's not the way I understand it; no.

Q. And with respect to discipline itself, discipline--you've spoken at staff meetings about progressive discipline; true:

A. I'm sure we've all discussed it, yes. I don't know that I have spoken on it, per say se', but yes it's been discussed at length.

Q. And you've related information again from Shannon Bradbury to the department relative to progressive discipline?

A. Yes, I have.

Q. And in fact, isn't it true that you have indicated that labor relations believes that progressive discipline should be one--in terms of suspension, would be a one, three and five-day suspension and no ten-day suspensions?

A., I've indicated several different things that were told to me, including one, two and five;

1 MS. BOYLAN: That's all the questions I have.

2 HEARING EXAMINER: Cross examination.

3 CROSS EXAMINATION

4 BY MR. ERICKSON:

5 Q Officer Klobukowski, have you filed any grievances

6 against the Police Department?

7 A Yes, sir. I have.

8 Q Are there any currently pending?

9 MS. BOYLAN: Objection. This is irrelevant.

10 MR. ERICKSON: And you'll find out—

11 HEARING EXAMINER: And if it is, you have to

12 find-- No, I don't have any idea what this is about.

13 I'm going to let him go.

14 BY MR. ERICKSON:

15 Q Are there any currently pending?

16 A Yes, sir. There is.

17 Q How many?

18 A One.

19 Q What's the nature of it?

20 MS. BOYLAN: Same objection. Irrelevance.

21 HEARING EXAMINER: I don't know. Overruled.

22 A The nature of the grievance is that I was denied union

23 representation while being questioned in this matter.

24 Q "In this matter" meaning the matter concerning Sergeant

25 Brenon?

1 A That's correct, sir.
2 Q You had requested representation?
3 A Yes, sir.
4 Q In your meeting with who?
5 A In my meeting with Lieutenant Hodermann and Chief
6 Clark.
7 Q Who denied the representation?
8 A Lieutenant Hodermann.
9 Q And that matter's still pending, is that right?
10 A That's correct, sir.
11 Q Have you signed any statements that were prepared by
12 Lieutenant Hodermann?
13 A Yes, sir. I did.
14 Q I'm showing you Appellant's Exhibit 10. I've opened it
15 up. And that's a three-page document, is that correct?
16 A Yes, sir.
17 Q Does that look like the statement that was prepared for
18 your signature?
19 A (Pause while going through document)
20 HEARING EXAMINER: I'm going to ask, is that,
21 is that what you provided the Commission?
22 MR. ERICKSON: Right.
23 HEARING EXAMINER: Okay. I just want to make
24 sure. If I find it.
25 MR. ERICKSON: Appellant's Exhibit 10, sorry.

1 A Chief Clark, Security Officer Esler, and two people
2 from Diversity and Compliance. One's name, first name
3 is Tammy, I don't recall her last name. And Victoria
4 Boswell.
5 Q At the time of the interview with the Office of
6 Diversity, did there come a time during this interview
7 when Chief Clark reacted to something you said?
8 A Yes, sir. There was.
9 Q Can you describe what happened for the Commissioner,
10 please?
11 A I was asked questions in reference to Cadet Panas. And
12 I explained to Victoria Boswell that Cadet Panas had
13 told me that she was receiving phone—
14 MS. BOYLAN: Objection. Hearsay.
15 HEARING EXAMINER: Well, what he does say in
16 that question is hearsay. But really, the question
17 really pertains to what, what he was asked in his
18 response to a question by one of your witnesses and
19 what he told. He told it for (inaudible two word,
20 background noise) I think that was it. I'm going to
21 let him continue.
22 A Anyways, she informed me that she was receiving phone
23 calls from management at home and she felt that she was
24 being pressured into making a statement against
25 Sergeant Brenon. And when I informed Victoria Boswell

1 of this, there was a definite reaction from Chief
2 Clark.
3 BY MR. ERICKSON:
4 Q Did Chief Clerk attend the entire interview?
5 A Yes, sir. He did.
6 Q Are you aware of whether or not subsequent to that
7 Chief Clark was not allowed to attend interviews?
8 A I was not aware, sir.
9 Q The statement, Exhibit 10, Appellant's Exhibit 10,
10 indicates that-- Well, strike that. This, the typing
11 that appears on these three pages, did you type this
12 up?
13 A No, sir. I did not.
14 Q Do you know who did?
15 A No, sir. It came from Lieutenant Hodermann.
16 Q So it was presented to you by Lieutenant Hodermann for
17 your signature?
18 A That is correct, sir.
19 Q If, looking at the first page of this, the fifth
20 paragraph, it says "Klobukowski has been harassed and
21 intimidated by three other officers." Did I read that
22 correctly?
23 A That is correct, sir.
24 Q And did you inform Lieutenant Hodermann about this?
25 A Yes, I did.

1 and some of the comments made. Apparently some other
2 officers had complained about something that was said
3 about me.
4 Q And Lieutenant Hodermann immediately told you that you
5 were not the subject of her investigation, true?
6 A I believe so.
7 Q Okay.
8 A Yes.
9 Q And you were not asked if you were telling jokes, were
10 you?
11 A No.
12 Q In fact, you had told these Million Man March jokes,
13 correct?
14 A I didn't say I told them; I said I was discussing them.
15 Q Well, you told these—
16 A They weren't on a, a basis of telling the joke.
17 Q You were on duty and you repeated jokes you claim you
18 heard on the radio, true?
19 A I discussed the joke, that it was heard on the radio,
20 yes.
21 Q And you were on duty?
22 A Yes, I was.
23 Q And, and Lieutenant Hodermann never even asked you if
24 you did that at this meeting, did she?
25 A Nope.

1 Q You have never been reprimanded or sanctioned in any
2 way for repeating those jokes while on duty, true?
3 A True.
4 Q You made-- By the way, you have been disciplined,
5 however, for filing a false claim for reimbursement for
6 meals, true?
7 A I have a letter, and that's a pending situation right
8 now.
9 Q Okay. That's where you tried to claim meal expenses
10 for attending a seminar where meals were included in
11 the seminar price?
12 A I was having problems with the computer. I made a
13 mistake and accidentally entered, entered some
14 information in. And I never, never double checked my
15 work and I turned it in.
16 Q It, in the, in the meeting prior to your memo, Exhibit
17 8, you were-- Well, strike that. During that meeting
18 on Monday morning or Monday, December 4th, did
19 Lieutenant Hodermann ask you to prepare a memo
20 regarding jokes you heard Sergeant Brenon tell?
21 A I don't recall about, what she had exactly said to me
22 at that time.
23 Q Well, weren't you invited to prepare a memo on all of
24 the concerns you had regarding Sergeant Brenon?
25 A She asked me about these, questions about what he had
26 said to me. And I went on and told her more things

1 MR. ERICKSON: It's page 35.

2 HEARING EXAMINER: Okay.

3 MR. ERICKSON: Line 17.

4 MS. BOYLAN: I think you should start

5 earlier, so the paragraph is complete—

6 HEARING EXAMINER: Well, just a moment. It's

7 his question.

8 BY MR. ERICKSON:

9 Q Line 17. I asked you a question.

10 "Q Did you take it as an order for Lieutenant

11 Hodermann to prepare this memo?

12 "Answer As a supervisor, yes. If I'm asked to do

13 something, I would take that as an order."

14 Did I read that correctly?

15 A Yes. You read that correctly.

16 MS. BOYLAN: I renew, I object about

17 completeness.

18 HEARING EXAMINER: Well, you didn't say you

19 objected.

20 MS. BOYLAN: Okay.

21 HEARING EXAMINER: You -

22 MS. BOYLAN: I object.

23 HEARING EXAMINER: - you were -

24 MS. BOYLAN: I object.

25 HEARING EXAMINER: - you -

26 MS. BOYLAN: I object.

1 A As far as I know, it was these two times. I may have
2 talked to her occasionally in passing, which is not
3 uncommon.
4 Q Okay. Now, the Esler joke that is referenced in the, I
5 guess it's the third paragraph of Exhibit 73,
6 Respondent's 73.
7 A Okay.
8 Q It says that you remember the Esler joke being
9 performed—
10 HEARING EXAMINER: (Tape beeping) Just a
11 moment.
12 (Off the record)
13 HEARING EXAMINER: Okay. Go ahead.
14 Q And on Exhibit 70 or Respondent's 73 indicates that you
15 first remember hearing the Esler joke in November? Do
16 you see that?
17 A Yes.
18 Q That's referencing November 1995, true?
19 A Yes, it is.
20 Q And that was prior to your meeting on December 4th with
21 Lieutenant Hodermann and prior to your preparing the
22 P-mail to Lieutenant Hodermann on December 5th,
23 correct?
24 A Correct.
25 Q You didn't make any comment at all about the Esler joke
26 in your December 5 P-mail, did you?

1 Q All right.

2 HEARING EXAMINER: January 1st he worked?

3 MR. ERICKSON: We're going to get to that in

4 one second.

5 Q On December 31 and January 1st you worked. Is that

6 correct?

7 A Yes.

8 Q Okay. So you had been, the last day you had worked

9 prior to December 31st was December 24th and you had

10 been the OIC.

11 A Yes.

12 Q Now, the next time you came back on December 31, do you

13 have the shift logs in front of you? That's Exhibit

14 21.

15 A December -

16 Q 31.

17 A - 31st. (Witness complies) Okay.

18 Q And on that date Klobukowski is the OIC?

19 A Yes, he is.

20 Q And then on the 1st you worked and Holmes is the OIC.

21 Is that right?

22 A Yes, he is.

23 Q And then you're off until January 4th. Is that right?

24 A Yes.

25 Q And when you came back on January 4th, you were the

26 OIC, weren't you?

1 Q Have you ever disciplined Lieutenant Hodermann for
2 similar conduct?
3 A No.
4 Q Did Lieutenant Hodermann make claim for meals during
5 the time she was attending the Northwestern School?
6 A Yes, under my authorization she did.
7 Q And that school is held where?
8 A It was held at Milwaukee County Sheriff's Department.
9 Q That was within the 15-mile limit for receiving
10 reimbursement for meals, isn't it?
11 A Fifteen-mile limit is one of the restrictions. The
12 other is, you can go less than 15 miles if you went to
13 a different jurisdiction, different municipality, or
14 something of that nature.
15 Q Did you require reimbursement by Lieutenant Hodermann?
16 A Yes.
17 Q Why did you do that if you authorized it?
18 A Because I was overruled. But was more than Lieutenant
19 Hodermann, also.
20 Q During the EEOC or - strike the - the Office of
21 Diversity & Compliance investigation, you were asked by
22 Tori Boswell not to participate anymore, weren't you?
23 A Yes.
24 Q Because she thought you had a chilling effect on the
25 interviewees?
26 A Yes.

1 Q So, and let me just ask you from a hypothetical
2 standpoint that Chief Clark came in here today and
3 told you that we've got some allegations relating an
4 employee telling racial jokes. And I think it's
5 serious and I'm considering termination.
6 A Okay.
7 Q Then as part of the process or procedure that would
8 be utilized in that circumstance, you would
9 recommend to Chief Clark he have a pre-disciplinary
10 hearing?
11 A I recommend that he conduct an investigation
12 hearing.
13 Q Okay. And then if he is considering potential
14 termination -
15 A If the investigation has been completed.
16 Q - okay - then a pre-disciplinary hearing should take
17 place?
18 A Yes.
19 Q Now, sometimes investigations just continue and
20 continue over an extended period of time because of
21 tracking down different witnesses and complainants
22 or, or whatever, correct?
23 A Yes.

1 Q Well, the question is, you have been consulted on
2 those issues by members of the supervisory staff of
3 the Police Department, true?
4 A I don't have a clear recollection of that,
5 specifically, no.
6 Q Do you recall telling Lieutenant Hodermann that you
7 believe the appropriate should be one, three and five
8 days and then ten-day suspensions should be one?
9 MS. BOYLAN: Objection. The witness has
10 already said she doesn't have any recollection of
11 discussing that.
12 HEARING EXAMINER: Well, she can answer.
13 She -
14 A Okay.
15 HEARING EXAMINER: - she's capable of doing
16 that.
17 A I would say that, that one, three and five is probably
18 an appropriate progression from the union organized,
19 wage earning, Fair Labor Standards Act, non-exempt
20 employees. However, for exempt employees, the
21 employer is not privileged to issue disciplines of
22 less than one full work week.
23 So the only disciplinary suspensions that
24 the employer would have available to it for FLSA, Fair
25 Labor Standards Act exempt employees would be either

1 one full work week, two full work weeks or three.

2 Q Now, were you involved in preparing the suspension

3 letter that was issued to Sergeant Brenon?

4 A I do not remember.

5 Q And maybe if we just take a second and show it to you

6 so that you can see if that jogs your memory. Take a

7 look at exhibit, Respondent's Exhibit 2.

8 A Okay. (Witness complies) I don't see it in the

9 books.

10 Q Oh, this one. I'm sorry.

11 A Oh, okay.

12 Q We don't use the same numbers.

13 A All right.

14 Q Is that a letter dated 12/19/95?

15 A Yes.

16 Q And it's a two-page letter from Chief Clark and

17 Lieutenant Sroka?

18 A Yes.

19 Q Does this refresh your recollection at all that you

20 were involved in that—

21 A I've seen this letter, but I don't have any direct

22 recollection of whether or not I directly helped them

23 on this or not.

1 A Yes. She said that she had been approached.
2 Q And can you just describe for the Commissioner what
3 Cadet Panas informed you of?
4 A Well, in somewhat bullish statements something of the
5 nature that she was getting a lot of pressure from Ken
6 Peters to file a complaint. Again, I don't know what
7 her relationship was working on second shift with
8 those officers or when Sergeant Brenon happened to
9 been that shift. There were a lot of things that I
10 was not aware of. And if she had a complaint that I
11 don't know about, that's just not knowledge to me.
12 Q Did Cadet Panas indicate to you how she had responded
13 to Officers Peters' inquiry?
14 A I don't believe she gave me a response. It, it became
15 more of something that she tried to push the issue
16 aside, that the impression I got from her was that she
17 didn't want to file a complaint, if there was
18 something to file one. Again, I don't know what her
19 workings were. And we didn't pursue the issue on a
20 one-to-one basis if she even had a complaint.
21 Q All right. When you say that she was receiving
22 pressure from Peters, is that something that she
23 personally related to you, Cadet Panas?
24 A That was one half of the coin, when she used the word
25 "pressure". She related to me that she was getting a

1 lot of pressure from Ken Peters and the entourage that
2 followed and she was getting a lot of pressure from
3 management. So she was kind of between a rock and a
4 hard place.
5 Q Did she identify anyone from management who had been
6 pressuring her?
7 A Again, I'm looking to be sure-- I don't know if I can
8 actually recall her pointing out any individual or
9 individuals, other than to say that she was getting a
10 lot of pressure from management to come forward and
11 file a complaint. And her words to me were that
12 management told her it would be in her best interest
13 if she came forward. And, and I didn't delve into
14 that too much. This is something she felt by talking
15 to me about it.
16 Q And was this at or about the time she was expressing
17 concerns to you about her status, her future status
18 within the Department?
19 A Very much so. There was some doubt about the program,
20 whether or not it was going to come true or whether or
21 not she was going to (inaudible word). A lot of
22 things seemed to be racing through her head.
23 Q Now, following your submission of your December 20,
24 1995 memo to Lieutenant Sroka, were you suspended?

1 A I was suspended in January of '96, I believe it was
2 January 3d. And I was advised that, by Lieutenant
3 Sroka by telephone as I was getting ready to go to bed
4 prior to getting up for my shift the next day that
5 effective immediately I was suspended with pay and
6 that my main contact would be Lieutenant Sroka and I
7 was to have no contact with anyone in the Department
8 other than him and to not speak with Sergeant Brenon.
9 And he said that's all he could tell me. And I said
10 "Okay".
11 Q At the time of your suspension, were you informed in
12 any way, shape or form as to what, why you were being
13 suspended?
14 A I believe I, I asked Lieutenant Sroka after he told
15 me, you know, there's not much I can tell you about
16 it, this is the way it's going. And as of today's
17 date, I have not received anything written as per the
18 contract why I was suspended. And right now, I, I
19 still don't know.
20 Q What do you mean as of now you still don't know?
21 A According to the contract, I was entitled to a written
22 response as to why I was suspended. Management has
23 not given us, the union or myself, a written
24 explanation.
25 And it's been referred to, I mean their

1 contact as administrative leave, a change to an
2 administrative leave. That's never been told to me.
3 In light of the words that Chief Clark told me at the
4 January 11th meeting, when I was called into the
5 Department, that he was considering lifting the
6 suspension on me. So to this, to date I don't know
7 whether they're going to call it administrative leave
8 or a suspension.
9 Q Is that matter regarding your suspension/
10 administrative leave, is there something pending
11 within the union? Is there a grievance or something?
12 A Well, there's not an official grievance on file.
13 We've made verbal and written requests to management
14 for an explanation and we have not received one yet.
15 Q Do you have any grievances pending currently?
16 A Yes, I do.
17 Q What do those relate to?
18 A Currently being denied representation at the Legal
19 Affairs Department involving this lengthy issue.
20 Q "This lengthy issue" refers to what?
21 A UWM versus Brenon or vice versa.
22 Q Now, if I can refer you to Exhibit 17, Appellant's
23 Exhibit 17.
24 A (Witness complies)

1 that Lieutenant Hodermann would be conducting a
2 further investigation?
3 A No.
4 Q In fact, he had informed you to contact only him
5 within the Department?
6 A That was part of, he was my contact personally.
7 Q In November of 1995 when Sergeant Brenon was not on
8 duty, did you ever witness Officer Peters using
9 Sergeant Brenon's office to interview members of your
10 shift?
11 A That was one of the first occasions I saw Officer
12 Peters having people in that office. He was sitting
13 behind the desk and yet would be talking to someone
14 about certain issues. And then mum was the word when
15 I walked into the office.
16 Q And when you say "the office", you're talking about
17 Sergeant Brenon's office?
18 A The Sergeants all share a common space, yes.
19 Q That's not Officer Peters' office?
20 A It is not.
21 Q Did you witness Officer Peters in Sergeant Brenon's
22 office with Cadet Panas?
23 A I did at one time, yes.
24 Q Was that in November of '95 while she was on duty on
25 the third shift?

1 Q So was it represented to you that something Sergeant
2 Brenon did affected the morale of the Department?
3 A Well, it affected three or four other officers at
4 least.
5 Q Three or four officers who had complained about his
6 joke?
7 A Jokes and his treatment of them.
8 Q And you understand that it was three or four officers
9 complaining of treatment and jokes that led to the
10 ten-day suspension, true?
11 A I don't know if it was three or four officers, no.
12 Q Did you do anything to determine or to protect
13 Sergeant Brenon from being disciplined twice for the
14 same conduct?
15 A No, I didn't.
16 Q Did you leave that to Chief Clark?
17 A Chief Clark has total disciplinary authority.
18 Q So in terms of whatever rights Sergeant Brenon had to,
19 with respect to disciplinary process, you left that
20 entire matter to Chief Clark?
21 A That's correct.
22 Q Your own experience in dealing with the pol, with the
23 Police Department issues, disciplinary issues within
24 the Police Department is that in the normal course of
25 events the officer - or Sergeant in this case - who

1 was being disciplined, the disciplinary process would
2 include an individual's direct supervisor, true?
3 A That's correct.
4 MR. ERICKSON: Thank you. That's all I
5 have.
6 HEARING EXAMINER: Cross-examination.
7 CROSS-EXAMINATION
8 BY MS. BOYLAN:
9 Q The exhibit containing, Exhibit 6 containing Dale
10 Brenon's- your deposition in the Brenon case was
11 supplemented, is that correct?
12 A That's correct.
13 MS. BOYLAN: May I have this marked as an
14 exhibit? That was received in my office last week.
15 HEARING EXAMINER: Received last week?
16 MS. BOYLAN: From the court reporter.
17 HEARING EXAMINER: Why, what number do you
18 want?
19 MS. BOYLAN: How about if we make it 6-A,
20 Appellant's or can it be Appellant's 6-A to make that
21 complete? No?
22 HEARING EXAMINER: (Inaudible word).
23 MR. ERICKSON: I might have it marked as my
24 exhibit.
25 MS. BOYLAN: Okay.

Q. And which days of the week would you work?

A. Monday through Friday.

Q. And is that a consistent schedule?

A. Yes.

Q. For how long? Most of the year?

A. Yes.

Q. Prior to your taking some time off from Thanksgiving, did Lt. Hodermann make you aware of any concerns that had been brought to her attention regarding conduct by--the conduct of Sgt. Brenon?

A. No.

Q. You said you were off through December 3rd?

A. Yes.

Q. You returned on the 4th?

A. That's correct.

Q. And on the 4th when you returned were you made aware on that day of any concerns that had been brought to Lt. Hodermann's attention?

A. Yes.

Q. How was that brought to your attention?

A. I was called into a meeting the morning of December 4th with Chief Clark and Lt. Hodermann.

P-mail to Sgt. Brenon on the same date, bearing a time of 15:46:26, and you can look at appellant's exhibit 8; is that right?

A. Yes.

Q. Did you receive the Jensen memo prior to sending this P-mail to Sgt. Brenon?

A. I believe I did, yes.

Q. Did you talk to Chief Clark again between the P-mail in the morning on the 5th from Lt. Hodermann and your sending the P-mail to Brenon in the afternoon?

A. Yes.

Q. And, uh,--so this was the second meeting then between you and Chief Clark?

A. Correct.

Q. Was anybody else present at that meeting?

A. No.

Q. Now, at either of the two meetings that you've mentioned so far, on the 4th and 5th, did Chief Clark indicate to you that he had been in contact with the University administration?

A. No.

Q. On the 5th, were you given any directives from Chief Clark?

A. Yes.

Q. What were you asked to do?

A. He asked me to meet with Sgt. Brenon and to get his side of the story about the allegations, the joke telling, and he told me not to discuss any discipline with him but he's going to have to knock this conduct off or words to that effect.

Q. At either the meeting on December 4th or the meeting on December 5th, did Chief Clark indicate to you that the conduct referenced in the memos, in all the memos that we've been talking about so far, that, um, he felt this conduct was so serious he was considering termination?

A. No.

Q. Would you have sent the P-mail, marked as exhibit 8 to Sgt. Brenon, worded as it is, had Sgt.-- had the Chief, Chief Clark indicated to you he was considering termination?

MS. BOYLAN: Objection; calls for speculation.

MR. MURPHY: The question was--

MR. ERICKSON: Would he have sent

appellant's exhibit 8 in the form it is--

MR. MURPHY: Well, I'll allow him to answer that, it's not quite speculation.

THE WITNESS: I would not have sent it in that fashion.

BY MR. ERICKSON:

Q. Let me ask you this, the P-mail to Sgt. Brenon on the 5th says it's a Tuesday?

A. That's right.

Q. And then you're asking to meet with him on Friday morning, the 8th?

A. Right.

Q. Why is it that--why did you meet--(inaudible)?

A. A scheduling conflict.

Q. Do you recall what the--

A. I was going to be out of town on University business for three days.

Q. And what sort of business was that?

A. Uh, training.

Q. In what?

A. Um, advanced labor management.

Q. Did Chief Clark indicate to you that anytime prior to your meeting--well, strike that. Between your meeting with Chief Clark on December 5th

Q. Now, we had some testimony earlier this morning from Shannon Bradbury, is that a person known to you?

A. Yes.

Q. And evidently she's with the labor relations portion of the University?

A. Correct.

Q. Is she a resource available to you if you so require?

A. Yes.

Q. Do you need to go through Chief Clark in order to contact that resource?

A. As a courtesy I would.

Q. Did you do that at any time between December 4th, 1995, and December 8th?

A. No.

Q. Do you know if Chief Clark did?

A. No.

Q. He didn't inform you that he had had any contact with Shannon Bradbury?

A. No.

Q. Now, had you been addressing an issue with Sgt. Brenon that could result in termination, would you have provided some notice to Sgt. Brenon in

any form?

A. Yes, I would.

Q. And what form would that have taken?

A. I would set up a formal investigator hearing.

Q. What does that mean--formal investigator hearing?

A. Well, in steps of disciplinary matters, I would set up a hearing where he could be given the allegations and then give him--I would ask him questions about those allegations and ask him to respond.

Q. In terms--strike that. We've had some testimony regarding representation by--or requests by employees in the disciplinary process for representation, do you know when that kicks in?

A. For represented people, anyone should be able to have a person they choose to represent them at such a hearing?

Q. At what sort of a hearing, an investigator hearing?

A. Yes.

Q. And let's talk for a minute about non-represented or non-union people where potential discipline includes potential termination, is the issue of representation applicable to non-represented

did make those jokes that could have been overheard by other persons within the department and he said he did. Um, at that time I told him that that conduct was not satisfactory, that he would have to cease and discist from telling these kinds of jokes publicly and that, uh, he said that he would. He was sorry for what he did. (Inaudible). I at that point told him that I didn't think he would continue to do that anymore and that would be the end of it and I left the meeting. I told him to--(inaudible)--Chief Clark.

Q. Did you explain to Sgt. Brenon prior to your meeting that as far as you were concerned--

MS. BOYLAN: Objection; leading question.

MR. MURPHY: You can rephrase it.

BY MR. ERICKSON:

Q. Okay now, so in just in terms of comments you made to Sgt. Brenon before you left the room. Did you indicate to him in some way the finality of what he had just done?

A. Yes. I relayed to him that I considered the matter closed. I don't know what words I used.

I believe that he told me that he would not do that any longer--again. (Inaudible)--all I needed to hear and that was the end of it.

Q. Had Chief Clark or Lt. Hodermann at the meeting on the 4th, or Chief Clark had the meeting on the 5th, indicated to you that appropriate discipline in this matter would not be within your authority?

A. No.

Q. Were you satisfied--well, strike that. Would you describe this discussion you had with Sgt. Brenon as a warning?

A. Yes.

Q. And in terms of the spectrum of discipline, where does that--

A. It's the first step of discipline. I would describe it as an oral reprimand.

Q. And in terms of your decision of using an oral reprimand at this time, was that based on your years of experience and your handling of other disciplinary matters?

A. Yes.

Q. And was it made--your decision on this oral reprimand made after consideration of the memos

mouth. We should hear it from the witness--

MR. MURPHY: Well, I don't know--

MS. BOYLAN: --as to what--who said what.

MR. MURPHY: --let me just say this in terms of this particular question. I don't think this question actually puts words in its mouth. I think he can answer yes or no.

BY MR. ERICKSON:

Q. Do you recall the question?

A. Could you repeat the question?

Q. Again, we're talking about this meeting with Chief Clark while Sgt. Brenon is waiting. During that meeting, did Chief Clark indicate to you that the matter regarding discipline was out of his hands?

A. No. I discussed with the chief the level of discipline. He stated to me that it was good that Dale had admitted the jokes because if he wouldn't have, they wanted him fired. They meaning the administration which surprised me also.

Q. Why?

A. When I directed them to issue the ten-day

A. Yes.

Q. And why did you do that P-mail?

A. I had not seen anything from other persons that he directly supervised and I wanted them--to give them the opportunity to respond with any concerns they may have.

Q. When you say people that Sgt. Brenon directly supervised, didn't he directly supervise Officer Sorrell and Officer Jensen?

A. Yes. Those are the other two that I--(inaudible).

Q. So you were surveying the balance of the shift?

A. Yes.

Q. I don't want to get beyond the 8th yet, there's a couple things I need to follow up on. Why did it surprise you when Chief Clark indicated that administration wanted to terminate him?

A. Again, it seemed like an awfully harsh punishment for what had--(inaudible).

Q. Did it surprise you that the administration had been involved at that point?

A. Well, it's the first time I was ever involved with something like that. I guess I'd have to say yes.

Q. So in terms of precedent, this would be the first time you were involved in a disciplinary matter in which the administration had been involved prior to your knowledge?

A. Yeah.

Q. I want to come back to this comment that Chief Clark made that they wanted termination. What else did he say after that?

A. I don't recall anything else.

Q. You said that he brought that up after you discussed the level of discipline?

A. Yes.

Q. What do you mean by that?

A. I questioned the ten-day suspension, um, I thought it was a little much and that I already told Sgt. Brenon to consider this a verbal reprimand and that's when he--(inaudible)--admitted telling the jokes--(inaudible).

Q. Did Chief Clark indicate in any way that the matter regarding discipline was out of his hands?

MS. BOYLAN: Objection, that's already been asked.

MR. ERICKSON: (Inaudible)--I'd like

to reform the question into something else.

MS. BOYLAN: I believe that the witness had said that was all he could remember, that he didn't say anything about his hands.

MR. MURPHY: Well, I don't know that he hasn't answered this question. He's answered another form of a question for sure. Um, repeat the question again.

BY MR. ERICKSON:

Q. My inquiry is on the 8th, --(inaudible)--talking about the level of discipline with Chief Clark, did Chief Clark indicate to you in any way that the matter from a level of discipline was out of his hands?

A. Not in those words, but with what I testified to before, I took that to mean that.

Q. Now, after talking to Chief Clark, what did you next?

A. I went back to Sgt. Brenon and explained to him that I had been directed to issue him a ten-day suspension for his conduct outlined in those memos. He then asked if he could then meet with the chief and, uh, I said I would try to

it, so we can just move ahead.

BY MR. ERICKSON:

Q. Did you personally speak with Sgt. Brenon after you left this message on the answering machine?

A. Yes, I did.

Q. And in that conversation, what did you tell Sgt. Brenon?

A. I advised him that he was to be in the paid suspension status and that if you needed to contact anyone on the department he was suppose to contact myself or Chief Clark.

Q. What did you tell him with respect to contacting any other members of the department?

A. He was not to.

Q. Was that an order?

A. Yes.

Q. Did you make similar statements to Officer Holmes?

A. Yes, I did.

Q. Did you have some time off in January of '96?

A. Yes, I did.

Q. Do you recall what dates?

A. January 9th through January 16th.

Q. Now, the ten-day suspension was to take effect when; do you recall?

recollect that our meeting--mine with Lt. Sroka concluded, I returned to my office, picked up my personal belongings and was headed out the door when he returned from what he said was a brief meeting with the chief, touched me on the arm and said "we need to return and talk some more".

Q. And then you indicated, I believe, what Lt. Sroka informed you?

A. Correct. That's when he told me about the ten days.

Q. What did you do next?

A. I was obviously shocked and the only thing I could think of was, "lieutenant, if the chief's still here, I need to ask you for chain of command, and ask it to him directly".

Q. And his response was?

A. Yes, I'll look into that.

Q. And did that occur?

A. It did, within minutes.

Q. Can you describe for Commissioner Murphy what happened.

A. I went to the chief's office, closed door session with just he and I. I told him that I was

shocked and surprised and said I think this is very wrong. I think this is way too severe. I'm asking you to reconsider.

Q. What did he say?

A. His reply was, "this is a done deal, I will not reconsider," and I even had quotes on my notes from that meeting that he said, "if it's overturned, it's overturned".

Q. Your understanding of that comment was what?

A. His feeling that possibly it would be overturned or overruled and if it is, that's fine.

MS. BOYLAN: I'm going to object to that last statement in terms of interpreting Chief Clark's feelings.

MR. ERICKSON: I'm not asking what Chief Clark meant, I'm asking what--

MR. MURPHY: How he interpreted it as I understood it, not what he meant because he couldn't know that. So based on that, I'll let the answer stand.

BY MR. ERICKSON:

Q. When is the next time that you learned that there was anything going on relative to your possible personnel matter including you? Try to be as

January 3rd.

BY MR. ERICKSON:

Q. Did you work on the 3rd?

A. I did not. January 2nd at about eleven a.m. was the last time I was at the department.

Q. Now, the ten-day suspension you already talked about was served when?

A. January 22, 1996, through February 2, 1996.

Q. Were you paid during that time?

A. I was not.

Q. And following the suspension without pay were you back on the payroll?

A. I was advised in a pre-disciplinery, or what they called a pre-disciplinery hearing, that I was going to be put back on suspension with pay. Um, and that suspension with pay I understood was to take effect from February 3rd, which is the day after the suspension without pay, until such time as they get in touch with me again.

Q. And the next that you heard from UWM was what-- after the February 5th meeting? Was that the termination meeting?

A. Saturday the 10th of February, I believe, is the date. I received a notice in the mail that I

1 in the UWM PD. Can you tell Commissioner Murphy what
2 past practice is with respect to disciplinary
3 procedures?
4 A It was always my understanding and training that non-
5 reps were treated the same as those represented by
6 contract. The contract was also applied to non-reps
7 almost completely the same as it was to the reps.
8 Q Can you tell Commissioner Murphy what the, have you
9 heard the term called a "one year look back"?
10 A I have.
11 Q And what do you (inaudible)
12 A We had been told on any number of occasions in
13 disciplinary actions that supervisors at staff
14 meetings and et cetera, we can only consider one year
15 prime as far as the progression of discipline.
16 Q Has anybody indicated to you during the course of your
17 working at UWM that the one year look back does not
18 apply to non-represented employees of the UWM PD?
19 A No.
20 Q Prior to December 8, 1996 (sic), in Exhibit 22, as I
21 understand it, it's got summaries of discipline. But
22 prior to December of '95 evidently there's prior
23 discipline of November '93 by way of written warning?
24 A That's what it says.
25 Q And there's an oral warning in January of '93?

UNIVERSITY OF WISCONSIN MILWAUKEE

University Police

December 19, 1995

Dale R. Brenon, Sergeant
University Police Department
University of Wisconsin-Milwaukee

RE: Letter of Suspension

Sgt. Brenon:

Pursuant to the authority vested in me, you are hereby suspended for a period of 10 days for violating University Work Rules and University Police Department Rules and Regulations. This suspension is to be effective on the Third Shift commencing January 22, 1996 through February 2, 1996.

This disciplinary action is based on your conduct, as related by four officers of this Department, that during the first week of November, 1995 you related racially demeaning jokes to them while in the performance of your duties as a police sergeant. Regardless of the motivation for relating such jokes, this conduct exhibits unprofessional behavior, demonstrates a lack of sensitivity and creates a hostile environment within a diverse workplace.

This conduct constitutes violations of University of Wisconsin System Work Rules IV., B and J, which states:

B. Threatening, intimidating, interfering with, or using abusive language towards others.

J. Failure to exercise good judgement, or being discourteous in dealing with fellow employees, students or the general public.

These actions violate University Police Rules and Regulations, Article I - Conduct, Section 4, which states:

4. When dealing with any person, employees shall at all times conduct themselves in a courteous and helpful manner.

EXHIBIT
R. 2

urg Halls • PO Box 413 • Milwaukee, WI 53201

414 229-462
FAX 414 229-491

As these violations in and of themselves show cause for disciplinary action, the greater concern is that such behavior is not acceptable for a University of Wisconsin-Milwaukee Police Supervisor.

You are advised that UWM maintains an Employee Assistance Program for use by employees who may be experiencing personal problems which are affecting their work performance. The program manager is Mr. Edward Cimermanic, who may be reached at extension 6149.

It is hoped that this 10-day suspension will allow you to reflect on your duties and responsibilities as a police sergeant and the importance of exercising sound and careful judgement when dealing with subordinates.

I also want to advise you that any further violation of work rules will result in further disciplinary action, up to and including discharge. If you feel that this action is taken without just cause, you may exercise your appeal rights as set forth under the UWM Grievance Procedure guidelines for non-represented employees.

Sincerely,

Phillip A. Clark, Chief
University Police Department
University of Wisconsin-Milwaukee

by: Richard A. Sroka, Lieutenant

cc: Personnel Office
Dept. Personnel File

Receipt acknowledged on; Wednesday, 12/20/95

Signed: Sgt. Dale R. Brown

UNIVERSITY OF WISCONSIN MILWAUKEE

University Police

UW

February 9, 1996

Sgt. Dale Brenon
8250 N. 46th Street #122
Brown Deer, WI 53223

Sgt. Brenon:

Pursuant to the authority vested in me, you are hereby terminated from your position as a Police Sergeant with the University of Wisconsin-Milwaukee. This termination is effective Sunday, February 11, 1996.

On December 19, 1995, you were given a 10 day suspension for telling inappropriate ethnic and racially demeaning jokes to your subordinates during November 1995. These jokes were told to subordinate officers while in the performance of your duties as a police sergeant. Officers did not relate all the jokes that were told, however, the following jokes were specifically mentioned: "What do you get when one million lesbians show up at the million man march? Two million people that don't do dick!" "What was the best thing about the million man march? Only four people missed work!" Another joke was of well known Americans and their known quotes, including John F. Kennedy, Martin Luther King and LAPD Detective Mark Fuhrman. This joke included terms and language which were derogatory to African Americans, such as "fucking niggers".

This termination is based on other complaints of your conduct, untruthfulness uncovered in the course of the investigation of those complaints and your retaliation against subordinates who cooperated in those investigations. Specifically, complaints were received that subsequent to your learning of your 10 day suspension, you continued to tell jokes to subordinate officers substituting "Irishman" for other ethnic groups. Additionally, new complaints were received about your making sexually explicit and demeaning comments, telling ethnically and sexually demeaning jokes.

In November of 1995, while talking to Officer Sorrell about his stay in a motel, you made a comment to the effect that Sorrell was too cheap to get two beds and that the three of them (Sorrell, his wife and infant son), probably slept in the same bed. You then made reference to them having sex or a menage a trois. You then said that, "No, it was really (Security Officer) George Esler" or words to that effect (Esler, Sorrell and wife having sex) and made noises mimicking as if they were all having sex. This eventually became just Esler masturbating, you would do this "joke" grunting and making masturbating motions in front of both male and female employees. On other occasions, you referred to your penis as "Lucky", describing its size and making comments such as, "I'm going to drain Lucky," to both male and female employees.

EXHIBIT
R. 9

burg Halls • PO Box 413 • Milwaukee, WI 53201

414 229-46
FAX 414 229-49

After Officer Sorrell submitted a statement about your conduct in early December, 1995, you changed your pattern of appointing him as Officer-In-Charge, you returned the Christmas Card he sent to you marked "refused" and you told others that now you knew who you could trust or words to that effect. You began prefacing your remarks to Officer Sorrell with, "I hope this doesn't offend you..." in a sarcastic tone of voice on those rare occasions when you spoke to him at all. This treatment was sufficiently noticeable to warrant comment by both Officer Sorrell and other officers on the shift.

These examples are not an exhaustive list, but merely indicative of a much larger problem of continuing inappropriate and abusive treatment of subordinates and co-workers which cannot be tolerated in a UWM Police Department supervisor. Your behavior is all the more unacceptable in light of the frequent and numerous training programs you have attended on proper supervisory practices, appropriate interpersonal relations in the workplace, and dealing with the sensitive issues of diversity in a campus environment.

This conduct constitutes violations of University of Wisconsin System Work Rules; I E., and IV., B., D., and J., which state:

Prohibited Conduct

I. E. Failure to provide accurate and complete information whenever such information is required by an authorized person.

IV. B. Threatening, intimidating, interfering with, or using abusive language towards others.

IV. D. Making false or malicious statements concerning other employees, supervisors, students or the University.

IV. J. Failure to exercise good judgement, or being discourteous in dealing with fellow employees, students or the general public.

These actions violate University Police Rules and Regulations, Article I - Conduct, Section 4, which states:

4. When dealing with any person, employees shall at all times conduct themselves in a courteous and helpful manner.

In addition, a complaint was made by one of your subordinates to the Office of Diversity/Compliance on December 28, 1995 regarding the hostile work environment created by your demeaning, degrading and otherwise inappropriate racial, ethnic and sexually explicit language, as well as an intimidating and retaliatory management style. Their investigation and findings corroborated the findings of the University Police Department's investigation.

This continuing unprofessional behavior demonstrates a lack of sensitivity and creates a hostile environment within a diverse workplace and is not acceptable for a University of Wisconsin-Milwaukee Police Supervisor.

If you feel that this action is taken without just cause, you may appeal directly to the Wisconsin Personnel Commission, 131 W. Wilson St., Madison, WI 53702.

Sincerely,

Phillip A. Clark, Chief
University Police Department
University of Wisconsin-Milwaukee

cc: Human Resources Office
Dept. Personnel File

From: Self <WATSON/SROKA>
To: BRENON
Subject: Meeting
Date: Tue, 5 Dec 1995 15:46:26

Dale, I need to meet with you on Friday morning, 12/08/95, regarding some recent personnel issues that I have just been made aware of. I will be away in Madison the rest of this week but will attempt to get in the office on Friday as early as I can. No big deal, won't take up much of your time, but please wait. Thank you.

EXHIBIT 8

From: "Peter A. Holmes" <WATSON/HOLMES>
To: SROKA
Date: Sun, 17 Dec 1995 15:49:59 CDT
Subject: INPUT ON UNIT 17'S ISSUE

COPY

I AM NOT COMFORTABLE PUTTING MY REPLY IN P-MAIL AND WILL FORWARD A TYPE WRITTEN RESPONSE TO YOUR OFFICE BY WEDNESDAY, DECEMBER 20TH.

HOLMES/129

500932

EXHIBIT 16

UNIVERSITY POLICE DEPARTMENT
UNIVERSITY OF WISCONSIN-MILWAUKEE

tomorrow afternoon 1 3L PM

INTEROFFICE MEMO

TO: Lt. Richard Sroka

FROM: Ofc.Peter Holmes / 3rd Shift

DATE: Wednesday December 20, 1995

RE: Internal Investigation - Sgt. D. Brenon

In response to your request for input on the allegation(s) that Sgt. Brenon may have acted inappropriately in his official capacity as a supervisor and that he may have offended certain members of this department by his actions is a difficult question to answer. I will, however, give you my view on the matter.

At no time have I personally ever been offended by the actions of Sgt. Brenon before, during, or after any scheduled work shift. I believe we are all guilty of telling "jokes" before, during, or after our shift to other members of this department. Having been in the vicinity of Sgt. Brenon when he would retell a "joke" to 3rd shift personnel, as well as 1st and 2nd shift during shift changes, I did not get the impression from those in attendance that they were ever "offended" by the joke told. As a matter of fact quite the contrary. Not only did those in attendance laugh at the joke, but many times they themselves would retell a joke they may have heard somewhere along the line. I do not know if anyone was offended by their jokes as well.

I make mention of this as I am aware of the person(s) who have come forth with the allegations that they were "personally" offended by Sgt. Brenon's behavior. I know, for a fact, that at least two officers from 2nd shift "solicited" officers from all three shifts to submit complaints on Sgt. Brenon. Yet, those officers were selective on who they approached. My opinon on this "conspiracy" was to ensure no dissenting opinions would be included in their efforts. In part it is apparent that their efforts were successful.

My read on this entire episode is that Sgt. Brenon's follow-up on poor police work by 2nd shift officers has offended the officers assigned to that shift. Past experience has shown a disregard for adequate building/vending checks, unwillingness to take police related calls just prior to shift change that may need immediate attention, and shoddy/inaccurate police reports written by 2nd shift personnel that affect the following shift officers.

It is with those thoughts that I, personally, have not found Sgt. Brenons actions offensive nor inappropriate. His contacts with the public at large have always been professional and he has always been supportive of the officers assigned to his shift.

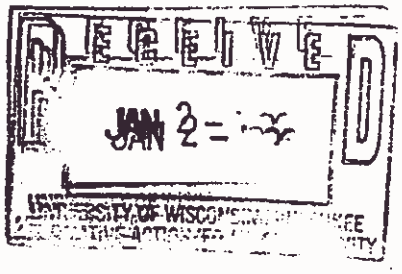
Repectfully submitted,

Peter A. Holmes

Officer Peter A. Holmes / 3rd Shift

UNIVERSITY POLICE DEPARTMENT
UNIVERSITY OF WISCONSIN-MILWAUKEE

INTEROFFICE MEMO



TO: CHIEF CLARK, LT. SOROKA

FROM: Lisa Panas

DATE: December 23, 1995

RE: SGT. BRENON

I have experienced numerous instances in which the actions or comments made by the above named were offending, or discriminatory to my person.

I do not have exact dates that most of these occurances took place, but will include the dates that I am sure about.

I have been subjected to numerous "jokes" told by Sgt. Brenon that contained sexist implications, and remarks, as well as racist. I have many examples, but am unable to recall word for word.

I have also witnessed Sgt. Brenon make remarks about persons employed here engaging in sexual activity, and demonstrating the type of sounds that they may make. There is one specific example in this case.

I also feel that Sgt. Brenon has been dishonest with his duties. I asked Sgt. Brenon numerous times when and if I would be able to get back to second shift. Sgt. Brenon told me the following:

1-When classes start at MATC I will be able to return to second shift.
When this time arose I P-mailed Sgt Brenon, to ask for the exact date I would be able to go back to second shift. Along with my P-mail (Titled "schedule", written November 06 1995), I forwarded a P-Mail from Sgt. Brenon (Titled "Police Cadets/scheduling" written on May 31 1995) In this P-mail Sgt. Brenon stated that I would be allowed to return to second shift as soon as my classes started. In the return P-mail that I recieved the P-mail I sent was deleted, and Sgt Brenon said he never said any of this. Also in the return P-mail there were two other P-mails forwarded that I do not even have in my folder. The heading for my original P-mail, from Sgt. Brenon, (May 31) still remains in my folder, but the p-mail itself is deleted.

EXHIBIT 21

501410

I am not sure who has access to delete these P-mails, but I was told that Sgt. Amodeo could find out. When I told Sgt Brenon that this occured, he said "Oh that happens to me all the time.

I asked Sgt Brenon 5 or 6 times when and if I would be able to get off of third shift, he told me that he would pass my request along. I did not get any action following the chain of command, so I asked Sgt. Brenon if I could talk to LT. Boinski. I spoke to Lt. Boinski, explaing the same situation, (school) to him that I explained to Sgt Brenon. The following day I was informed that I could go back to second shift.

On another occasion Sgt. Brenon asked me if I would like an extra weekend off in November, because he needed me during the week. I said that would be fine. He adjusted my schedule accordingly. About a week later we were again discussing me getting off of third shift. He P-mailed me, and supervision stating that the reason I want off is third shift is to have weekends off, and that he had to adjust my schedule earlier that month because I wanted another weekend off.

When I ask Sgt. Brenon for his assistance or have a question about something, his most common answer is "what would you do if I was not here". I feel that I cannot get a direct answer from him.

There is another instance that occured on Dec 22 1995, that I feel was inappropriate behavior. I do not know if it is valid at this time, because I am not at the decision making level, and am not sure if I have the right to question a Sgt's decision. Also this situation does not directly affect me.

This instance involves Sgt. Brenon sending an Officer to a Whitefish Bay location to get doughnuts, while the other squad while the other squad was off campus doing routing checks. The officer doing off campus checks was told to return to campus until further notice.

During this time all units were advised and dispatched of an ATL (RP on Kenwood). Subject was said to be having seisures.

I was unaware that the unit I was assigned to was getting doughnuts off campus per unit 17, because I was doing checks in the west area. I proceded to walk south bound on Maryland from hartford to Kenwood.

Unit 118 in squad 39 saw me, and stopped. I called in on the radio that I was in squad 39. We reached the location and thc call was 10-22, because the subject was found. After relaying this information. Unit 118 was told to immediatley drop me off in the east.

Approximatley 15 minutes later the unit that was off campus getting doughnuts called back on campus.

Unit 118 then asked Sgt. Brenon if she could proceed with her off campus checks. Sgt. brenon, over the radio, from the station, asked this unit if he was mobile and on campus. This unit said, over the radio, that yes he was mobile, but would be turing his squad over to Sec. Esler in about 15 minutes. Sgt. Brenon told unit 118 she could now finish her off Campus checks.

Unit 131, dispatch duty, stated that this unit was in the station the entire time.

When unit 118 returned to campus, at 7:30 Sgt. Brenon told her to 10-25.

I spoke to unit 118 after work that morning, and she told me that unit 17 told her that I was not to be with her while working at any time. Unit 118 pointed out that I have been assigned to all male officers on this shift, and asked why not her. She told me his reply was that is the way it is because that is what I want.

Sgt. Brenon did not inform me that I am not allowed to be with unit 118, or make any such implication.

Lisa M. Panas
unit 401

Received from Lisa Jan 96 LEA

UNIVERSITY POLICE DEPARTMENT
UNIVERSITY OF WISCONSIN-MILWAUKEE

INTEROFFICE MEMO

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Sgt. Brenon did not inform me that I am not allowed to be with unit 118, or make any such implication.

Lisa M. Panas
unit 401

ROUGH DRAFT

Lisa Panas interview 1/10/96 1PM
Present: Chief PA Clark
Lt PS Hodermann

Sgt Brenon always told jokes, even when she was on 2nd shift
OJ Simpson jokes, lesbian/gay jokes that were gross, inappropriate; would tel them at roll call, sometimes an extra 20 or 30 minutes of jokes
would generally tell them to Paul (Sorrell) Greg (Klobukowski) Pete (Holmes) and Panas who were considered supporters. Dawn (Neuman and Jack (Jensen) were not included in the "group" Did Esler masturbation joke often, Panas observed him doing Esler joke in Mid-late December, definitely after suspension notification. Made noises without the hand gestures. Joke about lesbians with their periods having sex. After 12/08/95 (suspension notification) would often insert "Irishman" for Polish or Black in his jokes-used it sarcastically.

End of December, Brenon found out about EEOC complaint, Panas was on desk, went out for a cigarette, Brenon asked her if she wanted to go to Fuzzy's before work the next day, she said no, had no money. Later while she was on the desk, he asked her again, she said maybe we should ask Jack (Jensen) Brenon said no, "We wouldn't want Jack along" or words to that effect. Panas replied that Shannon couldn't go along and she wouldn't go to Fuzzy's. Later he asked if she was sure and told her that his number was in the book if she needed it. {Information from D. Neuman that he called her again the next day and asked her again.}

Did not have a complaint about Holmes.

Felt she was asked to Fuzzy's to find out more info on the EEOC complaint. Holmes asked her if she was filing a complaint, said that Paul filed a complaint. She said she wasn't.

Sgt. Brenon discusses his penis, "it's Lucky" , talks about it's size, states he's going to drain Lucky when he goes to the bathroom, comments on size, does this regularly and did this after his notice of 10 day suspension.

RE: Dawn Neuman; won't make her OIC, tells dumb blonde jokes to her and Neuman, won't let her go on important calls. Says things that are derogatory to women, "I don't want a wife, what would I do with that?" Demeans Dawn Neuman, makes her feel incompetent

Peter Holmes told Panas that Brenon was going to be suspended, felt that Paul Sorrell had a valid complaint but that Dawn Neuman didn't.

EXHIBIT 22 501

Lisa didn't want to be involved.

Said his behavior didn't change after he knew of suspension for jokes, except Sorrell wasn't made OIC anymore. Brenon knew "who he could trust". Brenon ignored Sorrell, Neuman and Jensen, before he would make fun of Sorrell and constantly ride him. Obviously disliked Dawn Neuman. Did not allow Panas to ride with her-said that Neuman was not capable of doing her job. Wouldn't let Panas ride with Greg- implied romantic involvement.

After Officer Hedbany was shot , Brenon make comment to the effect of "so what he was gay anyway, or words to that effect.

Very controlling, angry if she would attempt to talk to any other supervisor, told her to stay away from Lt Hodermann, don't talk to her, you can't trust her

Cadet Panas 1/10/96 1PM

Cadet Panas was concerned about her job status and possible retaliation if she cooperated in this investigation. Panas was assured that no retaliation or repercussions would result from her discussions on this matter.

Panas has observed Brenon make grunting noises as officer Esler sometimes does and make motions as if he is masturbating. This is recognized by all the officers as mimicking Esler. She had seen him do this on several occasions including after he was notified of a 10 day suspension for inappropriate jokes, as he felt comfortable that she would not make a complaint about him. He also told inappropriate jokes about gay people, and racist and sexist jokes, usually these were in front of Holmes, Klobukowski and her

Sgt Brenon has always told jokes, even when she was on 2nd shift, lots of OJ Simpson jokes. He had photocopied pages, he would tell them at roll call and sometimes just call people into his office and tell them jokes for another 20 or 30 minutes. He would do this with Sorrell, Klobukowski or Holmes, not Neuman or Jensen. He was more comfortable with Panas, Sorrell, Klobukowski and Holmes. She remembers him standing at the dispatch area on December 30, 95, with his arms folded across his chest, telling her jokes.

December 23, 1995, Holmes asked Panas if she was filing a complaint, he told her he knew that Sorrell filed a complaint. He asked who else was filing a complaint and what she knew about the complaint(s) he told her that she would be better off not filing a complaint. She told him she probably wouldn't file a complaint.

Panas was on the desk December 30, 1995, she left the dispatch area to smoke a cigarette, Brenon joined her and asked her if she wanted to go to "Fuzzy's" later that day, and she said she couldn't afford it. Later when she was at the desk, he asked her again. She mentioned that Jensen was off too and Brenon said, we wouldn't want Jack along, or words to that effect. When Brenon was leaving that day, he told her that "My number's in the book if you need it." Panas feels Brenon probably wanted to find out more about the Diversity Compliance office complaint and/or if she was going to complain. It appears to Panas that Brenon does not like Jensen.

Sgt Brenon talks about his penis, it's size, it's "lucky" he talks about how he's got to drain Lucky. He talks about Lucky in front of her and Neuman.

Brenon tells dumb blonde jokes to her and Dawn Neuman, makes derogatory remarks about women, she had heard him say, " I don't want a wife, what would I do with something like that? Implies that he does't like women. Panas has observed that Brenon will not assign Neuman as Officer in charge or let her go on important calls. Panas feels that Brenon demeans Neuman and makes her appear incompetent. He tries to get people to trust him, but he lie to people, is very controlling.

Around 12/8/95, Holmes told Panas that Brenon was going to be suspended. He felt that Paul Sorrell had a valid complaint, but Dawn Neuman didn't. [Neuman had not filed a complaint at this time]

Panas didn't want to get involved or take sides.

Panas saw no real change in Sgt Brenon's behavior after he was notified about a ten day suspension. He acted nervous for a day or so, after that, he told Klobukowski, Holmes and Panas that he knew who he could trust. They were considered to be on "his" side. he no longer made Sorrell OIC.

Brenon continued to tell offensive jokes after learning of his suspension, often sarcastically using "Irishman" instead of Polish or Black, and would make the "Esler" noise at rollcall. He would tell lesbian jokes that Panas felt were gross and inappropriate.

Panas is absolutely clear on the fact that this joke telling continued after Dec. 8, 1995.

When Officer Hedbany of Glendale PD was shot Brenon said 'so what' he is gay anyway, or words to that effect

Sgt Brenon is very controlling, and makes you feel like you can't go anywhere, gives Directives, YOU CAN'T disobey me. He gets very angry if officers on his shift talk to other supervisors or if he believes they violate the chain of command.

When Panas first started Sgt Brenon warned her to "stay away from Hodermann" - "don't talk to her". Often had negative things to say about Lt Hodermann.

Panas observed Sgt Brenon make fun of Sorrell and "ride" him, Brenon obviously dislikes Dawn Neuman, she is not allowed to ride with Neuman because Brenon believes Neuman is not capable of doing her job.

Panas is not allowed to ride with Klobukowski, Brenon has implied that he thinks they are romantically involved.

Recorded by Lt. B. Hodermann
Lisa M. Panas
11/23/96

Cadet Panas Followup 1/17/96 4PM

Cadet Panas is absolutely certain that she personally observed Sgt. Brenon mimic Esler masturbating on several occasions in front of various officers. She believes, based on her observations that all officers on the shift have heard or seen Sgt Brenon do this.

Sgt. Brenon did the Esler joke in front of her several times, she believes that the "Joke" started on November 12, 95. She, Brenon and Sorrell were the only ones working. Sorrell was talking about having gone away for the weekend with his wife and infant son George. They stayed at a motel. Sgt Brenon made a comment to the effect that Sorrell was too cheap to get two beds and that the three of them probably slept in the same bed. He then made reference to them having sex or a menage 'a trois. He then said that, 'No, it was really George Esler' or words to that effect (Esler, Sorrell and wife having sex) and made the noises mimicking as if they were all having sex. This eventually became just Esler masturbating. After awhile, people just ignored Brenon doing this and he stopped.

Cadet Panas is absolutely certain that she observed Sgt Brenon talk about "Lucky", referring to his penis. She saw him do this on more than one occasion. He would do it each time he went to the bathroom. She found this offensive.

Cadet Panas is absolutely certain that Brenon told jokes after notification of his suspension. He did so on the night of 12/30/95 when she was on the desk.

She was smoking a cigarette and he walked back to join her. He stated; 'You know where this all started', 'It started along time ago with her (indicates Lt Hodermann) husband. Panas understood this to mean that he was referring to the complaint(s) and investigation of his conduct. They talked briefly about Dawn Neuman. He then asked her, as they were walking back to the station, if she played darts and would she like to go to Fuzzy's. He mentioned a time of 6PM that day. He later asked her to Fuzzy's again and told her he was "in the book" if she needed to get ahold of him.

Panas is absolutely certain that Sgt Brenon told her, Holmes and Klobukowski, after he found out about his suspension, that know he "knew who he could trust" or words to that effect.

Cadet Panas is absolutely certain that Pete Holmes asked her about the complaint(s) against Sgt Brenon, and wanted to know what she knew. He told her that she would be better off not filing a complaint The date of this conversation was 12/23/95. She remembers being concerned about being able to write her complaint without being detected. Cadet Panas's memo to Chief Clark regarding her complaint is 12/23/95.

Cadet Panas is absolutely certain that Pete Holmes discussed Brenon's initial unpaid suspension with her and possibly other officers. She was always assigned to Officer Holmes and it appeared that Brenon confided a great deal in Holmes.

Panas remembers an incident in which Dawn Neuman was told to immediately drop off Cadet Panas, this is while Officer Holmes was off campus picking up doughnuts. Neuman got called into Brenon's office and "yelled at". Brenon told Panas that he really didn't want Panas riding with Neuman. She asked why. Brenon said because she can't do her job. Panas then said, well isn't it your job to correct that? Then why is she working here if she can't do the job. Brenon replied that he can't get her to do her job and that she could do half the job, or words to that effect.

Each time Brenon would call her into his office to correct a report, he would begin reading jokes off his paper. At times this would last for 20 or 30 minutes, she felt trapped in his office. This occured with other officers as well.

Recorded by Lt. R. Hodermann
Lisa M. Panas
01/23/93
rec'd 1/24/96
Lt R. Hodermann

RWPahl 11/12 followup w/Panas 1/17/96 [illegible]

Brenon started the Eler joke after Paul Sorrell told him he went to a motel with their infant son. Sgt Brenon said you're ~~too~~ cheap to get to bed did you get one bed. You had a menange a tois (first indicating it was Sorrell, wife + baby) then ~~somehow~~ George brought Esler into picture + stated it was George Esler Sorrell + wife. did the noises + made noises as if having sex

A couple days after that he would make the noise while at roll call or conversing with officers Panas observed this personally. After a while people just ignored him + he stopped.

Sorrell / motel comment.
Probably weekend of
11/12 Because it was
only Panas, Sorrell + Brennan
+ he had a sector the night
of the 12.

12/23
Holmes asked Panas
about Diversity

12/2 Peter getting donuts + WFB.
Dawn got yelled at for
picking Lisa up
401 get out of squad right now - called
in Neuman - said dont pick up Pina

No doubt talked
about lucky
each time he went
to bathroom.
Offensive

Smoking cigarette
at Fuzzy's Night.
Brenn you know where this all started
said: (referring to H.H.) It started
a long time ago with her
husband.
Walkin in asked if she
played darts would she
like to go to Fuzzy's.
about 10pm the ~~following~~ same day

To 12/23/95

Was the day Holmes ~~talked~~ told

Panas she'd be better off

not filing a complaint.

He asked questions

What are the complaints about?

Who is filing complaint?

Generally wanted to know

What info Panas had on complaint

12/30 was date Panas

was asked to Fuzzy's

that day she specifically

remember Brenon standing at

dispatch desk with arms folded

+ telling 'Irishman' jokes'

told Parras I don't really
want you riding with Dawn.

Parras OK, why

Brenon: she can't do her
job.

Parras: isn't it your job to
correct it?

Brenon: I can't she can
do half the job

~~more than once~~ Sgt Brenon called
he went to his office
& correct reports
trapped in his office
& he just keeps talking
telling jokes, reading them
off paper.

BRENON INTERVIEW
January 12, 1996

Present: **Dale R. Brenon, Police Sergeant**
Phillip A. Clark, Director of the Police Department
Shannon E. Bradbury, Emp Relat Spec 2, Human Resources

CLARK Today is January 12, 1996. By mutual agreement Sgt. Brenon has agreed that we and I have agreed that we tape record this interview. This is an investigation basically to try and get some fact finding on the complaints that's come into our office. It is now 1:25-1:26 p.m. Sgt. Brenon apparently there's two investigations going. One we have here is for internal investigation and then there's EEOC investigation. You're basically directed to be honest and truthful in answering all, any and all questions at this and also fully cooperate with EEOC. Do you understand that?

BRENON **Absolutely.**

CLARK O.K. First of all you were advised of a pending 10-day suspension on December 8th for telling racially demeaning jokes to officers of the University Police Department. Subsequently, did you tell jokes to any officers?

BRENON **No**

CLARK Did you tell any jokes that you perceived were not demeaning? Were there any jokes at all?

BRENON **No, I don't remember any jokes after that.**

CLARK Specifically, did you tell any jokes to any female officers or cadets?

BRENON **That's about as specific as I can get. I don't believe I told any more jokes at all.**

CLARK O.K. Who did you readily appoint as officer-in-charge in your absence?

BRENON **There was a sequence and normally it was Officer Holmes on a pretty regular basis. I also utilized Officer Sorrell and I've also utilized Officer Klobukowski and on occasion I believe I've also**

utilized Officer Jensen.

CLARK Why these officers?

BRENON **Well the first one, Officer Holmes, dependability is a big part of it. He's a very dependable officer. He has demonstrated dependability, judgement, maturity.**

CLARK O.K. Did you change your pattern of appointing the OIC anytime in the last two months?

BRENON **The only time I would've varied from that would be if certain officers aren't available and then I'd have to vary it. I tried my best to keep some kind of a pattern and I thought there was a fairly regular pattern there. It has varied, but it varied over the holidays and over the holiday season, especially with everybody using their time off. Who was available for OIC duties and etc.**

CLARK How did you make a decision on who to sign then to that?

BRENON **I used the same criteria I just mentioned to you. Dependability, maturity, how well they knew the job and how they do the job. How well they knew how I wanted the job done and how I expected it to be done and how the Department expected it to be done.**

CLARK I'll slow down if you want me to, so you can, so you can make notes.

BRENON **No, I'm all right. I don't know if we need to for the record, just to say who's all involved here.**

CLARK Oh sure, sure.

BRADBURY *In attendance on behalf of management, University Police Chief Phil Clark and Shannon Bradbury on behalf of the Department of Human Resources.*

CLARK And you were offered if you would like to bring someone in.

BRENON **Correct**

CLARK And you declined to bring them in at this time.

BRENON **And I was told that if I brought somebody in it would only be as**

a witness and they couldn't comment on anything.

CLARK That's correct. That's correct.

BRENON O.K.

CLARK O.K. Did you ever mimic any officer in an attempt to be funny?

BRENON Ever? That's pretty hard to say. But I sure didn't. I wouldn't say that I ever, you know, made a habit of it or anything. But there was some levity between me and other officers. They've mimicked me. There may have been some. I can't give you anything specific and I sure don't think I can come up with anything specific, but I'll tell you that I thought there was a very good working relationship and that we got along good, all of us and that I know they've mimicked me also. So I can't say that I definitely did not. You know when you say ever do it. I can't say I definitely did not and I can't think of any specific time I may have.

CLARK You said they mimicked you. How did they mimic you? Do you have any suggestions at all?

BRENON They joke around about how I approach role call. How I come into the dispatch area. How I stand. Where I stand in the dispatch area.. That's about, that's about the only things I can think of right off hand. Obviously, you know if I had time to think about it I might be able to come up with more. But that's about the only things I can think of. Some will even change their voice to make it a little deeper like mine. And make it kind of obvious that they're joking around.

CLARK O.K. O.K., can you think of any of the things which you've mimicked?

BRENON As I said, I really can't. Boy, I really can't. I can't think of a thing right now.

CLARK O.K. Let me get a little bit more specific. Did you ever make sounds or motion or mimicking of Essler masturbating?

BRENON Oh no. No. Essler masturbating? No.

CLARK Yeah.

BRENON No. No.

CLARK Did you ever make any grunting sounds? To imitate someone with a speech impediment or something of that nature?

BRENON **Speech impediment. The only thing I can think of is I've heard a lot of officers and a mimic the way George kind of makes a, I wouldn't say grunt, he kind of makes a sound when he does it. And the officers will joke around about that. I'm not sure if I've done it. I may have. I can't say for sure that I didn't. I may have. In the context of doing it with the other officers and definitely not to George or**

BRADBURY *Who?*

BRENON **Who?**

CLARK Yeah.

BRENON **What do you mean who?**

BRADBURY *Well if other people are making fun of George*

CLARK Who, who are they?

BRADBURY *Yeah.*

BRENON **Well you're asking me to implicate other people.**

CLARK I'm asking you to be truthful, that's all. Just honest and truthful.

BRENON **I'm always honest and truthful to the best of my ability. One of the main ones that really does, I really hate to name them and implicate others and, understood, maybe as a supervisor I probably should have said something when I heard this and probably shouldn't, you know, participate in the jocularity and the joking around. Paul Sorrell does it quite a bit.**

CLARK Who else?

BRENON **I really, I, I, can't say for sure because I can't be sure of others. Paul I'm sure of.**

BRADBURY Just the ones you've seen.

BRENON	**I can't say that.**
BRADBURY	*You saw*
BRENON	**I can't say that.**
BRADBURY	*Or they've done it in front of you or*
BRENON	**Without, boy, without a lot of time to think about it, I can't be positive what the ones I've heard do it. But I know more than one have and I know more than Paul. But Paul is the only one that I'm absolutely sure of.**
BRADBURY	*O.K.*
CLARK	What did you do when he, when he did that? What action or what did you do if anything?
BRENON	**Probably nothing and I should've said something.**
CLARK	At any time did you join in with this?
BRENON	**That's possible. I can't say I didn't. I don't believe I did. If I did I would have thought it would have been in the context of, you know, maybe Sorrell talking to me and joking around in my office, just him and I. I wouldn't say in general public or amongst anybody else. If I did, I'm not, I can't even tell you for sure I have.**
CLARK	Is there anyone else that would have witnessed this?
BRENON	**I would say no. I would say that if it was done, witnessed Paul probably. I mean I think he's done it amongst a group in a regular basis. Irregular basis. Regular wouldn't be fair. Me doing it? I don't think anybody other than possibly Paul Sorrell in my office just him and I talking or something maybe. Again I can't say for sure that I ever did. I really can't. I'm trying to remember.**
CLARK	You had said that this is the, Paul did it in front of other people. Who are those people?
BRENON	**I would say people on the shift. I don't know specifics. I don't know specific times. I don't know who was involved. But Paul**

just, it was just kind of a natural thing. Kind of a regular thing with Paul.

CLARK And when did this happen?

BRENON **I can't tell you. I couldn't say for sure.**

CLARK Have you ever discussed or talked about any of your sex organs in front of any female officers on your staff?

BRENON **Absolutely not.**

CLARK Have you ever discussed any of your sex organs in front of any officer?

BRENON **Absolutely not. I don't know maybe off duty or something or other. Not, not, not on duty, not.**

CLARK O.K. Let's say off duty. When would that have occurred?

BRENON **If it did, it would have been a long time ago, because I haven't socialized with anybody from the Department in a long time. So again, I can't say. You know, maybe some party or a wedding or something. I don't know, possibly. And again that's just possibly. I sure as hell can't remember doing anything like that.**

CLARK Have you ever make this statement, "I'm going to drain lucky", or words to that affect in reference to urination?

BRENON **I may have.**

CLARK What, when would that have taken place?

BRENON **If it did it was probably again with a you know, probably only in front of like a Paul Sorrell or maybe Pete and joking around. Like you know give me a minute instead of saying "I have to go to the bathroom." It was just kind of a, a male exchange I would say.**

CLARK And when would this have been done?

BRENON **I couldn't tell you.**

CLARK Within the last two to three months?

BRENON	**I couldn't tell you for sure. I couldn't tell you when. You know I couldn't tell you.**
CLARK	Was there anyone else? Or who were these comments made to? Would you say?
BRENON	**I would definitely say, if they were made and I think I may have, it would have been only with like one other male officer at the most. I wouldn't do it in general public.**
CLARK	Have you ever printed a list of jokes within the last six months?
BRENON	**Yes, I have. Off the Internet.**
CLARK	Do you have copies of those now?
BRENON	**No, I don't.**
CLARK	Where are they?
BRENON	**I think I've disposed of those. I know I used them, I even used some of them at a, like role calls and stuff. Just for like to end the role call.**
CLARK	Have you photo-copied those jokes?
BRENON	**I believe I did at the time because they were provided to me by somebody else and I had to give them back them, their copy and then I used them and then got rid of them. I don't think I have them anymore. I don't believe I have them anymore.**
CLARK	Have you ever passed out copies of these jokes to other officers?
BRENON	**If somebody asked, I may have. I don't believe I have, but I may have.**
BRADBURY	*Any chance you might still be able to get them, that they might still be on the Internet, whoever you were, whoever you were talking to?*
BRENON	**See I didn't get them off the Internet.**
BRADBURY	*Somebody else?*
BRENON	**Somebody handed me the originals.**

BRADBURY *O.K.*

BRENON **And I made copies.**

CLARK What officers would you have given them to? Maybe they still have copies.

BRENON **I don't know. I don't know that I even, I don't even know that I actually gave anybody a copy.**

CLARK Did you discuss your initial suspension, your 10-day suspension with any officers?

BRENON **Sgt. Williamson, but that's not an officer. I mentioned it to him and then I went back to him and asked him if he had told anybody, because it was out. And others knew that and I couldn't understand how they knew. I don't, I don't, I believe I may have told Pete and both I asked not to say anything to anybody about, and they told me they wouldn't.**

CLARK When would that have happened?

BRENON **It would probably be after you and I had the discussion when you first, when I was first told of it and probably a day, maybe a day, or maybe two days before I actually got a (?????) letter.**

CLARK So you discussed it more than one time?

BRENON **Here, yes. Probably just those two people is all I can really think of. Both told me that they wouldn't say anything to anyone, and I went back and they said they hadn't. So I didn't understand how it got out. But it was also out before I ever knew about it. Before Lt. Sroka even knew about it.**

CLARK Did you tell any officers after getting notified, after getting notified of a 10-day suspension, that now I know who my, who I can trust or words to that effect?

BRENON **Oh no. No, no.**

CLARK Did you at anytime repeat the jokes you were suspended for after notification of suspension?

BRENON **Here? Absolutely not.**

CLARK Did you do it anywhere?

BRENON **Off duty with some friends possibly. But, but not here.**

CLARK And what were those jokes?

BRENON **I'd rather not repeat them.**

CLARK For the record.

BRENON **I think I've learned my lesson on that. I'd rather not repeat them.**

CLARK O.K.

BRENON **I definitely learned a lesson on that. I don't want to repeat those jokes.**

CLARK O.K.

BRENON **The context of them are in the complaints which I'm sure you've seen.**

CLARK Did you say them without necessarily using the, the words that you use, but using the word Irish.

BRENON **I may have, I doubt it, but I may have. I mean I don't after that I, I, I may have told another joke about an Irish man afterwards off duty or something, but not those jokes, no way, no way.**

CLARK When did you find out about the complaint to the Diversity office?

BRENON **Lt. Sroka told me my last morning here which was the morning of the 2nd, a Tuesday, I believe, is when he first told me. He had said that he had heard about it the previous Friday, and that you were going to hear about it on the 3rd when you got back from vacation.**

CLARK Did you hear that from anyone else besides Lt. Sroka?

BRENON **No**

CLARK What specifically were you told?

BRENON **What Lt. Sroka told me was that Tori, Tori Boswell I believe is**

who he's referring to, had called him on Friday and said that it had something to do. That he had heard from Tori that she'd get the message to you to call right away when you got back from your vacation. She, about something to do with Dawn Neuman and Lisa Panas. And that Dawn Neuman was there on behalf of Lisa Panas. It wasn't, it wasn't anything to do with jokes or anything he said. I don't know, something about, I can't remember exactly, but something about that she was going over there for Lisa, because Lisa was afraid to and that's about all he had to say and that's about all he said. He said that's about all he knew at that point.

CLARK Did you attempt to discuss this, the complaint, with the officer making the complaint? Either one of the officers?

BRENON There was a night that a, in fact I could tell you probably which night I was thinking about this, Lisa had brought it up when her and I were having a cigarette outside and that would have been, let's see, I think it was Friday. I worked like one day and had other days off. I think it was like the 29th and I was off the next day. December, I think. But Lisa just said something to the effect of that Dawn's got a legitimate complaint. That you never put me with her. That I never assign Lisa with Dawn. And then Lisa said, "I know what your reasons are and I know why you don't. But she's got a legitimate complaint that you never put her with me." And I said "yeah, well on the one instance that Dawn had come to me about, I explained to her and to you that you were looking for a suspicious male. Your field training officer put you on foot in that sector. That's where you're suppose to stay. It's not up to you and Dawn to decide to just hop into a squad together and patrol together. Besides the fact that it's not, it's not making much sense as far as covering areas, looking for this suspicious male. You can be covering an area while she is also covering an area and in a squad you can be doing it on foot." And that was about the extent of it. So I think Lisa put it in the context of she's got a legitimate complaint about treating a female different if you don't put me with her. And words to the effect of "I know the reasons you don't put me with her." And as if she had no doubt about why I didn't assign Lisa to Dawn.

CLARK Did you discuss this complaint with any other officers?

BRENON Oh no. Oh no. First of all I wouldn't have any opportunity. I got it that morning. My last morning here. Then I got orders not

to talk about it with anyone. I talked about it with somebody outside of the Department, but not with anybody here. I mean I had a direct order on my answering machine from Lt. Sroka not to have any contact with anyone from this Department. So I haven't.

CLARK You have not talked to anyone in this Department since you got that reference, anything about the case?

BRENON Several called me and I told them I couldn't talk.

CLARK Who were they?

BRENON Again, do I have to do that? I

CLARK I'm just trying to get to the truth.

BRENON Am I required to do this? I

BRADBURY *Yeah*

CLARK I just want the truth.

BRENON There was no discussion of this. None whatsoever, because I cut it off right away. The day I got the notification, Pete called me and he was in tears. I said, "Pete, we can't talk. I just got notice on a direct order that we cannot talk. Pete, I cannot talk. I'm sorry we have to end this phone conversation." And that was it. And then I got a call from Burt Williams. A message on my answering machine. I didn't respond to it. And I got a , I got a call from Brenda. She said she walked into the office and saw on the board 'off until further notice' by my name, and she wanted to know what it was about. I said "Brenda, I can't talk to you. I have direct orders that I can't talk to anyone from the Department." And she kind of tried to talk more, "Brenda I'm sorry, I can't talk." And that was it. And that's the extent of anyone from this Department, any contact since besides Lt. Sroka and yourself.

CLARK Did you attempt in any regards to influence the officer involved in making the Diversity Officer complaints?

BRENON Absolutely not.

CLARK	Did you attempt to influence any officer to change their statements?
BRENON	**Absolutely not.**
CLARK	Did you request that anyone else talk to officers to find out if their intention was to file a complaint?
BRENON	**Absolutely not.**
CLARK	Are you aware of other supervisors who have recently told racial, sexual or sexually joke to you or their staff?
BRENON	**I know they have in the past. And I cannot give you specifics. I wouldn't say recently.**
BRADBURY	*Anybody else using that Internet list of jokes at their shift meetings?*
BRENON	**Not mine. Not my list.**
BRADBURY	*O.K.*
BRENON	**No other supervisor. Any list that I know of, unless I gave it to somebody and they got it that way.**
BRADBURY	*O.K.*
CLARK	Are they pulling it up on our Internet?
BRENON	**I wouldn't know. I don't think so.**
CLARK	Are you aware of other supervisors who may have mimicked masturbation or in an attempt to be funny?
BRENON	**I'm sorry I have to change the tape. O.K. Go ahead.**
CLARK	I'll repeat the question. Are you aware of other supervisors who have imitated masturbation in an attempt to be funny?
BRENON	**No, I can't think of any.**
CLARK	To your knowledge have any other supervisors talked to you or other officers about their sex organs?
BRENON	**I'm sure they have and I'm sure other supervisors have just one**

on one and goofing around and joking around and probably just in the Sergeants' office or, or a like out having a cigarette in the parking structures. I can't give you any specifics.

CLARK In your opinion is it appropriate in the workplace to tell racial, sexual or ethnic jokes?

BRENON Absolutely not. I have learned that the hard way. The very hard way.

CLARK In your opinion is it appropriate to show these jokes to people on paper?

BRENON The ones that were on paper, weren't really racial. The ones that I remember on the Internet had nothing to do with race. A, it was a, a standard O.J. jokes that everybody was hearing and it wasn't really racial, because you know the O.J. thing wasn't really racial, I don't believe. I mean part of it was and they brought up a racial context in the trial, but I don't believe that the context of the murder and of the crime was racial. I'll give you, I'll give you a good example. This wasn't on the Internet, but there was a time like for two nights in a row, Eddie Clayton, Toni Howard, together. I just thought of this recently just thinking about these jokes. But dancing around, and I mean dancing around the dispatch area together both and singing some kind of a rhyming thing about, all I remember is something to do cotton-candy was a part of it and O.J. killed Nicole, and this was right after, like within a day or two of when he was found not guilty. And that was like celebratory and it was like a rhyme type thing. Like blank, blank, cotton-candy blank, O.J. killed Nicole.

CLARK Did you say anything to them at that time?

BRENON No, I don't think I did. I think I, I just walked out of the room or, or just looked at them and kind of smiled and then walked out of the room. I, I didn't obviously didn't sing with them or anything. No. No.

CLARK At any time did you invite any of the female officers down to Fuzzy's?

BRENON Oh boy. I would say absolutely not and you can put that as an absolutely not. Now, well maybe not absolutely. Lisa and I at that same time when we were having a cigarette, we were talking

about both being off the next night. What are you doing? I was thinking of maybe going visiting Burt. Burt tends bar at Fuzzy's. I've never seen that bar. It's a cop's bar. Burt tends bar there, maybe go give him a hard time and , and visit with Burt. She said something about, "well I may be going out too." Or "me and my boyfriend may be going out." I said "fine if you want to meet me there, why don't you meet me there. We can have a drink, fine." And it was in the context of her and her boyfriend. There's no way I'm going to ask anybody out here. No one period. I would never, I would never mix you know to have a drink with somebody at a cop bar where one of the cops is tending bar is different than asking somebody out. I wouldn't. No, absolutely not. And I don't think it was my invite. It seemed more like it was, it was her asking what I was gonna be doing and mentioning that her and her boyfriend may be going out too. And it was and I, as I recall that happened like during the shift and then when I left that morning I said, "Well you know if you and your boyfriend want to go there or are going to be there, give me a call. Maybe I can meet you there." And I know I said "and your boyfriend", so, because I wanted to make sure she didn't think I was asking her out or anything because I would never do that.

CLARK Did you subsequently call her?

BRENON Absolutely not. I've never called her at home other than for business. Never.

CLARK When you're on duty and off duty as far as you're, whether you're laughing, joking or rough language, is there a difference, in your opinion?

BRENON I'd say there normally is and I'd say that this was a time when I didn't, I didn't draw that line and realize that difference and make sure that I kept that difference. Actually now I'd say it'll be a cold aa in hell before I tell any racial or ethnic or anything or any kind of a joke that might offend someone. And if I did if I heard something like that maybe I would because I'm Irish and look at the Irish. And just try not to offend somebody. And make sure they know I'm Irish and you know joking about the Irish. I mean I've heard people call Irishmen 'mix' and things like that. 'Potatoes' and 'potato heads' and things like that. And I'd say people have even done that here with me. But I, you know it rubs off my back. It's a joke. It's just goofing around.

CLARK Do you realize that's inappropriate?

BRENON **Agreed. I realize it now, more than I ever have before.**

CLARK Did you discuss this investigation with any other officers? Any others?

BRENON **I think you've already asked me this.**

CLARK Yes, I did. I want to be sure on this.

BRENON **No, I've told you exactly, exactly what I did.**

CLARK O.K.

BRENON **And I went out of my way to make sure that I didn't discuss it and to comply with the order. Not to have any contact much less any discussion with anybody else.**

CLARK O.K. When you leave here, we're, you're going to be going over to, to, over to, to have a, have a meeting with the EEOC. And I'm requesting that you again be truthful and honest with them and open what not, as part of your duties as a state employee. We're going to try and I still have other people to interview. I hope to have this thing resolved in a week. I know you're anxious to find out where everything stands and what not. I should be getting back to you within a week. And if you have any questions while Lt. Sroka is on vacation, feel free to contact Lt. Hodermann. She's filling in for him while he's gone.

BRENON **He told me he would be back Tuesday.**

CLARK I hope so. He went off to Vegas for some wedding. I hope he's back.

BRENON **There's something I need to bring to your attention. During this time I have, I've got a disc problem of some kind. I don't know if you need that or not, but that's my**

CLARK I can, I can. O.K. What I've got here is a doctor's excuse. I really don't need a doctor's excuse, but if want me to hang on to it.

BRENON **Why don't you hang on to that. I have to get a CAT scan. He thinks it's a disc problem. I've been on pain pills sitting here**

sweating. I've been on pain pills and muscle relaxants and anti-inflammatories since Monday.

CLARK O.K. O.K. I

BRENON **One more thing, I'm sorry, one more thing.**

CLARK O.K.

BRENON **There's this subpoena I've discussed with Lt. Sroka. And it's for this coming, well it's for the 23rd of January. But when I discussed it, that was that same morning that Lt. Sroka gave me that slight briefing on EEOC stuff, he said that I should contact this and just return it.**

CLARK The?

BRENON **About this, this subpoena.**

CLARK The subpena is a court order. You should honor the subpena and appear in court.

BRENON **O.K.**

CLARK As requested.

BRENON **Well the bottom line to that though, is that I'm also, you know, if, I'm, this January 23rd falls within the suspension. Period.**

CLARK It's a court order.

BRENON **Which means that I'm not an employee at that time.**

BRADBURY *Sure you are.*

CLARK And I cannot, I cannot overrule a court order. You're an employee. The suspension is not

BRENON **So I should go over there in plain clothes or what?**

CLARK Yes, you should. I cannot overrule a court order. O.K.?

BRENON **Alright.**

CLARK You go and, and what happened is the suspension is not a form of punishment. It's mainly to, to move, to move you away from the work environment, so that really a non-biased investigation can, may be conducted. It doesn't say you're guilty or innocent or anything against you. We're mainly trying to get the facts at this time. If the court asks you to do something, you do whatever they ask.

BRENON **Well, as I understand it now, you know, O.K. As I understand it currently I'm in suspension with pay status.**

CLARK Absolutely

BRENON **But January 23rd is that 10-day suspension.**

BRADBURY *It's during that disciplinary catchment period.*

CLARK Oh I see.

BRENON **For that joke telling.**

BRADBURY *No, of course you're our employee. You're just on suspension.*

BRENON **But it sounds like I'm going through this same thing again. I mean I'm already being disciplined for telling jokes and now we're, now we're going through another investigation about telling jokes. I don't understand why this wasn't all at one time or all incorporated.**

CLARK Because it was not aware of it at that time. This is two separate instances. Two separate things, a what not.

BRENON **Lt., Lt. Sroka was saying that he even was told by you to ask others if there was anything else.**

CLARK Yes. (Chief Clark received telephone call) That was a call and it was to inform you that the Affirmative Action Officer will not be able to interview you today. He'll have to reschedule you. And that's why they butted in.

BRADBURY *Great*

BRENON **To finish what I was saying though, Lt. Sroka was saying that you know, he was told by you to solicit from the other people and all**

them people on the shift, if there's any other complaints. He then did that he said and then when he gave me that letter, which was the 20th, I believe, it was the day of the staff meeting and it was during the staff meeting, he said, we briefly went into his office. He said there's no more complaints received, this is it. O.K., but now we're talking more complaints. And about the same things. About, well I just don't understand.

CLARK Well, well, it progresses. It came in later, O.K. The information we received, we received it from a different source later. But some of it's about the same thing, but continuing, even after you were notified of this behavior. And that's the allegations.

BRENON Allegations that joke telling continued?

CLARK Yes, that's one of them.

BRENON Oh

CLARK And many of the questions I've asked, but you will be, you will be further informed later of everything involved. You will be informed. O.K.?

BRENON Yeah, I guess it's going to have to be O.K.

CLARK Yeah, O.K., but anyhow, we've, your appointment over there has been cancelled. I thought we could do it in the same day. So that you

BRENON So they're going to give me a call?

CLARK Oh, yeah. They'll set up a schedule and I'll probably be contacted. I'll keep in touch with them and then I'll set up a schedule with you and then you can come in. But, in the mean time, any court orders, any subpoenas, we have to honor them.

BRENON Alright. Then I should appear at this court case in plain clothes.

CLARK Well, yes. And they also sign up for their, their, I think they will pay you for coming in.

BRENON Why don't you, could you make sure that they

BRADBURY Don't you normally, ordinarily show up in a suit or sport jacket or

something?

BRENON	**No, I would normally be in uniform because I normally operate in uniform, and our departmental guidelines have always been that if you made the arrest in uniform or you were operating in uniform at the time, then you're in uniform when you appear in court.**
CLARK	At this time appear in civilian clothes. Now you gave me a copy of this?
BRENON	**That's the original that had to be signed and returned. So I don't know if you want to get that to Lt. Sroka or**
CLARK	It's, it's due to return by
BRENON	**Well, no. It doesn't say when you have to return it.**
CLARK	O.K. Well, I'll get it to Burt. We'll get it down to (??????)
BRENON	**O.K.**
CLARK	O.K. That's it?
BRENON	**Would you also ask Burt to check on the status because if it's been changed, I'd like to know ahead of time.**
CLARK	Sure
BRENON	**Or, you know, quite often those things do**
CLARK	And a
BRENON	**I'd appreciate that.**
CLARK	I'll get back to you.
BRENON	**Alright. So mine is completed at 2:06. Is that what we**
CLARK	Yes, O.K., that's close enough

BRENON PREDISCIPLINARY HEARING

DATE: February 5, 1996

PRESENT: Sgt. Dale R. Brenon, University Police
Chief Phillip A. Clark, University Police
Shannon Bradbury, Human Resources

CLARK: Today is February 5, 1996. This is a predisciplinary hearing. ????? Shannon Bradbury from Human Resources and ??????? This is an investigative type interview and this is a predisciplinary hearing and we've covered many of the things that, that, you know we'll just rehash on the things that, if you'd like to today and we've already covered much of the material. The allegations that have been brought forth was basically your con???????, two week suspension, 10 day suspension for mainly, primarily telling jokes and that you continued to tell jokes that were racially and sexually demeaning and also other things came to light such as your con?????? work environment, talking about your sex organ, ????? punitive actions and different employees after they filed complaints. This is your opportunity, if you'd like to add or say anything that ???????? the ??????? is considered very serious. We're considering, a minimum would be a 30 day suspension, the maximum would be a discharge. This is your opportunity and I'd like to give you all the opportunity to ?????

BRENON **Well, first and foremost, I don't understand it. The last time when I was here with the three of us gathered, I think it was the 12th, I was told before I came in here, on the phone, by you, Chief, the day before in the late afternoon, that that was a predisciplinary hearing and now I'm hearing you're telling me that this is a predisciplinary hearing. I guess maybe what Lt. Sroka said that the last one should be considered investigatory. I don't know maybe that's what this is all about. I don't understand.**

CLARK Apparently there was a miscommunication in that case. I do not recall saying that it was a predisciplinary hearing. The first one was an investigative hearing. We were trying to get all the facts at that time. We asked you numerous questions, and you responded accordingly. But this is a predisciplinary hearing.

BRENON Well, I guess from what I understand here you're just offering me son chance to say something here?

CLARK Yes, respond to the allegations.

BRENON O.K. Well the allegations I heard at the last hearing that the three of us were gathered at, I don't understand because it seems like it's all old, it's all the same old thing. It's all the stuff that I was told was a done deal, it was all over with. With the 10 day disciplinary thing. There was an investigation, Lt. Sroka even, he told me at your directive, Chief, he even polled by p-mail or e-mail, all the people on the shift and when he gave me the letter for the 10 day suspension he said, "Here it is, that's it. It's concluded, it's over." And then something else starts again. Well it seems like it's over the same stuff and it just doesn't add up for me. It's befuddling. It's spinning in circles. With all of those, with the one for the 10 day suspension and stuff, it's just As I said before, if I did anything like that I most certainly wouldn't, where, near, nor in front of anyone I even remotely thought might be offended. There was never any intention to ever offend anyone. I've obviously spent many hours thinking about this stuff. I lost a lot of sleep. I'm sitting here now with some notes in front of me about what I need to say to you and I guess that's what I'm gonna have to use because I, I mean I'm on the hot seat here. It's like I feel this is pretty intimidating in and of itself. But again I don't see anything new here. This is all related to prior discipline and it's my total understanding that this right here is why I served that 10 day suspension, which is just concluded. Lt Sroka told me and that was December 20th, he told me he gave me that letter telling me that 10 day suspension set for January 22nd till February 3rd. He said this is it. It's over, it's concluded. He polled all the employees, there's no more complaints. There's no more concerns and there's no more problems. And then we're here again. I have to tell you that in all of this, (thank you) it's my conclusion that this is the direct result of my formal complaint and my request for an investigation on ??????? someone at the very top level of this department breached the confidentiality of that prior discipline and that prior discipline action. I filed that letter with Lt. Sroka, to you Chief, per the chain of command, on January 2nd, my last actual day I was here. The very next day, on my day off, Wednesday the 3rd, I get a message on my answering machine at home that I am suspended with pay while the department investigates me. The day after I asked the department to investigate something else. I've never been told what happened with that investigation. I've never been told the results of it. It's never even come up in our discussions here. The last thing I have to say, and this is with all the sincerity of my heart, every bit sincere and I, I have never ever believed, I never ever knew, I

never ever thought I was or could be offensive, nor intimidating, nor harassing and never intended to be nor would I ever believe from anyone that I'm capable of harassment, intimidation, racism, retaliation, abusive power, abusive position, nor demeaning anyone. That's really all I have to say.

CLARK O.K. Just to clarify you. I want to tell you the allegations that we talked last time and refresh your memory. You were given a 10 day suspension for telling of jokes and some of the questions was, you were asked by a couple of your employees, "What did you get the 10 days for?" And eventually after that not only did you tell them for telling jokes, but you repeated the jokes to several people. Do you recall me asking that question or talking about this?

BRENON **I recall you asking me if I had and my answer then was, No, and my answer now Chief is, no. This is the first time not in that hearing the last time, the 12th. Not in that hearing either. This is the first time you ever said some of my employees that I went back and told them a dang joke to? Absolutely not! And if they're telling you that, it's an outright lie!**

CLARK The 10 day suspension was for telling jokes, it was not for sexual harassment as far as talking about your private sex organs and things of that nature. Are you aware of that?

BRENON **Again, again, Chief, as respectfully as I can put this, that was suppose to be the conclusion of any complaints of anything that happened in the past. Call it sex organs, call it intimidation, call it harassment, call it jokes, anything, was suppose to be done right then and there. And now you're talking about something that happened God knows when, long ago and most definitely before that 10 day suspension. But now here I am with something else. You tell me it's all over. I'm told it's done. I'm told that they polled everybody; no more complaints. It's done. It's over, but here I am. And not only that I'm sitting at home and I'm wondering what's going on? Why am I here? I got a 10 day suspension but now I'm here at home, sitting here while they're telling me there's another investigation. Well not only that, I can't talk to anyone. I can't talk to anyone that might be supportive. When I'm sitting there looking at what's going on. Is my job in jeopardy? Twenty one, over 21 years and 15 1\2 as a Sargent. And I'm left that way. I'm sorry, that seems to me very unfair. That seems to me intimidating, that seems to me harassing and it seems very wrong!**

CLARK Do you have a[illegible] else you'd like to add or tell us about?

BRENON **I'm real, real sorry. I'm sounding really angry here, but I'm frustrated, I'm very frustrated and I don't mean to, I surely don't mean to be insubordinate or disrespectful by any stretch.**

BRADBURY *Do you just want to take a minute and let me talk to Phil for a second?*

BRENON **Sure, do you want me to leave the room for a minute?**

CLARK We can go.. We can.

BRENON **No. No, I'll leave.**

CLARK Compose yourself and have a cup of coffee.

BRENON **Do you want to mark this for what time it is?**

CLARK Oh sure, I've got 8:18 a.m.

***** **break** *****

CLARK We start back again and I've got 8:24.

BRENON **I don't think your watch is correct, sir.**

CLARK What have you got? What have you got?

BRENON **I've got 8:28.**

CLARK O.K. We'll we start with mine, we'll end with mine and we'll start with mine.

BRENON **Alright.**

CLARK Well just basically to give you every opportunity. Maybe I'll try to refresh your memory just a little bit on some of the allegations. And if you'd like to comment or if you feel that you'd like to address them, fine. The, some of the questions that were asked was the discretion apparently of telling of Esler jokes and the imitating masturbating or what not. Do you recall that question at all?

BRENON **I sure do and I recall the answer too. No. No.**

CLARK O.K.

BRENON **About as plain as I can make it is, No.**

CLARK What you're saying is you'd of never tell the joke or never ever imitated him masturbating or something or grunting?

BRENON **Absolutely not. I could tell you that someone else may have. But I'll tell you straight out. No, not me. Absolutely not.**

CLARK Did you witness someone else doing that?

BRENON **I can't say for sure. I can tell you that it sounds like something that I may have seen and if it did it was a subordinate, it was not me. I can't, what we're talking about here is something that was long ago. There's no way that that happened in between when I'm told it's all over and now.**

CLARK O.K. Before you got the 10 day, what you're saying is that you've apparently witnessed this prior to that?

BRENON **I'm saying if I did, again Chief, I'm telling you I can't confirm it. I can't deny it. It's too long ago.**

CLARK Do you remember ever telling the joke about Officer Sorrell's child named George, or should be named George, or something like that or of that nature?

BRENON **Chief, Officer Sorrell and I had a terrific working relationship for a long time. I believed it was that way from both perspectives. I truly did. And yes, we joked around as far as George Esler and his child being named George. Yes, a long time ago and definitely before this 10 day suspension and before I was told everything's all over with and no more complaints. Yes, he and I joked about that and it wasn't just me joking about it, it was Paul also joking about it.**

CLARK Was anyone else around when you guys joked about that?

BRENON **I would say as best I can remember, no. Just he and I.**

CLARK You use to regularly assign Paul as OIC, Officer In Charge.

BRENON **I would not say regularly. I would say fairly irregularly. I told you last time when we were here, what my rotation was about and the way I did**

it, and that didn't change. The only thing that might of changed, that was the holidays and who was working, and who wasn't. We were down to minimums all the time.

CLARK After he filed the complaint, did you assign him to OIC at all after that?

BRENON I'd have to say I did. But again you're gonna have to show me my schedule, where I have it outlined who's the OIC and then I can tell you for sure. But I can't tell you sitting here now.

CLARK Yeah, O.K., I understand.

BRENON But I'd say, yes.

CLARK But if you didn't assign him that would be a change in the treatment of Officer Sorrell. Is that correct?

BRENON You might perceive that, but that certainly was not ever what I was doing. Why would I?

CLARK At the time that you were notified of your 10 day suspension, were you aware that there was another complaint filed with OI, I mean EEOC?

BRENON Absolutely not.

CLARK So there's things that were filed with EEOC that neither, probably you nor

BRADBURY *Phil, can I clarify? It would be a Diversity Office on campus.*

CLARK O.K.

BRENON Right, they call it Diversity and Compliance now, right?

BRADBURY *Yeah*

BRENON But it's the former EEOC.

BRADBURY *EEOC is the name of the federal agency.*

CLARK Oh, O.K. I'm sorry, I thought it was still the Compliance Office. So you know your Supervisor knew at that time that there was a complaint filed over there as far as your knowledge is concerned?

BRENON And that would probably be December 20th, when he gave me the letter.

Correct. And not only that it's my understanding that this person that went to EEOC, I'm sorry Comp Diversity and Compliance Office. This person that went there was the same person who was polled before the suspension with everyone else, and didn't have any complaints and didn't come forward when they were asked to come forward. Now tell me that's fair.

CLARK When you or before you received your letter of suspension, you were verbally informed that you would be getting a suspension. Is that correct?

BRENON The belief that I was verbally informed that I was gonna get a letter of suspension, was I believe, it was a Friday morning, but I know, I'm almost positive it was December 8th. In the original discussions with Lt. Sroka, he told me that he knew me, that we knew each other. He had some of the complaints in his hand and he said, "These will be kept on file, Dale, I know you. I know we can take care of this and I know we will. And I know you won't do anything like this again." And I said, "There's been rumor of discipline." He said "No discipline. No formal discipline. I know we can take care of this between you and I and it won't happen again." We agreed on that. Ten minutes later he asked me to come back to his office and he said, "I'm sorry." Quote, Administration, unquote, is involved and it's gonna be a 10 day suspension now. That's what happened.

CLARK O.K. After you were notified of that, did you recall our conversation and there was a joke that they referred to as the Million Man March joke. But did you tell jokes, that the name of the people involved was changed to be Irishmen rather than the, any other minority?

BRENON I certainly did not tell, excuse me for a minute, it looks like my tape ran out here. .... Go ahead tape over I'm originally ?????? taping. I certainly did not, Chief, tell that Million Man joke March joke again. Period. Not as an Irish Million Man March or anything like it. Absolutely not.

CLARK Did you tell any jokes, using Irish as the brunt of the joke?

BRENON That's something I maybe need to clarify here. After we left here, that would be 12th, I guess, January 12th, after that hearing then I had a hearing at Cultural or Diversity and Compliance Office. That interview with Tori Boswell, I tried to clear up the record and again that was on tape and I said since I left this office that day, I was thinking about it and I had told an Irish joke. It was my belief that I told it off duty, not even here at all and that I made sure I told it about the Irish because I'm Irish and everybody knows I'm Irish. That way I can't offend anyone.

They know how Irish I am. They know I'm totally wrapped with the Irish in the Milwaukee area. Three different boards and everything else, therefore, I can't offend anybody and it was just a joke about a chainsaw or something. And a joke about a person not understanding how a chainsaw works. Very harmless joke. If it's harmful at all, it's harmful to me, I'm Irish.

CLARK After the, you were notified of the 10 day suspension, did you ask Cadet Panas to meet you at Fuzzy's or some type of ????? bar or?

BRENON Chief, that is something you asked me at the last conference we had here with the three of us. I, I'll explain it to you the same way I did then. If you really need me to do that once more.

CLARK If you'd like to, you may.

BRENON No. I did not ask her to join me. As I recall, it was her initiating the discussion about Fuzzy's and about possibly meeting me there with her boyfriend. No, it never happened and no, I never called her at home and no, I never would.

CLARK What I hear you saying now and correct me if I'm wrong, the last time that you referred to your genitals was prior to either being notified of any discipline

BRENON Chief, I can't, I'm gonna tell you yes, that's my understanding and my sincere belief. Absolutely. I can't imagine I would have in between all of this. I can't imagine and I'm almost positive I didn't. You know talking about that, if that even happened, it's got to be so long ago and you're asking me to remember those things well, I'm sorry, I can't.

CLARK Well I'm trying to deal with the allegations.

BRENON Well I'm gonna tell you that those allegations are false and outright lies.

CLARK Do you have anything else to add? I'd like to give you every opportunity to.

BRENON I think everything I've needed to say, I've said. I think this is very wrong and very unfair.

CLARK I have no other [illegible], unless you have.

BRENON Well just as long as we're still on the record, what do I do now?

CLARK O.K., the time is now, I have, I'm sorry, is 24 minutes of 8 or 9. I'm going to place you

BRENON **Nine, I have twenty to nine.**

CLARK Sorry, it's just the dedication of our watches. I'm going to place you again on paid suspension. You're on paid until a decision is made and we'll try to make it as soon as possible, so that you'll know where you stand.

BRENON **Is there any idea of any kind of how long that'll be?**

CLARK I'll move forward after I review everything and we'll try and make, I'll try and make something as soon as I can, keep you and let you know.

BRENON **You can't give me any idea as to how long?**

CLARK No, I can't, not at this time.

BRENON O.K.

CLARK I'll resolve it as quickly, I'll keep you informed as soon as possible.

BRENON O.K.

CLARK If you need anything at this time or coming up, feel free to contact Lt. Sroka with the department.

BRENON O.K.

CLARK And that concludes our predisciplinary hearing.

NOTICE TO ALL EMPLOYEES

Pursuant to a Settlement Agreement reached in a case before the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the State Employment Labor Relations Act, we hereby notify our employees covered by the Agreement between the State of Wisconsin and the Milwaukee Graduate Assistants Association, WFT, AFT, AFL-CIO, that:

> WE WILL ensure that employees are advised that they have a right to have a grievance representative present at any investigatory or pre-disciplinary interview, if the employee requests a representative and if the employee has reasonable grounds to believe that the interview may be used to support disciplinary action against the employee (even if no disciplinary action is ever actually taken).
>
> WE WILL ensure that the employer (or the appropriate designee) answers all grievances at Steps One, Two and Three within the timeframes established under the collective bargaining agreement in Article IV, Section 2.

Dated: 12/20/95

By: _____
Kenneth L. Watters
Vice-Chancellor and Provost
University of Wisconsin-Milwaukee

and

_____
On behalf of the State of Wisconsin,
Department of Employment Relations

DEC 27

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREON AND MUST NOT BE ALTERED, DEFACED OR COVERED BY OTHER MATERIAL.

Posted:

001536

EXHIBIT 35

COURT OF APPEALS OF WISCONSIN
DISTRICT IV
Appeal Case No. 01-1899

Circuit Court Case Nos. 99 CV 2959, 00 CV 661

99 CV 2959
BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner-Respondent,

v

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent-Respondent-Co-Appellant,

DALE R. BRENON,

Appellant.

---

00 CV 661
DALE R. BRENON,

Petitioner-Appellant,

v

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent-Respondent.

RESPONSE BRIEF OF RESPONDENT-RESPONDENT-CO-APPELLANT STATE OF WISCONSIN PERSONNEL COMMISSION

Appeal from the circuit court for Dane County, Michael Nowakowski, Judge.

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Personnel Commission does not request oral argument as the briefs fully present and meet the issues on appeal.

The Personnel Commission requests publication of the decision in this case. Following the United States Supreme Court's decision in ***McKennon v. Nashville Banner Publishing Co.,*** 513 U.S. 352, 362 (1995), no published Wisconsin case has addressed whether after-acquired evidence justifying termination is admissible in proceedings on remedy for a civil service employee who successfully challenged a termination. This is an issue which the Commission and trial courts are likely to address in the future. A published case on this issue would provide guidance for other civil service remedy proceedings.

STATEMENT OF THE CASE

The appeal in this case arises out of the decision by the University of Wisconsin-Milwaukee ("UWM") to terminate the employment of Sergeant Dale R. Brenon, a police officer with UWM's police force. The Personnel Commission ("Commission") held that although some of Brenon's behavior warranted discipline, Brenon's termination violated due process and therefore it modified the termination to a suspension of ten days without pay. Although Brenon prevailed on the merits, the Commission found that UWM was substantially justified in its decision to terminate, and therefore denied costs and attorneys' fees to Brenon pursuant to §227.485(3), Stats.

Appellant Dale Brenon began employment at the University of Wisconsin Milwaukee (UWM) Police Department in October, 1974, and at all times relevant was a sergeant. Brenon's immediate supervisor was Lieutenant Richard Sroka. [R13:1038-39; 1190, R49:77].

On two occasions in November, 1995, Officer Kenneth Peters, who is Hispanic, approached Lieutenant Pamela Hodermann, Special Assignments, alleging Brenon had been telling inappropriate jokes but that Peters feared retaliation if he went to Sroka. [R13:1038, 1310, 2105]. Hodermann advised Peters that his case would be stronger if he had witnesses and that she would make every effort to prevent retaliation if he filed a complaint. [R13:1038, 1311, 1377].

By memorandum dated November 25, 1995, to Hodermann, Peters claimed that about the first week of November, 1995, Brenon told him the following jokes:

> What do you get when one million lesbians show up at the million man march? Two million people that don't do dick.
>
> What was the best thing about the million man march? Only four people missed work.

R53a:Ex.6.

While delivering this memorandum to Hodermann, Peters provided her with the names of Officers James Leaman and David Boyke as other witnesses to Brenon's jokes. [R13:1038, 1311].

Lt. Hodermann began an investigation and interviewed Officers Leaman, Boyke and Linda Swenson. [R13:1038, 1312].

Swenson stated she had not heard Brenon tell any inappropriate jokes. [R13:1312]. Leaman and Boyke stated that they had and provided Hodermann with written reports. [R13:1038, 1312-13].

Leaman's written report to Hodermann dated Tues, 28 Nov 1995 17:24:01 CDT states:

> During the first week off (sic), November, 1995 (exact date unknown), Sgt. Brenon related a joke to me. This was at approximately 11:50 p.m. while I was in the Sgts. Office to hang up my keys and radio. Sgt. Brenon told me a joke about "The Million Man March." The joke was as follows: "What was the best thing about the Million Man March? Only 3 or 4 people missed work." I don't recall there being any other people present in the office when he told me this.

[R13:2100].

Boyke's report, dated Tues, 28 Nov 1995 15:24:05 CDT stated:

> On or about the first week of November, I was approached by Sgt. Brenon prior to the start of the third shift and nearing the end of my second shift tour. Sgt. Brenon asked if I wanted [to] hear a joke, this is not unusual as he often has done so. Although I cannot specifically remember those jokes. There is one joke that I remember he told at or about the time given above. At the time I did not know if this would be a joke of racial overtones and slurs.

> The joke included well known Americans and their known quotes. These people included John F. Kennedy, Martin Luther King and Retired Detective Mark Furman, the joke included terms and language which are derogatory to African Americans, such as "Fucking Niggers."

[R13, 1038-39, 2098].

Hodermann also interviewed Officers John Jensen and Paul Sorrell. [R13:1039, 1313]. In a memorandum to Hodermann dated December 5, 1995, Jensen alleged (1) a fellow officer told him Brenon had made a negative comment that he "was on Hodermann's lap," potentially causing problems between him and other officers, (2) that in June, Brenon criticized him for not making a sick call sooner, and (3) that in November, Brenon criticized Neuman for calling in sick early. [R13:1039, 2102]. About jokes, Jensen wrote:

> Also in November of 1995, shortly after the Million Man March, Sgt. Brenon brought some pages to roll-call and said that they were jokes that he had. He told one of them, which partly said, to the effect of, the good news was that none of the marchers missed work that day.

[R:13, 1039, 2102, 2714].

In response to his interview with Hodermann, on December 4, 1995, Sorrell P-mailed[1] Hodermann the next day. [R:13, 1039, 2109]. Sorrell complained that Brenon had made many "demeaning statements" to him in front of his peers. Regarding jokes, Sorrell said, "I think there is a place for some fun and humor while at work, but [I] believe that Sgt. Brenon has stepped over the line and may cause some people to be offended by his words or actions." [R13:2109]. During the interview, Sorrell told Hodermann that he had not heard Brenon tell any racial jokes. [R13:1533].

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[1] "P-mail" is the department's electronic mail system. [R13:1314].

Dispatcher T. Howard, a female African-American, in a memorandum to Hodermann dated November 28, 1995, stated that she was "hurt" and "insulted" when "[she] was told of Sgt. Brenon's joke regarding the Million Black Man March." The source of Howard's information was never revealed. [R13:1040, 2107].

Lt. Sroka was first advised of the investigation in a meeting with his supervisor, UWM Police Chief Phillip Clark and Lt. Hodermann on December 4, 1995.[2] [R13:1040, 1905]. Clark directed Sroka to continue the Brenon investigation. [R13:1040, 1908-9]. Hodermann provided Sroka with the memorandums from Peters, Leaman, Boyke, Jensen, Sorrell and Dispatcher T. Howard. [R13:1040, 1907-08].

Sroka met again with Chief Clark on December 5, 1995, and was directed by Clark to meet with Brenon to "get his side of the story." [R13:1040, 1921-22].

> Sroka requested Brenon to meet with him by P-mail: Dale, I need to meet with you on Friday morning, 12/08/95, regarding some recent personnel issues that I have just been made aware of . . . No big deal, won't take up much of your time, but; please wait.

[R13:1040, 2109].

On the morning of December 8, 1995, Sroka met with Brenon and advised him of the memorandums regarding the "Million Man March" jokes. [R13:1040, 1917-18]. Brenon admitted to telling some of the "Million Man March" jokes and said he was sorry. [R13:1040, 1918]. Sroka reprimanded Brenon that such conduct was not satisfactory and directed him to cease and desist. [R13:1049, 1918]. Brenon agreed to stop, and Sroka told Brenon he believed the matter was closed.

---

2 Lt. Sroka had been on vacation from November 23, 1995 (Thanksgiving Day) to December 4, 1995. [R13:1040, 1904].

[R13:1040, 1918].

While Brenon waited, Sroka reported his meeting with Brenon, including the oral reprimand, to Clark. [R13:1040, 1922-23]. Clark directed Sroka to prepare a ten-day suspension letter. [R13:1040, 1923]. Sroka returned to Brenon and informed him of Clark's directive to prepare a suspension letter. [R13:1929-30]. Immediately afterward, at Brenon's request, Clark met with Brenon. [R13:1929-30]. Clark did not change his directive to Sroka. [R13:1041].

On December 20, 1995, UWM sent Brenon a letter advising him that he was suspended for ten days without pay, effective January 22, 1996. [R13:1037-2095]. The suspension letter, dated December 19, 1995, provided the following:

> This disciplinary action is based on your conduct, as related by four officers of this Department, that during the first week of November, 1995, you related racially demeaning jokes to them while in the performance of your duties as a police sergeant. Regardless of the motivation for relating such jokes, this conduct exhibits unprofessional behavior, demonstrates a lack of sensitivity and creates a hostile environment within a diverse workplace.
>
> This conduct constitutes violations of University of Wisconsin System Work Rules IV., B and J, which states:
>
> > B. Threatening, intimidating, interfering with, or using abusive language towards others.
> >
> > J. Failure to exercise good judgment, or being discourteous in dealing with fellow employees, students or the general public.
> >
> > These actions violate University Police Rules and Regulations, Article 1-Conduct, Section 4, which states:
> >
> > 4. When dealing with any person, employees shall at all times conduct themselves in a courteous and helpful manner.
>
> and included a warning of possible discharge for "any further work rule violation."

[R13:1038, 2095].

By an Interoffice Memo dated December 23, 1995, Police Cadet Lisa Panas alleged to Chief Clark and Lt. Sroka, that she had been "subjected to numerous jokes told by Sgt. Brenon that contained sexist implications and remarks, as well as racist," that Brenon had made "remarks about [employees] engaging in sexual activity and demonstrating the type of sounds that they may make" and that she "[felt] that Sgt. Brenon ha[d] been dishonest with his duties." [R13:1041, 2700].

On December 28, 1995, Officer Dawn Neuman, during an interview with Adm. Program Specialist Boswell at the UWM Office of Diversity and Compliance (ODC), reported that she and Officer Panas had been harassed by Sgt. Brenon. Allegedly, Brenon thought she was stupid, never assigned her as Officer in Charge (OIC), talked dirty in front of her and never assigned her to work with Panas - only male officers. Also Neuman alleged Brenon told sexual jokes and made sexual remarks in the presence of Panas and that Officer Klobukowski told (dumb) blonde jokes. [R13:1041, 2503].

On January 3, 1996, Boswell, with her supervisor Asst. Chancellor Charmaine Clowney, met with Chief Clark to discuss Neuman's allegations against Brenon. [R13:1041] A joint investigation was contemplated by the two units. [R13:1041]. That day Brenon was placed on suspension with pay pending another investigation and was directed not to contact any UWM police personnel except Sroka or Clark. [R13:1041-42, 1932].

Clark participated with Boswell during the first day of interviews but afterward, Clark's participation was discontinued because it was believed Clark's presence had a "chilling effect" on the interviewees. [R13:1041, 1730]. However, subsequently, Clark directed Hodermann to conduct interviews of some of the officers, immediately preceding interviews by ODC. [R13:1041, 1380]. In the course of Hodermann's

investigation, she interviewed Officers Sanchez, Panas, Klobukowski, Neuman, Holmes, Jensen, Sorrell, Breit and Price. Hodermann wrote summaries of the recorded interviews, which were signed by the interviewee. [R13:2491-2514, 1042, 1381-82].

On January 12, 1996, Clark, with Shannon Bradbury, UWM Labor Relations Manager, interviewed Brenon regarding his conduct both before and after December 8, 1995. [R13:1043]. Brenon admitted mimicking Officer George Esler's speech pattern, making some variant of the statement "I'm going to drain 'Lucky'," printing jokes off the Internet, passing out copies of jokes when asked, but denied telling racial jokes after notification of his ten-day suspension. [R13:1042, 2115].

On January 31, 1996, Clark notified Brenon to report to a pre-disciplinary hearing on February 5, 1996. [R13:1042]. The notice identified the hearing subject matter as "allegations of [Brenon] making sexually explicit and demeaning comments and jokes to subordinates, . . . allegations of retaliation against subordinates in violation of UW System Work Rules and the University of Wisconsin-Milwaukee Sexual Harassment Policy, and continuing in appropriate activity subsequent to his suspension. [R13:1042, 2523].

At the meeting on February 5, 1996, also attended by Bradbury, Clark explained the meeting to Brenon as follows: "This is an investigative type interview and this is a predisciplinary hearing." [R13:1042, 2135]. Next, Clark apprised Brenon of allegations by employees that he had told racial and sexual jokes after his suspension notice, created a hostile work environment, talked about "[his] sex organ," and retaliated against employees who had filed complaints against him. [R13:1043, 2135]. Clark informed Brenon that they were considering a disciplinary action ranging from thirty days without pay to termination. [R13:1043, 2135].

By letter dated February 9, 1996, UWM terminated

Brenon's employment with them, effective February 11, 1996. [R13:1043, 2111]. The termination letter in part states:

> On December 19, 1995, you were given a 10 day suspension for telling inappropriate ethnic and racially demeaning jokes to your subordinates during November, 1995 . . . This termination is based on other complaints of your conduct, untruthfulness uncovered in the course of the investigation of those complaints and your retaliation against subordinates who cooperated in those investigations. Specifically, complaints were received that subsequent to your learning of your 10 day suspension, you continued to tell jokes to subordinate officers, substituting "Irishman" for other ethnic groups. Additionally, new complaints were received about your making sexually explicit and demeaning comments, telling ethnically and sexually demeaning jokes.
>
> In November of 1995, while talking to Officer Sorrell about his stay in a motel, you made a comment to the effect that Sorrell was too cheap to get two beds and that the three of them (Sorrell, his wife and infant son), probably slept in the same bed. You then made reference to them having sex or a menage a trois. You then said that, "No, it was really (Security Officer) George Esler" or words to that effect (Esler, Sorrell and wife having sex) and made noises mimicking as if they were all having sex. This eventually became just Esler masturbating, you would do this "joke" grunting and making masturbating motions in front of both male and female employees. On other occasions, you referred to your penis as "Lucky," describing its size and making comments such as, "I'm going to drain Lucky," to both male and female employees.

[R13:1042, 2111]. Other allegations in the letter were that Brenon changed his pattern of appointing Sorrell as Officer in Charge after Sorrell's written statement, dated December 5, 1995, regarding Brenon's conduct, and that Brenon returned a Christmas card sent to him by Sorrell. [R13:1043, 2111].

In addition to UW System Work Rule IV., B and J, the letter stated that Brenon had violated Work Rules I. E (Failure to provide accurate and complete information whenever such information is required by an authorized person), IV. D (making false or malicious statements concerning other employees, supervisors, students or the University) and Police Rules and

Regulations, Art. 1-Section 4 (when dealing with any person, employee shall at all times conduct themselves in a courteous and helpful manner). [R13:1043, 2111].

Appellant Brenon made a timely appeal of his suspension and termination to the Commission. [R13:1043]. The Commission concluded that UWM violated Brenon's procedural due process rights when it suspended him for ten days following Brenon's admission that he told "million man march" jokes. Prior to discipline being imposed, Brenon was not informed of the nature of the complaints, that the department viewed the complaints as serious, and that suspension or some other serious form of discipline could result. Further Brenon was not given the opportunity to attempt to influence the decision of what type of discipline should be imposed.

With respect to UWM's decision to terminate Brenon, the Commission concluded that the evidence presented established that, contrary to Brenon's claim, Brenon simulated masturbation in the workplace; but the Commission also concluded that UWM failed to establish that Brenon told derogatory ethnic jokes after notification of the ten-day suspension, that he retaliated against Sorrell by discontinuing the practice of assigning him as officer in charge or that Brenon was otherwise untruthful during the investigation. [R13:1051]. Accordingly, the Commission concluded that while UWM established just cause for disciplinary action, there was not just cause for termination where UWM failed to present evidence sufficient to establish two of the three principal allegations of misconduct. Accordingly, the Commission modified the termination to a suspension of ten days. [R13:850]. The court held further hearings on the issue of remedy. [R13:1114].

Following the decision on liability, Brenon filed a motion for attorneys' fees and costs. [R13:787]. The Commission denied the request, stating that the meeting between Sroka and Brenon in December prior to the ten-day suspension had "enough of the attributes of a sufficient due process proceeding

to support that [UWM] has a reasonable basis in law and fact for contending that the just cause standard had been met in this regard." [R13:715]. With respect to the discharge, the Commission concluded that it was "reasonable for [UWM] to have relied upon the representations by [Brenon's] coworkers to the effect that he was continuing to engage in the type of behavior cited as the basis for his previous discipline." ***Id.*** The Commission also concluded that consideration of termination by UWM was appropriate as the next step in the progressive discipline process. Accordingly, the Commission denied Brenon's request for costs and fees. [R13:715].

During the proceedings on remedy, UWM filed a replevin action against Brenon to recover UWM documents in Brenon's possession, which it found about through discovery in the disciplinary matter. [R13:11-12]. Brenon requested costs and fees not only for the proceedings on remedy, but also for litigation expenses in the replevin action. The Commission denied both requests. [R13:10]. The Commission concluded that the authorization to award costs and fees under §227.485, Stats., did not include fees for defending the separate civil replevin action and that UWM had a reasonable basis for its position on the issue of backpay, where there were discrepancies in records which bore on the issue of mitigation of damages. [R13:18-19].

Brenon appealed the Personnel Commission's decision which refused to award costs and attorneys' fees under §227.485, Stats.[3] The circuit court, Hon. Michael Nowakowski presiding, affirmed the decision of the Personnel Commission. [R24]. The judge agreed that although the due process afforded Brenon was deficient with respect to his ten-day suspension, he did have notice of the charges against him and was given an

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UWM appealed the Personnel Commission's decision regarding discipline, which was affirmed by the trial court. UWM did not appeal that decision to this court.

opportunity before the suspension was ultimately imposed to discuss the matter with Chief Clark. [R24:16]. With respect to the termination, termination was the next step in the disciplinary process, and UWM relied upon statements of witnesses for which UWM had no reason to question their veracity. The Commission made its decision based on weighing the credibility of witnesses and found there was sufficient evidence to warrant suspension (although not termination). Therefore, the court concluded that the Personnel Commission's decision that UWM's position in pursuing discipline and termination of Brenon was substantially justified under §227.485, Stats., was reasonable and affirmed. [R24:18]

The court also concluded that Brenon waived any challenge to the factual underpinnings of the fee award decision. [R24:33]. Brenon's argument that UWM had a conspiracy or vendetta against him was dismissed by Judge Nowakowski because the Personnel Commission made no such finding, and the circuit court's review was limited to assessment of whether the findings were supported substantial evidence in the record.[4] ***Id.***

Other facts will be discussed in the argument as necessary.

ARGUMENT

I. The Court Should Deny Brenon's Appeal Regarding Attorneys' Fees Because UWM Was Substantially Justified in its Position

The Commission denied Brenon's request for fees and costs

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4 The circuit court also affirmed the Personnel Commission's decision to deny attorney's fees incurred in the replevin action in Milwaukee County and in arguing for a hearing on remedy before the Personnel Commission. Those decisions are not part of Brenon's appeal to this court.

under §§ 227.485 and 814.245 Stats., which allow costs and fees to prevailing parties unless the state agency was "substantially justified" in taking its position. On appeal Brenon argues that "under no construction of the law or facts of this case can UWMPD be said to have been substantially justified in its abuse of Sgt. Brenon's rights." Brenon Brief at 11. Because the Commission correctly determined that UWM had a reasonable basis in fact and law for disciplining Brenon, this court should affirm.

A. Standard of Review

1. The Commission's Determination of "Substantially Justified" Will be Upheld Where Reasonable, Which is an Issue of Law

An agency's position is substantially justified if it has a reasonable basis in law or fact. ***See*** § 227.485(2)(f), Stats. "The test is essentially one of reasonableness, without more." ***Behnke v. DHSS,*** 146 Wis.2d 178, 183, 430 N.W.2d 600, 602 (Ct. App. 1988). Reasonableness is a legal standard. ***Susie Q. Fish Co. v. Wisconsin Department of Revenue,*** 148 Wis.2d 862, 868, 436 N.W.2d 914, 917 (Ct. App. 1989). Although application of a legal standard to a set of facts is a question of law, an agency's conclusion of law is entitled to deference and given great weight where (1) the agency is charged by the legislature with the duty of administering the statute, (2) the interpretation of the statute is long-standing, (3) the agency employed its expertise or specialized knowledge in forming the interpretation and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. ***See Susie Q Fish,*** 148 Wis.2d at 868, 436 N.W.2d at 917; ***Kannenberg v. LIRC,*** 213 Wis2d. 373, 384, 571 N.W.2d 165, 171-72 (Ct. App. 1997). Under the great weight standard, the Court of Appeals will uphold an agency's reasonable interpretation of the statute if it is not contrary to the clear meaning of the statute, even if it concludes that another interpretation is more reasonable. ***Id.***

The Commission's decision that UWM's disciplinary decisions were substantially justified is entitled to great weight. Section 230.44(4), Stats., authorizes the Commission to preside in civil service appeals. The Commission has experience in the interpretation and application of §227.485(3), Stats., and has developed expertise and specialized knowledge in interpreting and applying the statute. See ***Manthei et al. v. DER,*** Case Nos. 86-0116, etc.-PC (1/13/88); ***Showsh v. DATCP,*** Case No. 87-0201-PC (3/14/89); ***Duello v. UW-Madison,*** Case No. 87-0044-PC-ER (3/9/90); ***Christofferson et al. v. DER,*** Case No. 90-0058, etc.-PC (2/7/91); ***Arneson v. UW***, Case No. 90-0184-PC (5/14/92); ***Zentner v. DER,*** Case No. 93-0032-PC (8/18/94); ***Murray v. DER,*** Case No. 91-0105-PC (4/6/95); ***Pearson v. UW,*** Case No. 84-0219-PC (2/12/97).

Because of the Commission's vast experience in interpretation and application of the statute, the Commission's decision must be affirmed if it is reasonable. ***Cf. Susie Q. Fish Co.,*** 148 Wis.2d at 868-69.

2. Issues of Fact by the Commission Must be Upheld if There is a Substantial Basis in the Record.

To the extent that Brenon challenges the factual underpinnings of the Commissions' conclusions, the Commission's findings must be upheld if they are supported by substantial evidence in the record. The court must review the factual underpinnings of an agency's order in light of §227.57(6), Stats., which states:

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence on the record.

Thus, the court must determine whether there is sufficient

evidence in the record to support the agency's decision. ***Leist v. LIRC***, 183 Wis. 2d 450, 457, 515 N.W. 2d 268, 270 (1994). If the court finds substantial evidence in the record, it must not upset the agency's decision. ***Id.***

The court must affirm the agency's findings if there is *any* credible evidence, even if the agency's findings are contrary to the great weight and clear preponderance of the evidence. ***CBS, Inc. v. LIRC***, 213 Wis. 2d 285, 294, 570 N.W. 2d 446, 450 (Wis. Ct. App. 1997). Credible evidence is evidence that excludes speculation and conjecture. ***Bretl v. LIRC***, 204 Wis. 2d 93, 100, 553, N.W. 2d 550, 552 (Wis. Ct. App. 1996). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. ***Id.***

In some instances, one or more inferences may be drawn from the evidence. In those cases, the drawing of one such permissible inference by the agency is an act of fact finding, and the inference so derived is conclusive on the reviewing court. ***Bernhardt v. LIRC***, 207 Wis. 2d 292, 299, 558 N.W.2d 874, 876 (Wis. Ct. App. 1996). However, if the facts are undisputed and only one reasonable inference can be drawn from the facts, and that inference is contrary to the conclusion drawn by the agency, the court must overrule the agency. ***Leist***, 183 Wis. 2d at 458, 515 N.W. 2d at 271.

3. Although UWM's Disciplinary Decisions Were Overturned by the Commission, UWM Was Substantially Justified in its Actions of Discipline and Termination

The Commission applied the standard under ***Sheely v. DHSS,*** 150 Wis.2d 320, 442 N.W.2d 1 (1989), to determine whether UWM's actions were "substantially justified." Under that standard, UWM had to demonstrate that it (1) had a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory

advanced. ***Id.***

Brenon does not challenge this standard; he argues merely that UWM did not meet the standard. This court should conclude that the Commission's decision that UWM was substantially justified was reasonable.

a. UWM Was Substantially Justified in its Position That the 10 Day Suspension Complied with Due Process.

The Commission concluded that even though the disciplinary procedure did not comply with due process, it possessed enough of the attributes of a sufficient due process proceeding to support a conclusion that Respondent had a reasonable basis in law and fact for contending that the just cause standard had been met. [R29:3] Brenon did have notice of the specific allegation against him (repeating the Million Man March joke) during the meeting with Sroka; he was given an opportunity to respond during the meeting; he was made aware during the meeting that the purpose was to discuss the allegation and its consequences; he was provided with notice at the end of the meeting that a ten-day suspension was contemplated, and he subsequently met with Chief Clark.

Brenon first isolates his meeting with Clark and argues that the meeting did not "cure" the due process defects of Brenon's meeting with Sroka. Brenon's argument misses its mark.

The Commission ***agreed*** with Brenon that the meeting with Clark did not cure the due process defects. However, in examining the attorneys' fees and costs issue by examining whether UWM was substantially justified in its decision to discipline Brenon, the Commission looked at the entirety of the process afforded Brenon when he was suspended, both in the meeting with Sroka and in the conference with Clark. [R13:714]

The Commission agreed that the procedures did not comply with due process based on the very issues argued by Brenon but held that the meetings with Sroka and Clark demonstrated a substantial basis for UWM to argue that due process was met. These facts included that Brenon had notice of the allegations, had the opportunity to respond, and was made aware of the purpose of the meeting and consequences (although much occurred during the meeting with Sroka, rather than in advance). ***See***, *supra* p. 4-5. Brenon had a second meeting and an opportunity (albeit not successful) to attempt to persuade Chief Clark to impose a lesser penalty. ***See,*** *supra* p. 5. Although the meetings did not afford Brenon the due process required by ***Cleveland Board of Education v.Loudermill,*** 470 U.S. 532 (1985) because Brenon did not have adequate prior notice of the charges and was led to believe that no serious discipline was considered, the Commission's decision that enough attributes of due process were afforded to substantially justify UWM's decision to suspend Brenon was reasonable and should be affirmed.

Brenon argues that UWM was not substantially justified in proceeding with discipline without advance notice and without an adequate opportunity to be heard. However, the question of sufficient due process requires a balancing of the employee's interest against that of the employer. ***See Mathews v. Eldridge***, 424 U.S. 319 (1976). Further, notice may be oral. ***Loudermill***, 470 U.S. at 546. As noted in ***Gilbert v. Homar***, 520 U.S. 924, 930 (1997) the concept of due process is flexible, depends on the facts at hand, and the amount of notice necessary varies depending on the balancing of the employee and employer's interests. In fact, adequate process may occur in some instances (although not present here) even ***following*** the imposition of discipline. ***Id.***

It cannot be seriously contested that UWM has legitimate, substantial interests in having a workplace free from racism or racist comments by supervising officers such as Brenon. UWM could be substantially justified in believing that adequate notice

and opportunity to be heard in compliance with due process standards occurred where Brenon had one meeting with a supervisor, was informed of the charges and prospective discipline, followed by a second, both prior to discipline being imposed. Because this conclusion by the Commission was reasonable, it must be affirmed.

b. UWM Was Substantially Justified in its Position on Termination.

The Commission found in its initial decision that evidence showed that UWM's police department had "two distinct factions operating in a fractious department, fraught with concerns of retaliation from various quarters." [R34: 24] UWM presented evidence to support each of its allegations which it argued supported the termination. However, following the hearing, the Commission found that UWM did not meet its burden on its allegations that Brenon continued to tell racial jokes and retaliated against subordinates; and three of its four allegations that Brenon was untruthful. The evidence involved determinations of credibility of conflicting witnesses, a province most suited to the Commissioner to determine, and upheld if there is any credible evidence to support the finding. ***See CBS, Inc.***, 213 Wis. 2d at 294, 570 N.W. 2d at 450. The Commission simply found Brenon's witnesses more credible and/or that UWM did not meet its burden to show that a violation occurred. UWM had factual underpinnings supporting the termination, including sworn statements from witnesses. Although the Commission's findings of fact rejected in large part the testimony offered by UWM, it was certainly reasonable for UWM to rely on this testimony in support of its decision.

Brenon does not contest the facts as found by the Commission that Brenon violated work rules. Instead Brenon argues that UWM's termination decision was not substantially justified because termination was "not the next step in the progressive discipline." However, Brenon supplies no factual

basis for this assertion. At the time that UWM imposed the discipline of termination, Brenon had recently had a ten-day suspension. Although this prior suspension was ultimately overturned on due process grounds--over UWM's objections--at the time termination was imposed, termination was the next step in Brenon's discipline. Merely because the prior suspension was later overturned does not make the termination decision unjustified from its outset. Further, as discussed in the proceeding section, this court should conclude, as did the Commission, that UWM was substantially justified in imposing the original ten-day suspension. Because it was substantially justified in the prior decision, it would be substantially justified in concluding that termination is the next step in a progressive discipline system.

c. The Fee Shifting Statute Does not Require Fee Shifting Where the Agency's Position was Substantially Justified

Brenon correctly cites authority regarding the purposes of the Equal Access to Justice Act as compensation of a party for ***unreasonable*** government action and to encourage challenges to agency action. Brenon Brief at 36. However, as discussed above, UWM's actions, although not ultimately upheld in total, were substantially justified, and thus reasonable.

Losing a case does not raise the presumption that the agency was not substantially justified. ***Sheely,*** 150 Wis.2d at 338, 442 N.W.2d at 8. Nor is advancing a "novel but credible extension or interpretation of the law" grounds for finding a position lacking substantial justification. Id. Brenon's arguments, taken to their logical conclusion, would have ***any*** prevailing litigant recover fees, wherever the agency vigorously defends its decisions, yet ultimately loses. This is not required, nor the purpose of the statute. Because the Commission's decision that UWM was substantially justified in its positions was reasonable, this court should affirm.

CONCLUSION

The Commission appropriately reviewed the evidence and reached conclusions supported by that evidence. The Commission applied the appropriate law. That Brenon disagrees with various conclusions of the Commission is not grounds for reversal where the Commission's decisions are given weight. Accordingly, this Court should affirm the Commission's decision denying Brenon's request for attorney's fees.

Dated this 19th day of November 2001.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief and appendix in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 5,470 words.

Dated this 19th day of November, 2001.

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APPENDIX

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STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * * *

RODNEY A. ARNESON,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 90-0184-PC

* * * * * * * * * * * * * * * * * *

DECISION ON FEES AND FINAL ORDER

The Commission entered an interim decision and order on February 6, 1992, adopting the proposed decision and order, which had rejected respondent's disciplinary action, but retaining jurisdiction with respect to appellant's petition for costs filed under §227.485, Stats. Both parties have filed arguments on the matter of costs.

The basis for the decision on the merits rejecting the disciplinary action was respondent's failure to have afforded appellant an adequate predisciplinary hearing.[1] In order for respondent to avoid an award of costs under §227.485, Stats., the Commission must be able to determine that respondent's actions with respect to the predisciplinary process were "substantially justified" as "having a reasonable basis in law and fact," §227.485(2)(f), Stats.

Respondent contends that: "[i]t is clearly within the realm of legitimate legal debate viewed from the standpoint of reasonable advocacy[2] for the University to assert that Due Process requires less in a situation involving demotion than in a situation involving termination. This argument finds its basis in the language of Loudermill itself." It is correct that less elaborate procedures are necessary for less substantial property deprivations, see

[1] The proposed decision observed that respondent's failure to have provided an adequate predisciplinary hearing voided the disciplinary action, but nevertheless went on to address the merits, even though it was not absolutely necessary, because a plenary hearing had been held.

[2] Respondent cites Behnke v. DHSS, 146 Wis. 2d 178, 183-84, 430 N.W. 2d 600 (Ct. App. 1988), for this standard. However, the Supreme Court in Sheely v. DHSS, 150 Wis. 2d 320, 338, n.10, 442 N.W. 2d 1 (1989), noted its disagreement with this enunciation of the standard by the Court of Appeals.

Showsh v. DATCP, 87-0201-PC (9/5/91) ("a five-day suspension without pay does not necessarily require the same panoply of procedural protection as does a complete termination of employment."). Nevertheless, there are certain minimum requirements for any property interest deprivation in the employment context.

In Showsh v. Wisconsin Personnel Commission, No. 90-1985 (Ct. App., 1991) (unpublished), the Court of Appeals upheld a Circuit Court decision reversing the Commission's decision that the predisciplinary proceeding followed there had been adequate. The Circuit Court had pointed out that, at a minimum under Loudermill, the employe is entitled to notice of the charges against him or her and is entitled to an opportunity to respond prior to the disciplinary action. Showsh v. Wisconsin Personnel Commission, Brown Co. Circuit Court No. 89CV445 (6/29/90). The Court of Appeals held:

> Before a person may be deprived of a protected property interest, he must be given notice of the charges against him and a meaningful opportunity to respond. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985).

The Court observed that a key reason why adequate notice is important is that it gives the employe an opportunity not only to respond to the substance of the alleged misconduct, but also to try to persuade the employer to impose a lesser penalty.

In the instant case, after appellant had heard rumors in the workplace about a sexual harassment complaint against him, he inquired of the personnel coordinator about this, and she confirmed it. At the ensuing predisciplinary meeting, the Commission found that:

> Jezwinski [the personnel coordinator] asked Arneson questions about his interaction with the employe and her sister regarding taking photos. Jezwinski told Arneson very little about the employe's allegations, except to the extent they were corroborated by Arneson's statements.
>
> * * *
>
> Only parts of the employe's allegations were provided Arneson. Before the meeting ended, Jezwinski told Arneson she did not know what was going to happen, that she was going to consult with others and that any level of discipline — reprimand, suspension or termination — was possible.

* * *

> It is clear Thoftne [appellant's supervisor] and Jezwinski's meeting with Arneson was focused on corroborating the employe's allegations of sexual harassment, instead of providing Arneson a pre-disciplinary hearing. Proposed decision, pp. 4, 6.

Thus, appellant received only selectively fragmentary notice of the charges against him, and he had no notice that any possible discipline against him was being considered until the end of the meeting. At this point, it was of little or no value with respect to allowing him "to present reasons why proposed action should not be taken," Loudermill, 470 U.S. at 546, 84 L.Ed. 2d at 506, or, as the Court of Appeals put it in Showsh, "to have persuaded the decision maker to impose a lesser penalty notwithstanding justification for the suspension." Showsh at pp. 3-4.

In summary, when the instant case is juxtaposed with Showsh, where §227.485 costs were denied, several factors stand out:

1) In Showsh, the Commission first noted that there was a split of reported authority on the question of whether the degree of property deprivation (a five day suspension) was significant enough to implicate Fourteenth Amendment protection, and then went on to state:

> If this issue had been resolved in favor of respondent, and it had been concluded that Fourteenth Amendment due process protection did not apply to appellant's suspension, then no predisciplinary process would have been required, and respondent's procedure would have been upheld regardless of its extensiveness. Since the threshold question of the applicability of the due process clause to this transaction turned on a legal issue as to which there was conflicting precedent, it cannot be concluded that respondent's position did not have a reasonable basis in law.

In the instant case, the discipline combined a thirty day suspension with a demotion from a supervisory to a non-supervisory position. Perhaps not surprisingly under these circumstances, respondent has not contested that this degree of discipline represents a property interest protected by the Fourteenth Amendment. Thus, respondent in the present case does not have a similar threshold legal theory, with supporting case law, on which to base its contention that its actions were "substantially justified."

2) The difference in penalties (five day suspension versus a thirty day suspension and an involuntary demotion from a supervisory to a non-supervisory position) is also material to a comparison of the procedural protections extended to the employes, because, as noted above, these vary with the degree of property deprivation involved. The facts of this case indicate a more extensive procedure was required than under the facts present in Showsh.

3) In this case, the employe was given no notice that disciplinary action was being considered at all until at the end of the predisciplinary hearing. In Showsh, the employe was told at the beginning of the hearing that disciplinary action might ensue, and the Commission found that it could "be inferred from this that appellant, as the supervisor involved in the missing inspections, and being aware that management was looking into these matters in a disciplinary context, should have had at least some level of awareness that management was concerned about the missed inspections, disciplinary action was being considered, and that he might be implicated as the responsible supervisor." While Mr. Arneson knew the employe in question had made a complaint of sexual harassment against him, he did not know how seriously management was taking this, i.e., whether any disciplinary action was being considered, until the end of the hearing.

4) Even though Mr. Showsh did not have full notice of the charges against him, he knew the employer was concerned about the missing inspections, which were a relatively discrete matter. All Mr. Arneson knew was that the employe in question had made a complaint against him concerning sexual harassment. He was not given notice of her specific allegations.

What emerges from this record is that management met with Mr. Arneson on March 23, 1991, not to conduct a predisciplinary hearing where he would have the opportunity to respond to the charges against him, but rather as part of its investigation of the sexual harassment complaint. As the proposed decision found, the meeting was "focused on corroborating the employe's allegations of sexual harassment, instead of providing Arneson a pre-disciplinary hearing." p.6. Particularly in light of the employer's failure to have provided notice of the charges against him, and to have provided any warning that disciplinary action of any kind was being considered, the

Commission cannot conclude that respondent's actions were "substantially justified" as "having a reasonable basis in law and fact," §227.485(2)(f), Stats.

Respondent objects to the $110 hour rate for appellant's attorney as in excess of the $75 hour permitted by §814.245(5)(a)2., Stats. This restriction is qualified by the proviso: "unless the court determines that an increase in the cost of living or a special factor ... justifies a higher fee." With respect to the cost of living factor, appellant has not made any showing concerning changes in the cost of living since the law was adopted. Therefore, it is speculative whether $110 is representative of the change in the cost of living during this period. Cf. Anderson v. DER, 86-0098-PC (11/11/87); affd., DER v. Pers. Commn., Dane Co. Cir. Ct. No. 87CV7397 (11/7/88) ("Appellants have submitted information showing a cost of living increase of 4.3%.").

With respect to any other criterion or "special factor" that possibly could justify a fee in excess of $75/hour, appellant has submitted affidavits that tend to show that $110 is a reasonable fee under the circumstances. However, §814.245(5)(a)2., Stats., is not couched in terms of a market-based fee. To the contrary, §814.245(5), Stats., specifically provides:

> (5) If the court awards costs under sub. (3), the costs shall include ...:
>
> (a) ... reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:
>
> * * *
>
> 2. Attorney or agent fees may not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee. (emphasis added)

Since the statute explicitly provides for attorney's fees at $75/hour as an exception to a market rate approach, it is obvious that the rate established by the market is not a "special factor" that would justify a fee in excess of $75/hour.

Appellant also contends that a fee higher than $75/hour is justified by the presence of a form of contingency fee contract. However, it also is unlike-

ly that the presence of a contingency fee contract would be considered a "special factor" that would justify a fee in excess of $75. In Board of Regents v. Personnel Commission, 147 Wis. 2d 406, 433 N.W. 2d 273 (Ct. App. 1988), the Court considered whether the term "reasonable attorney fees" in §230.85(3)(a)4., Stats., could include a multiplier based on a contingency fee arrangement. The Court expressed grave concerns about the policy implications of using a multiplier based on a contingency fee contract. Also, the Court pointed out that prior to the promulgation of §230.85(3)(a)4., Stats., the Supreme Court already had provided guidance as to the criteria to be considered in determining the reasonableness of an attorney fee. One of the eight criteria was "[w]hether the fee is fixed or contingent." Board of Regents, 147 Wis. 2d at 415. Thus the Court concluded that: "[b]y 1984, the term 'reasonable attorney fees' had acquired a meaning that did not include the use of [sic] multiplier. "id. If the concept of a reasonable fee already reflects the factor of whether a fee is fixed or contingent, it seems unlikely that the presence of a contingent fee contract would be considered a special factor that could justify a higher fee than the $75 (possibly inflation-adjusted) that the legislature already determined was a reasonable fee. Every fee arrangement must be either fixed or contingent. If the legislative intent with respect to §814.245(5), Stats., had been to allow upward adjustment of the $75 reasonable fee merely because of the presence of a contingency fee, it seems apparent this would have been reflected more explicitly rather than to have included this factor under the general language of "special factor."

Respondent also objects to costs claimed for copying, hearing tapes, facsimile transmission and postage as outside the costs permitted by §814.04(2), Stats. While this subsection does not cover the cost of copying and hearing tapes, and these items will be excluded, it specifically covers "postage, telegraphing, telephoning and express." Therefore, postage is explicitly allowed, and FAX transmissions fall within the scope of the term "telegraph, telephoning and express."

Finally, the Commission declines to consider prorating costs with respect to the merits (i.e., the "just cause" issue). As noted above, inasmuch as the appellant never received an adequate predisciplinary hearing, the disciplinary action taken must be voided. The proposed decision addressed the

merits because a plenary hearing had been held.[3] If an adequate predisciplinary hearing had been held, it is possible that no appeal would have ensued.

ORDER

The §227.485 petition is granted in the amount of $14,607.38, representing the total amount requested ($21,949.62) less copying and tape costs ($276.12) and less the difference between a rate of $110 per hour versus $75 per hour ($35 x 194 hours or $6790). The Commission's February 6, 1992, interim order is finalized as the Commission's final disposition of this matter.

Dated: May 14, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served per-

[3] The hearing examiner obviously did not know when he prepared the proposed decision whether the full Commission would adopt his conclusion that the predisciplinary hearing had been inadequate.

sonally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

KAREN CHRISTOFFERSON,
CLARA DAVISON,
JANE FISCHER,
JUDITH LEMBRICH,
MARSHA McKINNON,
SUE SCHERER,
LYNN ZASPEL,

Appellants,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and President, UNIVERSITY OF WISCONSIN SYSTEM (Whitewater),

Respondents.

Case Nos. 90-0058, 0059, 0060, 0061, 0062, 0063, 0064-PC

* * * * * * * * * * * * * * * * *

DECISION AND ORDER

This matter is before the Commission for consideration of a Motion for Costs filed by appellants pursuant to §227.485(2)(f), Stats. Pursuant to this statutory provision, the Commission must award appellants their costs unless it finds that respondent was "substantially justified in taking its position." Section 227.485(2)(f), defines "substantially justified" as "having a reasonable basis in law and fact." In Escalada-Coronel v. DMRS, Case No. 86-0189-PC (4/12/87), the Commission cited with approval the following language from Berman v. Schweiker, 531 F. Supp. 1149, 1153-1154 (N. D. Ill. 1982):

> The standard created by this statute is a new one, not in line with either the common law exceptions to the American rule restricting the award of attorneys' fees, or other statutory standards allowing fee awards in certain cases against the United States. It was intended to serve as a 'middle ground' between an automatic award of fees to a successful party and permitting fees only where the government's position was arbitrary and frivolous. . . .

* * *

> . . . The standard falls in between the common law 'bad faith' exception and an automatic award of attorney's fees to prevailing parties. (emphasis added)

The instant case involves the reallocation of appellants' positions as a result of a survey of nursing positions. While the Commission has found on the basis of a de novo hearing that the appellants' positions are more correctly classified at the NC 3 level as opposed to the NC 2 level, this is not equivalent to a conclusion that either respondent's decision to reallocate these positions to the NC 2 level or to contest these appeals did not have a reasonable basis in fact or in law. (Manthei et al. v. DER, Case Nos. 86-0116, etc.-PC (1/13/88))

The application of the classification specifications to the duties and responsibilities of appellant's positions did not lead to an obvious result. Not only were these positions not specifically identified in the position standard for the NC series but the language of the position standard was general and required the exercise of discretion in its interpretation and application.

For example, although the direct care and patient population issues appeared clear cut vis a vis appellants' positions, the issues relating to the consultant component and to the planning/programming/ research component were not clear cut. In regard to the consultant component, although it was clear that student health nursing is a nursing specialty, it was not clear that the consultant duties performed by appellants were NC 3 level duties and it was not clear that these duties were comparable to the consultant duties performed by the student health nurses at the UW-Madison. For example, although appellants and the UW-Madison nurses both serve as preceptors to student nurses, appellants do so for student nurses at a technical school whereas the UW-Madison nurses do so for student nurses at the UW-Madison. It was not clear

that these functions are equal in view of the more rigorous and advanced nursing program provided at the college level. In addition, appellants serve as a resource for a much smaller health service and community than do the UW-Madison nurses. It was not clear that these functions are equal in view of the potential for greater variety and complexity when dealing with a larger mix of people and their health problems.

In regard to the planning/programming/ research component, it was clear that appellants have independent responsibility for performing tasks in this area but it was not clear that the tasks themselves were NC 3 level tasks or were equal to such tasks performed by the student health nurses at the UW-Madison. For example, it was not clear that a quality assurance or unit planning function performed for a smaller health service is equal to a quality assurance or unit planning function performed for a much larger health service if for no other reason than the possible complexities created in this area by volume alone. It was not clear that educational programming for a small campus is equal to such programming for a larger campus if for no other reason than the larger numbers of people who have to be reached.

Although most of these issues were resolved in appellants' favor, the results were not obvious but required, as stated in the Manthei case cited above, "weighing evidence, opinion, and argument." The Commission concludes on the foregoing basis that appellants have failed to show that the actions of respondent in this regard were not substantially justified within the meaning of §227.485, Stats.

Since the Commission concludes it is inappropriate to award fees under §227.485. Stats., it will not address the issues that have been raised concerning specific items of fees and costs.

Order

Appellants' Motion for Costs is denied.

Dated: February 7, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

THERESE M. DUELLO,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - Madison,

Respondent.

Case No. 87-0044-PC-ER

* * * * * * * * * * * * * * * * *

DECISION AND ORDER

NATURE OF THE CASE

This case involves a charge of discrimination on the basis of sex and retaliation, with respect to a pattern of alleged harassment culminating in nonrenewal and refusal to reconsider this decision. This charge was filed with this Commission on April 30, 1987. On October 9, 1989, the Commission received a letter dated October 9, 1989, from counsel for respondent which states, in part, as follows:

> The Commission has placed the processing of this case on "hold" pending the University's internal review procedures to resolve the matter. Those procedures have been completed and, at your request, I am forwarding the final resolution of Dr. Duello's complaints. Dr. Duello has accepted the resolution, reserving only the right to pursue the payment of her legal fees in connection with her internal appeals. I have enclosed a July 27, 1989 letter from Dean Sussman to Dr. Duello, which also bears her signature and statement accepting the remedies. The University requests the Commission to dismiss the complaint.
>
> * * *
>
> In response to her claims, the University has not only continued her employment and provided her with an additional probationary period in another department, it has also provided substantial research support and a new laboratory. I have enclosed correspondence which summarizes the results of the negotiations on these issues. All of these matters have been resolved in a manner acceptable to Dr. Duello.
>
> Based on the successful resolution of her complaints, and Dr. Duello's acceptance of the remedies offered, the University requests that

> the Commission dismiss her complaint. Dr. Duello reserved only the right to pursue the matter of non-payment of her legal fees for the internal review process. The Commission does not have jurisdiction to enforce payment of attorney fees for internal agency reviews. Its authority regarding payment of attorney fees extends only to fees incurred in the prosecution of a contested case claim before the Commission. §227.485, Stats.

On November 16, 1989, the Commission received a letter from complainant dated November 13, 1989, which states, in part, as follows:

> On April 24, 1987, a sexual discrimination complaint was filed with the Personnel Commission on my behalf by Attorney Cheryl Weston. The following damages have been incurred as a result of the failure to resolve this complaint:
>
> $13,215.49 in attorney's fees and associated expenses
>
> Despite the fact that the University has paid legal fees in a past case involving an internal review process, Chancellor Donna Shalala has already clearly indicated her unwillingness to pay my legal expenses (letter attached). Therefore this complaint can not be resolved and will not be withdrawn.
>
> In the letter from Attorney Gail Snowden to Ms. Bastien dated October 9, 1989, Ms. Snowden specifically states that "Dr. Duello reserved the right to pursue the matter of non-payment of her legal fees for the internal review process". Given Ms. Snowden's comments, it is apparent that the University clearly understands that I was not waiving my rights to pursue a remedy through the Personnel Commission. I therefore ask that the Personnel Commission intercede at this point to resolve this case contested under §227.845, Stats. [sic][1]

By letter dated November 17, 1989, the Commission established a briefing schedule on what it construed to be a motion to dismiss set forth in respondent's letter of October 9, 1989, and both parties have submitted briefs.

DISCUSSION

Complainant has taken the position that this complaint has not been resolved because respondent has refused to pay her legal fees and associated expenses. Respondent has taken the position that as a matter of law the Commission can not award the attorney's fees and costs incurred in the

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[1] There is no §227.845, Stats. The Commission assumes complainant means to refer to §227.485 (Costs to certain prevailing parties.").

proceeding in question. If, as a matter of law an award of attorney's fees, the only remedy which remains in question, is precluded, then this case would be considered moot and the charge should be dismissed, see, e.g., In re Marriage of Sumby v. Sumby, 116 Wis. 2d 347, 351, 341 N.W. 2d 725 (Ct. App. 1983):

> 'A case is moot when a determination is sought which, if rendered, could have no practical effect upon a then-existing controversy,' State ex rel. McDonald v. Douglas Cty. Cir. Ct., 100 Wis. 2d 569, 572, 302 N.W. 2d 462, 463 (1981). The business debts which should have been included in the marital estate have been discharged, and neither Frederick nor Patricia are liable for their payment. Frederick's reaffirmation of his debt to Patricia is invalid, so that whether the amount of the debt was improperly determined is irrelevant. Any determination by this court as to whether the trial court should have included the business debts in the marital estate will therefore have no effect on an existing legal controversy. The appeal is moot.

That is, if the Commission can not award the only remedy which complainant is seeking (attorney's fees and costs), this case would be moot because the Commission could not render any kind of decision that would have a "practical effect on a then-existing controversy," id. Therefore, the Commission will address the issue raised by respondent's motion to dismiss. The underlying material facts do not appear to be in dispute.

In addition to filing her charge of discrimination with this Commission, complainant also appealed her nonrenewal to the UW-Madison Committee on Faculty Rights and Responsibilities (CFRR). The authority for such an appeal to this body is set forth at § UWS 3.08, Wis. Adm. Code:

> (1) The faculty and chancellor of each institution, after consultation with appropriate students, shall establish rules and procedures for the appeal of a nonrenewal decision. Such rules and procedures shall provide for the review of a nonrenewal decision by an appropriate standing faculty committee upon written appeal by the faculty member concerned. . . . The burden of proof in such an appeal shall be on the faculty member, and the scope of such review shall be limited to the question of whether the decision was based in any significant degree upon one or more of the following factors, with material prejudice to the individual:

(a) Conduct, expressions, or beliefs which are constitutionally protected, or protected by the principles of academic freedom, or

(b) Factors proscribed by applicable state or federal law regarding fair employment practices, or

(c) Improper consideration of qualifications for reappointment or renewal. For purposes of this section, "improper consideration" shall be deemed to have been given to the qualifications of a faculty member in question if material prejudice resulted because of any of the following:

1. The procedures required by rules of the faculty or board were not followed, or

2. Available data bearing materially on the quality of performance were not considered, or

3. Unfounded, arbitrary or irrelevant assumptions of fact were made about work or conduct.

(2) The appeals committee shall report on the validity of the appeal to the body or official making the nonrenewal decision and to the appropriate dean and the chancellor.

(3) Such a report may include remedies which may, without limitation because of enumeration, take the form of a reconsideration by the decision maker, a reconsideration by the decision maker under instructions from the committee, or a recommendation to the next higher appointing level. Cases shall be remanded for reconsideration by the decision maker in all instances unless the appeals committee specifically finds that such a remand would serve no useful purpose. The appeals committee shall retain jurisdiction during the pendency of any reconsideration. The decision of the chancellor will be final on such matters.

The applicable part of the Faculty Policies and Procedures, UW-Madison, provides as follows:

7.10 APPEAL OF A NONRENEWAL DECISION. (See UWS 3.08.)

A. By written request, within twenty days, the faculty member may appeal an adverse reconsideration of a nonrenewal decision in accordance with the provisions of UWS 3.08(1). The appeal shall be heard by the Committee on Faculty Rights and Responsibilities no later than twenty days after the request, except that this time limit may be enlarged by mutual consent of the parties, or by

order of the committee. The faculty member shall be given at least ten days notice of such review.

B. The Committee on Faculty Rights and Responsibilities shall report on the validity of the appeal to the faculty member, the departmental executive committee, the appropriate dean, and the chancellor, in accordance with the provisions of UWS 3.08(3).

C. The Committee on Faculty Rights and Responsibilities shall retain jurisdiction pending the resolution of the appeal.

The CFRR issued its final report on complainant's appeal on October 27, 1988. This report contained the following summary of the committee's recommendations at p. 21:

> We have concluded that the challenged nonretention decision did not violate any standard formal norms of procedure or due process, and we have discovered no evidence that it resulted from sexual discrimination. Nevertheless, it failed to meet the standards of fairness that the University of Wisconsin is committed to uphold. CFRR has found no actionable or malicious misconduct on the part of any faculty member or administrator, but there is nonetheless plenty of culpability to be shared. Lack of colleague sympathy and assistance, unfortunate and insensitive statements susceptible to misinterpretation, an investigation by AAO which distressed and angered the Anatomy Department Executive Committee and Dr. Duello, and apparently insufficient oversight by the Medical School Administration, conjoined with a tense and unfriendly work environment, prevented a fair evaluation of Dr. Duello's accomplishments and likely future performance. Her own heightened sensitivity did nothing to ameliorate these conditions, and probably only exacerbated them. Under the circumstances, CFRR believes that Dr. Duello is entitled to another chance to be judged <u>on her merits as a scholar</u>, the same opportunity to succeed that is routinely extended to all assistant professors. (footnote omitted)

The Committee then set forth a series of specific recommended steps that would provide complainant with a new contract and various other changes in her status that would result in another opportunity to obtain tenure. The Committee also recommended that the University reimburse complainant for fifty percent of her legal expenses.

By a memo dated February 10, 1989, Chancellor Shalala set forth her decision on complainant's appeal. While she disagreed with the CFRR

conclusion that there were proper grounds for appeal under § UWS 3.08(1), Wis. Adm. Code, she noted that the Anatomy Department and complainant agreed on most of the CFRR's recommendations, and she adopted most of these recommendations. She noted that since she found:

> [T]hat CFRR and each of the parties have a tenable reason for supporting the recommended remedies, it is not necessary for me to resolve their disagreements concerning gender discrimination and on what conditions prevailed within the Anatomy Department.

She reserved judgment on the question of attorney's fees. Subsequently, by letter dated July 10, 1989, Chancellor Shalala advised of her conclusion that "there is no legal or policy basis to approve the payment of attorney's fees in matters before the CFRR."

There are only two bases for the Commission to direct the payment of attorney's fees. Section 227.485(3), Stats., provides:

> (3) In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

This provision does not give the Commission the authority to award costs for a proceeding before another agency. Section 227.485(2)(a) defines "hearing examiner" as "the agency or hearing examiner conducting the hearing." Since this Commission did not conduct the hearing before the CFRR, this Commission lacks the authority under § 227.485(3) to award the attorney's fees incurred by complainant in connection with that proceeding.

The other basis for this Commission to award attorney's fees is the Fair Employment Act, Subchapter II, Chapter 111, Stats. While there is no explicit provision in that law for attorney's fees awards, the Wisconsin Supreme Court

has found implied authority in the law for such awards. In Watkins v. LIRC, 117 Wis. 2d 753, 765, 345 N.W. 2d 482 (1984), the Court held as follows:

> We therefore hold that under §111.36(3)(b), Stats. 1975, DILHR[2] has the authority to award reasonable attorney's fees to a complainant who prevails in an action brought pursuant to the Fair Employment Act.

Laying to one side the question of whether complainant can be said to have "prevailed" in her appeal under § UWS 3.08, Wis. Adm. Code, that proceeding clearly was not "an action brought pursuant to the Fair Employment Act," id. The only possible basis for a conclusion that the Commission has the authority under the FEA to award attorney's fees with respect to complainant's § UWS 3.08 appeal would be to analogize to a line of cases decided under Title VII (42 U.S.C. §§ 2000e-2000e-17), the federal analogue of the Wisconsin FEA, holding that under certain circumstances attorney's fees can be awarded to complainants in connection with proceedings outside of, but connected in certain ways to, the Title VII process.

The seminal case here is New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 L.Ed. 2d 723, 100 S.Ct. 2024 (1982). Under Title VII, a charge of discrimination filed with the EEOC must be cross-filed with the state equal rights agency. In that case, after complainant's Title VII discrimination charge was deferred to the New York State Division of Human Rights, she incurred legal fees in processing her charge with that agency and in subsequent state administrative and judicial review proceedings, in all of which she prevailed. While judicial review was pending in state court, the EEOC, in reliance on the state probable cause finding, found reasonable cause

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2 Pursuant to §111.375(2), Stats., this Commission has jurisdiction over charges of discrimination brought against state agencies (such as UW-Madison) as employer, and the Commission's powers under the Fair Employment Act are coextensive with those of DILHR, 68 Op. Atty. Gen. 403 (1979).

to believe discrimination had occurred and issued a "right-to-sue" letter. After complainant filed suit in federal court, the state judicial proceeding was finally resolved, as the employer agreed to comply with the state agency's order. The Title VII action then was settled as to all issues except attorney's fees. The Supreme Court concluded that Title VII authorized the award of attorney's fees under the circumstances.

Title VII provides for attorney's fees at § 706(k), 42 U.S.C. § 2000e-5(k), as follows:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party other than the Commission or the United States, a reasonable attorney's fee as part of the costs.

In its holding, the Court relied heavily on the fact that deferral to state proceedings was a statutorily-mandated integral part of the Title VII process:

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated . . . . Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme. 447 U.S. at 65, 64 L.Ed. 2d at 735.

While the Court thus construed Title VII to cover the award of attorney's fees for proceedings in another forum where resort to that forum was explicitly mandated by Title VII, it has declined to extend the reach of that (or similar) attorney's fee provisions to outside forums where resort to those forums was <u>not</u> so mandated. For example, <u>Webb v. Dyer Co. Bd. of Education</u>, 471 U.S. 234, 85 L.Ed. 2d 233, 105 S.Ct. 1923 (1985), involved a discharged elementary school teacher who engaged in an administrative proceeding before the Board of Education, which resulted in the Board deciding to adhere to its discharge decision. He then filed an action in federal court under 42 U.S.C. §§ 1981, 1982, 1983 and 1985, charging that his discharge had been

racially discriminatory. This action was settled by reinstatement and an award of damages. It was agreed to reserve the matter of attorney's fees for resolution by the parties or the court. The parties ultimately stipulated that the employe was a "prevailing party" entitled to an award of attorney's fees but were in disagreement as to whether he was entitled to fees with respect to the Board proceedings. The Supreme Court addressed alternate theories of entitlement to a fee award for the Board proceedings.

The Court held that the employe was not entitled to fees on the theory that the administrative proceedings were "proceedings to enforce a provision" of § 1983 within the meaning of § 1988, which provides:

> In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985 and 1986 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

While the Court noted this language was similar to the relevant language in Title VII, it distinguished New York Gaslight Club because in that case Title VII had required the employe to engage in the state administrative process, while there was no similar requirement under § 1983:

> Because § 1983 stands 'as an independent avenue of relief' and petitioner 'could go straight to court to assert it' . . . the School Board proceedings in this case simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII.
>
> Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an 'action or proceeding to enforce [§ 1983].' Administrative proceedings established to enforce tenure rights created by state law simply are not part of the proceedings to enforce § 1983, and even though the petitioner obtained relief from his dismissal in the later civil rights action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process on this theory. (footnotes omitted)

The employe also argued that attorney's fees could be awarded on the theory that:

> [A]ll of the hours spent by his attorney in the School Board proceedings were 'reasonably expended' to enforce the rights protected by § 1983. More specifically, since witnesses were examined and opposing arguments considered and refuted in those proceedings, the work was analogous to discovery, investigation, and research that are part of any litigated proceeding, and therefore should be compensable as though the work was performed after the lawsuit was actually filed. 'In sum,' petitioner concludes, 'Hensley requires that fees for work done from the onset of any attorney-client relationship be awarded if that work was reasonably related to the enforcement of federal civil rights unless the hours spent would not, in the exercise of normal billing judgment, be properly billed to one's client.' Brief for Petitioner 19 (quoting Hensley v. Eckerhart, 461 US, at 434, 76 L Ed 2d 40, 103 S Ct 1933). 471 U.S. at 242, 85 L.Ed. 2d at 241-242.

The Court rejected this argument:

> The Court's opinion in Hensley does not sweep so broadly. The time that is compensable under § 1988 is that 'reasonably expended on the litigation.' Id. at 433, 76 L.Ed. 2d 40, 103 S.Ct. 1933 (emphasis added) . . . .
>
> The petitioner [employe] made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type necessary to advance the civil rights litigation to the state it reached before settlement. (emphasis added) 471 U.S. at 242-243, 85 L.Ed. 2d at 242.

In the instant case, complainant was not required by anything in the FEA to have pursued the appeal of her nonrenewal pursuant to § UWS 3.08, Wis. Adm. Code, before the CFRR. These circumstances are not analogous to New York Gaslight Club where the Title VII system of referral and deferral to state agencies required the employe to pursue state administrative proceedings.

With respect to the second argument made in Webb, a prerequisite to an award of attorney's fees in connection with proceedings before another agency (here, the CFRR) would be a determination that the attorney work product from the other proceedings "was both useful and of a type necessary to advance the civil rights litigation." id. It is undisputed from the parties' submissions that the only issue left unresolved by complainant's § UWS 3.08 appeal is the matter of attorney's fees. Therefore, this proceeding before the

Commission is essentially akin to an action for attorney's fees. The Commission cannot discern, given these circumstances, how the attorney work product from the § UWS 3.08 appeal can or could possibly be characterized as "both useful and of a type necessary to advance the civil rights litigation."

A further reason why the Commission is unable to award attorney's fees in connection with complainant's § UW 3.08 appeal is that complainant was not successful in establishing that she had been discriminated against as she had alleged. See e.g., Grubbs v. Butz, 548 F. 2d 973 13 FEP Cases 245 (D.C. Cir. 1976), Hanrahan v. Hampton, 446 U.S. 754, 64 L.Ed. 2d 670, 100 S.Ct. 1987 (1980). This result is in keeping with one of the concepts underlying fee award provisions, see Independent Federation of Flight Attendants v. Zipes, 491 U.S. ___, 105 L.Ed. 2d 639, 648-649, 109 S.Ct. 2732 (1989):

> It is of course true that the central purpose of § 706(k) is to vindicate the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law -- assuring that the incentive to such suits will not be reduced by the prospect of attorney's fees that consume the recovery . . . In every lawsuit in which there is a prevailing Title VII plaintiff there will also be a losing defendant who has committed a legal wrong.

There are certain categories of cases where attorney's fees can be awarded in the absence of a decision on the merits of the discrimination claim against the employer. One example is a case resolved by a voluntary consent decree or settlement agreement, such as in Maher v. Gagne, 448 U.S. 122, 129, 65 L.Ed. 2d 653, 661, 100 S.Ct. 2570 (1980) (42 U.S.C. § 1983 lawsuit concluded by a settlement and a consent decree). Another category of cases involves the circumstance where a charge of discrimination is one of several claims, one of the non-discrimination claims is the basis for the resolution of the dispute favorably to the employe, but the court can not determine that the charge of discrimination contributed materially to the ultimate outcome. See Smith v.

Robinson, 468 U.S. 992, 82 L.Ed. 2d 746, 104 S.Ct. 3457 (1984). However, in the instant case it is not simply a situation where for one reason or another no decision was rendered on the employe's discrimination claim. Rather, the CFRR found that there was no evidence that the alleged discrimination had occurred. These circumstances obviate any possible argument that complainant's discrimination claim contributed in a material way to the chancellor's resolution of the controversy.

Complainant responded in her brief to respondent's argument that she had not prevailed on her discrimination claim as follows:

> Ms. Snowden states in her letter of December 18, 1989 that the CFRR did not find any discrimination or harassment on the basis of sex. What the report actually states is that "...we uncovered no probative evidence of gender discrimination....". This is not to say that gender discrimination did not exist, but rather that that this investigative body did not uncover it. They are in no way trained to make this determination. The determination of whether sexual discrimination took place laid solely with the Federally mandated Office of Affirmative Action and Compliance. Even if determinations regarding sexual discrimination did lie with CFRR, their ability to detect sexual discrimination or harassment would have been totally precluded by the events surrounding the investigation by the Office of Affirmative Action and Compliance, which included objections by members of the Department of Anatomy.

This contention ignores the fact that the Wisconsin Administrative Code specifically authorizes the CFRR to make determinations regarding gender discrimination:

> [T]he scope of such review shall be limited to the question of whether the decision was based in any significant degree upon one or more of the following factors, with material prejudice to the individual:
>
> * * *
>
> (b) Factors proscribed by applicable state or federal law regarding fair employment practices.... § UWS 3.08(1).

Furthermore, § UWS 3.08(1) specifically states that the "burden of proof shall be on the faculty member...." Since complainant had the burden of proof, she

had to produce sufficient evidence to support her allegations that her "'rights under fair employment law have been violated,'" CFRR Report, p. 11, and the CFRR statement that "we have uncovered no probative evidence of gender discrimination," id., p. 12, is equivalent to a finding that no gender discrimination occurred.

Finally, complainant's argument concerning the events surrounding the Office of Affirmative Action and Compliance investigation is outside the scope of this inquiry. In determining whether it can award attorney's fees for the CFRR proceeding, the Commission can only consider whether complainant in fact was successful on the gender discrimination issue before the CFRR and not whether certain circumstances allegedly prevented the committee from making such a finding.

In her brief, complainant makes a number of assertions as to why and how respondent's handling of the § UWS 3.08 appeal compelled her to retain counsel. These points are not material to the question of whether as a matter of law the Commission can award attorney's fees for the proceedings before the CFRR. As discussed above, the only possible bases for such an award would be either that those proceedings were required by the FEA or that the attorney's work product involved was both useful and of a type necessary to advance the Commission proceeding. If neither element is present, there is no potential basis for the Commission to award fees, regardless of whether complainant was forced to retain counsel by respondent's alleged misconduct.

In conclusion, since there does not appear to be any possible basis for an award of attorney's fees incurred in connection with complainant's § UWS 3.08 appeal, and this is the only matter in controversy between the parties, this case must be dismissed as moot.

ORDER

This proceeding is dismissed as moot.

Dated: March 9, 1990

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT:rcr

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STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * *

MANTHEI et al,
(Sandy Manthei, 86-0116-PC
Denise Kowalski, 86-0117-PC
Rebecca Finnessy, 86-0119-PC
Julius Rabideaux, 86-0120-PC
Dawn Carlson, 86-0121-PC
Kathy Lambert, 86-0122-PC
Bruce Marks, 86-0123-PC
Anita Janowski, 86-0125-PC
Arlene Conrady, 86-0126-PC

Appellants,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case Nos. (See above).

* * * * * * * * * * * * * * * *

FINAL ORDER

This matter is before the Commission for consideration of a proposed decision and order, and appellants' motion for fees and costs. The Commission has considered the parties' objections and arguments and consulted with the examiner. The Commission will adopt the proposed decision and order, a copy of which is attached hereto, as its final resolution of this matter, and adds the following:

1) The proposed decision at finding #5 sets forth certain facts concerning a 1985 settlement of discrimination complaints that had been filed by appellants Conrady and Janowski. It should be noted that in an interim decision entered October 29, 1986, the Commission held that it lacked the authority to enforce those settlement agreements with respect to Conrady's and Janowski's reallocations. The Commission also addressed the issue of whether it had the authority "... to consider the settlement

agreement... in determining the correctness of the... reallocations?" The Commission stated as follows:

> Obviously, based on the foregoing discussion, the Commission lacks authority to consider the settlement agreement in determining the correctness of the reallocations if this were to involve enforcing the agreement. However, it is difficult to postulate in advance of the hearing for exactly what purpose the settlement agreement might be offered, and in what context. Therefore, beyond reiterating that the Commission cannot 'consider' the agreement for purposes of enforcement, the Commission will not further address [this] issue... in advance of the hearing.

At this point, it should be noted that the settlement agreement played no role in the Commission's decision of this matter.

2) In their objections to the proposed decision, complainants seek an explicit back pay award. They cite §230.43(4), Stats., which provides, inter alia:

> if an employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the Commission..., the employe shall be entitled to compensation therefore from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification....

Complainants contend their positions were reallocated in violation of Subchapter II, Chapter 230, and they are entitled to back pay under §230.43(4), Stats. However, this subsection by its terms applies only to employes who have been unlawfully "removed, demoted or reclassified." (emphasis supplied) The appellants' positions were reallocated. A reallocation is separate and distinct from a reclassification, §§ER-Pers 3.01(2),(3), Wis. Adm. Code. Section 230.09, Stats., which deals with the civil service classification system and the secretary's duties and responsibilities with respect thereto, refers repeatedly to "reclassify or

reallocate." Also, pursuant to §ER-Pers 17.02(3), Wis. Adm. Code, a reallocation to a lower classification is not a demotion.

Seep v. Personnel Commission, 140 Wis. 2d 32, 41-42 (1987), contains the following discussion of whether back pay is available with respect to a transaction not enumerated in §230.43(4):

> The Commission examined the language of the statute [§230.43(4)] and also relied upon the maxim expressio unius est exclusio alterius in holding that back pay was not a viable remedy for Seep. Since the legislature expressly allowed the Commission to use the remedy of back pay in civil service cases only when dealing with removal, demotion or reclassification, it implicitly chose not to make the remedy available in reinstatement cases.
>
> We conclude that the Commission's interpretation of sec. 230.43(4), Stats., is reasonable and consistent with the plain meaning of the statute. We therefore reverse that portion of the circuit court's decision granting Seep back pay.

In addition to this Court of Appeals decision, see DER v. Wisconsin Personnel Commission (Doll), Dane Co. Cir. Ct. No. 79 CV 3860 (9/2/80); Nunnelee v. State Personnel Board, Dane Co. Cir. Ct. No. 158-464 (9/14/78); DER v. Wis. Pers. Commn. (Cady), Dane Co. Cir. Ct. No. 79 CV 5099 (7/24/81). Therefore, the Commission must conclude that it lacks the authority to enter the explicit back pay order sought by appellants.

3) Appellants have filed a Motion for Costs pursuant to §227.485, Stats., along with supporting affidavits. Pursuant to this section, the Commission must award appellants their costs unless it finds that respondent was "substantially justified in taking its position." Section 227.485(2)(f), Stats., defines "substantially justified" as "having a reasonable basis in law and fact." In Escalada-Coronel v. DMRS, Wis. Pers. Commn. No. 86-0189-PC (4/12/87), the Commission cited with approval the following language from Berman v. Schweiker, 531 F. Supp. 1149, 1153-1154 (N.D. Ill. 1982):

> The standard created by this statute is a new one, not in line with either the common law exceptions to the American rule restricting the award of attorneys' fees, or other statutory standards allowing fee awards in certain cases against the United Stats. It was intended to serve as a 'middle ground' between an automatic award of fees to a successful party and permitting fees only where the government's position was arbitrary and frivolous....
>
> * * *
>
> ...The standard, falls in between the common law 'bad faith' exception and an automatic award of attorney's fees to prevailing parties. (emphasis added)

The instant case involved the reallocation of appellants' positions as a result of a survey of position in the DILHR Job Service/Unemployment Compensation area. The hearing on these appeals of these reallocations resulting from the survey were de novo proceedings, with evidence not limited to a review of what respondent considered at the time the decisions were made during the survey process. Jallings v. Smith, Wis. Pers. Bd. 75-44 (8/23/76).

The record reflects that respondent conducted the survey in its usual manner. Questionnaires were sent to employes and reviewed by those doing the survey. The various types of positions were audited, and appellants' positions were among those audited. After new class specifications were developed, appellants' positions were analyzed and compared to other positions, and a determination was made as to their correct classification.

Now, while the Commission had found on the basis of a de novo hearing that the appellants' positions are more correctly classified as UBS 3's rather than UBS 2's, this is, of course, not equivalent to a conclusion that either respondent's initial decision to reallocate the positions to the UBS 3 level, or subsequent decision to contest these appeals, did not have a reasonable basis in fact or in law. Some of the significant points

in this matter revolved around relative levels of complexity and responsibility, based to some extent on comparing positions. These kinds of determinations call for weighing evidence, opinion, and argument. While the Commission found in favor of appellants on these points, this was not a case where respondent's position lacked any real foundation. This is not a case where, for example, as in Anderson v. DER, 86-0098-PC (11/18/87), the respondent failed to produce evidence at the hearing to support certain distinctions made at the time it denied the reclassification requests, and where the respondent's use of comparable positions was found to be "superficial."

Since the Commission concludes it is inappropriate to award fees under §227.485, Stats., it will not address the issues that have been raised concerning specific items of fees and costs.

ORDER

The Commission adopts the proposed decision and order, a copy of which is attached hereto and incorporated by reference, as its final disposition of this matter, subject to the foregoing discussion, and denies appellants' motion for costs.

Dated: January 13, 1988 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jmf
JANE/2

Parties:

Sandy Manthei, Denise Kowalski,
Rebecca Finnessy, Julius Rabideaux,
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STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * *

MANTHEI et al.,
(Sandy Manthei, 86-0116-PC
Denise Kowalski, 86-0117-PC
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Kathy Lambert, 86-0122-PC
Bruce Marks, 86-0123-PC
Anita Janowski, 86-0125-PC
Arlene Conrady,) 86-0126-PC

Appellants,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case Nos. See above

* * * * * * * * * * * * * * * *

PROPOSED DECISION AND ORDER

This matter, captioned above, is before this Commission on an appeal by the appellants of respondent's decision to reallocate the positions held by the appellants to the Unemployment Benefit Supervisor 2 (UBS 2) (PR1-10) classification. A hearing was held on appellants' claims, testimony was given, exhibits were received in evidence and the parties submitted post-hearing briefs. The following proposed findings of fact, conclusions of law, opinion and order are based on the record of the hearing.

FINDINGS OF FACT

1. The appellants are employes of the Unemployment Compensation Division, Department of Industry, Labor and Human Relations.

2. The respondent administers the state agency responsible for personnel policies, employment policies and programs for the state as an employer.

3. On March 30, 1986, appellants, Anita Janowski and Arlene Conrady, both classified at the Job Service Supervisor 3 (PR01-12) level were reallocated by respondent to Unemployment Benefit Supervisor 2 (PR01-11). Also, on this same day, the positions held by appellants, Rebecca Finnessy, Dawn Carlson, Sandra Manthei, Julius Rabideaux, Denise Kowalski, and Kathleen Lambert were reallocated from Job Service Supervisor 2 (PR01-11) to Unemployment Benefit Supervisor 2 (PR01-11). Within thirty days of the reallocation notification, the appellants filed an appeal of the reallocation with this Commission.

4. Reallocation of appellants' positions stemmed from a personnel management survey conducted by respondent. This survey covered positions in the Job Service and Unemployment divisions of the Department of Industry, Labor and Human Relations (DILHR) and included the development of new classification specifications series. The classification specification for the Unemployment Benefit Supervisor Series, which encompasses appellants' positions, was among those specifications newly developed during the survey.

5. Previously, in 1985, as a result of discrimination complaints filed by appellants Conrady and Janowski, DILHR and the respondent executed a settlement agreement which, among other things, provided for the reallocation of their positions from Job Service Supervisor 2 (PR01-11) to Job Service Supervisor 3 (PR01-12) or equivalent classification assigned to pay range 1-12, and to regrade Conrady and Janowski upon implementing the survey or on July 21, 1985, whichever was sooner.

6. On February 4, 1986, after respondent posted proposed reallocations, which recommended a lower reallocation of Conrady and Janowski's positions, the Secretary of DILHR wrote the secretary of DER -- respondent

-- and recommended reallocation of those positions to the Unemployment Benefits Supervisor series at pay range 12.

7. Neither the recommendations of the secretary of DILHR regarding certain positions being surveyed nor the terms of the settlement agreement between Conrady and Janowski and respondent were considered by respondent's survey staff in their deliberations on appropriate allocation for appellants' positions.

8. The state position standard for Unemployment Benefit Supervisor (UBS) positions, which was developed during the survey, under the heading, Class Concepts, provides:

> UNEMPLOYMENT BENEFIT SUPERVISOR 2 (PR 01-11)
>
> This is professional supervisory unemployment benefit work in the State Unemployment Compensation Program.
>
> Positions allocated to this class are responsible for supervising staff engaged in the establishment of a benefit claim, benefit record processing and maintenance activities conducted in a local office. Positions at this level are involved in the interpretation and application of established guidelines and procedures which have a direct affect on claimants and employers. Work is performed under general supervision.
>
> Positions are allocated to this class are responsible for supervising staff in a hearings office involved in processing and scheduling appeals of claimant eligibility and/or employer liability decisions filed by claimants and/or employers. Work is performed under general supervision.
>
> UNEMPLOYMENT BENEFIT SUPERVISOR 3 (PR 01-12)
>
> This is professional supervisory unemployment benefit work in the State Unemployment Compensations Program. Positions allocated to this class are responsible for supervising staff engaged in benefit records adjustment and maintenance through the use of the automated system, based on information received subsequent to an initial claim monetary determination; or supervisory positions responsible for coordinating hearings for special programs, such as plumbing license revocation for the Safety and Buildings Division of DILHR, which involves researching and interpreting applicable statutes nd federal codes to identify appeal rights, and supervising staff involved in processing and scheduling appeals of claimant eligibility and/or employer liability

> decisions filed by claimants and/or employers. Work at this level involves a broader interpretation and application of established guidelines and procedures due to the age and type of claimant records. Work is performed under general supervision.

9. The UBS position standard provides that it is to be used as a framework for classification decisions and, in instances where a position is not specifically defined by one of the class descriptions that position is to be allocated based on general classification factors such as listed in Section E. Section E is as follows:

> Individual position allocations are based upon the general classification factors described below:
>
> 1. The freedom or authority to make decisions and choices and the extent to which one is responsible to higher authority for actions taken or decisions made;
>
> 2. Information or facts such as work practices, rules, regulations, policies, theories and concepts, principles and processes which an employe must know and understand to be able to do the work;
>
> 3. The difficulty in deciding what needs to be done and the difficulty in performing the work;
>
> 4. The relative breadth, variety and/or range of goals or work products and the impact of the work both internal and external to the work unit;
>
> 5. The level and type of staff supervised;
>
> 6. Organizational status as it relates to level of responsibility;
>
> 7. The nature and level of internal and external coordination and communication required to accomplish objectives.

10. Sandra Manthei, Denise Kowalski, Anita Janowski and Arlene Conrady work in offices located in metropolitan Milwaukee and their job duties and responsibilities are substantially the same. Respondent stipulated that Manthei's position is representative of all positions held by appellants in metropolitan Milwaukee.

11. Manthei's duties and responsibilities are comparable to those described in the position description of Bruce G. Wambold. Wambold is an Unemployment Benefit Supervisor 3, who works in respondent's central office. He supervises the Monetary and Payment Adjustment Control unit, which is composed of a monetary section and a Payment Adjustment Control section.

12. Manthei is the Claims Service supervisor. This unit also is composed of two subunits: Initial Claims and Claims Assistance. Also in the absence of the local office manager, Manthei manages the office and supervises the Claims Service and Adjudication units. The office management responsibility takes approximately ten percent of her time.

13. Prior to the survey, the duties and classification levels of subordinates of Wambold and Manthei were comparable. Afterwards, Wambold's staff was given a higher allocation primarily because they worked in the central office on benefit adjustments.

14. Wambold's unit can be distinguished from Manthei's on the basis that it is in a central office rather than a local office and its claimants may dwell anywhere in the state in contrast to a specific district of the state. There is no evidence that these differences cause duties to be more complex in Wambold's unit than in Manthei's.

15. Respondent's personnel specialist testified that, based upon his discussions with Wambold and others, including personnel specialists, Wambold's unit was also distinguishable from appellants' because it dealt with subsequent changes to benefit records, whereas appellants' units were responsible for establishing benefit records. The record does not support such a finding. Manthei testified, uncontested, that she -- her unit-- handles both initial determinations of benefits and subsequent changes in

those benefits. Further, Wambold's position description, which was placed into the record, does not indicate that his unit deals only with subsequent benefit changes. Wambold was not called as a witness.

16. Respondent stipulated that Rebecca Finnessy's position was representative of positions held by appellants, Dawn Carlson, Julius Rabideaux, Kathy Lambert and Bruce Minx. These appellants work in local offices in various cities around the state other than metropolitan Milwaukee.

17. Rebecca Finnessy's responsibilities and duties are basically the same as Sandra Manthei's. She supervises the Initial Claims and Claims Adjustment units. In some instances initial claim decisions and subsequent adjustments are made en mass. In addition, from her district office in Eau Claire, she evaluates the work done at two branch offices and three itinerant locations. Her evaluation reports go directly to the regional director.

18. Finnessy, as are many of the appellants, responsible for providing the general public, legislative representatives and the media with information about unemployment compensation procedures and policy. This may include radio and T.V. appearances.

19. Based on the record, appellants' positions are comparable to the Wambold position which was determined by respondent to be at the UBS-3 level and representative of that classification.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction under §230.44(1)(b), Wis. Stats.

2. The respondent erred in the reallocation appellants' positions to Unemployment Benefit Supervisor 2 instead of Unemployment Benefit Supervisor 3.

3. The appellants are entitled to reallocation of their positions to Unemployment Benefit Supervisor 3.

OPINION

Appellants claim respondent was in error when it failed to reallocate their positions to the Unemployment Benefit Supervisor 3 classification. They argue that their positions clearly fit into the Position Standard for the UBS 3 classification. Alternatively, appellants argue that if the position standard for UBS 3 positions does not describe their entire job, other positions have been classified to the UBS 3 level when only 5% of their duties were described in the standard.

In support of their position, appellants presented three witnesses, who were stipulated by the parties to be representative of appellants' positions in Metropolitan Milwaukee and positions in other smaller offices around the state. Appellant Manthei testified about her duties in comparison with each item in the position description of Bruce B. Wambold. Wambold's position had been placed at the UBS 3 level by respondent at the recommendation of the same personnel specialist who had audited appellants' positions. Manthei's testimony was corroborated in substance, by appellants' other two witnesses, Rebecca Finnessy and Anita Janowski.

Respondent's only witness was the personnel specialist who audited appellants' positions. In substance, he testified that appellants were given their current reallocation because they establish benefit records rather than change records after they've been established, they are located in a district office rather then the central office and their clients are limited to a given district rather than the entire state.

The evidence demonstrates that appellants handle both the initial establishment and subsequent changes of benefit records. Further, it

demonstrates that appellants supervise employes comparable to those supervised in the representative UBS 3 position. Also, appellants have functions not found in the comparable UBS 3 position, such as office manager, branch office supervisor and itinerant location supervisor, which demonstrates the placement of a high level of responsibility on those positions. The evidence does not demonstrate that central office's work on benefits records is more complex than district office's work on benefit records.

The evidence offered by respondent regarding both Wambold's and appellants' positions, for the most part, was based upon information from employes, supervisors and personnel specialists who did not testify. This factor undercut many of the statements made by respondent's sole witness. For instance, Wambold's position description, which was placed into evidence, did not reflect the distinctions articulated by respondent's witness.

Based on the record, appellants' positions fit within the UBS 3 position standard and are comparable to a representative UBS 3 position. They should be treated accordingly.

DECISION

Respondent's action is rejected. This matter is remanded for action in accordance with this decision.

Dated:_____,1987 STATE PERSONNEL COMMISSION

_____
DENNIS P. McGILLIGAN, Chairperson

DRM:jmf
JMF06/3

_____
DONALD R. MURPHY, Commissioner

Parties:

Sandy Manthei, Denise Kowalski,
Rebecca Finnessy, Julius Rabideaux,
Dawn Carlson, Kathy Lambert,
Bruce Marks, Anita Janowski,
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STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * * *

DANIEL L. MURRAY,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 91-0105-PC

* * * * * * * * * * * * * * * * * *

RULING
ON
REQUEST FOR
ATTORNEY'S FEES
AND COSTS

This matter is before the Commission on appellant's request for attorney's fees and costs pursuant to §227.485, stats. By way of background, this matter involves an appeal pursuant to §230.44(1)(b), stats., of a reallocation. In a decision and order dated June 4, 1993, the Commission affirmed respondent's reallocation decision and dismissed the appeal. Appellant then petitioned for judicial review pursuant to §227.52, stats. In an oral decision rendered on April 29, 1994, the Dane County Circuit Court reversed the Commission decision. The Commission then filed an appeal in the Court of Appeals. The appellate proceeding was resolved prior to decision by a settlement agreement involving DER which included the reallocation of appellant's position to the desired level, and the restoration of the status quo prior to the appeal - i.e., the Circuit Court's decision would control.

In the underlying proceeding before the Commission, the stipulated issue involved the question of whether respondent's decision to reallocate appellant's position to Civil Engineer Supervisor 4 (CE Sup. 4) rather than Architect/Engineer Manager 1 (A/E Mgr. 1) was correct. The A/E Mgr. series class specification statement of "Inclusions" provides, inter alia: "[t]his series encompasses professional experts in the field of architecture or engineering that are predominantly executive and managerial." (emphasis supplied). The A/E Mgr. series class specification specifically excludes: "[p]ositions that do not perform predominantly executive and managerial functions in the field of architecture or engineering as defined in §111.81 Wis. Stats." The definition of the specific A/E Mgr. 1 classification is:

ARCHITECT/ENGINEER MANAGER 1

> This is professional managerial work in the field of architecture/engineering. Positions can function as a bureau director of a small, specialized and highly complex statewide architecture/engineering program OR as a chief architect/engineer for a small, complex agency architecture/engineering services program OR as a full-time deputy to an architect/engineer manager 2 OR as an assistant director to an architect/engineer manager 3 OR as a section chief/district chief in a major complex agency architecture/engineering services program OR any other comparable architect/engineer manager position.

The Commission observed that "[t]he most difficult issue raised by this appeal is whether the appellant qualifies as a manager so as to fall within the A/E Mgr. series." decision, 14. After considerable discussion of the record evidence bearing on this issue, the Commission reached the conclusion that appellant had not sustained his burden of proof on this issue, and affirmed respondent's decision.

Section 227.485(3), stats., provides for an award of costs to a prevailing party, such as the appellant, unless it is determined that "the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Section 227.485(2)(f) defines "substantially justified" as "having a reasonable basis in law and fact."

In appellant's underlying appeal, the Commission issued a twenty page decision (plus attachments) analyzing the evidence concerning respondent's reallocation decision. While remarking that [t]his is a close case, with arguments supporting either result," decision, 19, it ruled in respondent's favor. This resolution of this case is at least consistent with a finding that respondent's overall position was substantially justified. At this point, following the Court's reversal of the Commission's decision, it seems that the main question with respect to this request for costs and fees is whether, in light of the Court's decision, a conclusion that respondent's position was not substantially justified is indicated. This is the basis of appellant's position on the costs issue:

> The Personnel Commission originally upheld the respondent's classification decision, in the process finding the respondent's position, by inference, to be reasonable, and indeed correct. However, the Dane County Circuit Court, having the power to review the Commission's decision, found the Commission's decision to be legally unsustainable. The Circuit Court's decision was made notwithstanding a very demanding standard of review which had to be met by the appellant in order to convince the Circuit Court ... while the Personnel Commission may, and in fact did, find the respondent's position to be not only reasonable but

> correct, the Circuit Court has determined otherwise, and ruled that the Personnel Commission's decision was not sustainable. Thus, by extension and inference, the Circuit Court ruled that the respondent's position was without reasonable basis (i.e., unreasonable). Therefore, it could quite properly be argued that the Circuit Court, as a matter of law, has already determined the respondent's position to be unreasonable, and there can be no dispute at this point that the Circuit Court's decision is final and res judicata on that subject.

In its oral decision, the Court identified the commission's Finding 17 ("The appellant is not 'predominantly executive and managerial' as that phrase is used in the Architect/Engineer Manager series classification specification.") as "the focus of this dispute," and characterized it as "mixed question of law and fact in that it is a finding which requires the application of a legal standard to historical facts as they are found by the agency." Transcript of bench decisions, p. 3. The Court then pointed out that such questions are subject to limited review and "this Court must grant great deference to its [the Commission's] determination and only in the event that its determination is one which is unreasonable and especially were it to be found to be a conclusion based upon erroneous conclusions of law should this court intervene." T., pp. 3-4. The Court then proceeded, for a number of reasons, to reach the conclusion that the Commission's finding that appellant did not satisfy the "predominantly executive and managerial" criterion was unreasonable. The Court's decision must be taken into consideration in deciding this fee petition, but the Commission disagrees with appellant that it effectively determines its outcome.

First, the Court's conclusion is not, as appellant contends, res judicata on the §227.485 issue. Respondent was not a party to the Court proceeding, and the Court did not address the question of whether its (respondent's) position on the underlying controversy was substantially justified. Rather, the Court considered the question of whether the Commission's determination regarding appellant's managerial status was unreasonable in the context of a chapter 227 judicial review.

Second, in applying §227.485, it is a familiar principle that "[l]osing a case does not raise the presumption that the agency was not substantially justified." Sheely v. DHSS, 150 Wis. 2d 320, 338, 442 N.W. 2d 1 (1989). Appellant's approach conflicts with this principle because it would create a special, but relatively large category of cases -- an adjudicative agency's decision of a mixed question of fact and law -- as to which judicial reversal would lead ipso

facto to the conclusion that the original decision which had been litigated before the adjudicative agency was not substantially justified.

Third, federal precedent conflicts with a more or less automatic award of fees based on the Circuit Court decision. See, e.g., Howard v. Heckler, 581 F. Supp. 1231, 1233 (S.D. Ohio 1984):

> It is clear that the government's attempt to sustain the administrative decision may therefore be reasonable, even if the court determines that the decision was not supported by substantial evidence ... the substantial evidence inquiry and the substantial justification inquiry are two distinct inquiries. (citation omitted);

Houston Agricultural Credit Corp. v. United States, 736 F. 2d 233, 236 (5th Cir. 1984):

> Houston's argument that the finding by the jury that the Commissioner abused his discretion automatically requires an award of attorney's fees must fail. Were we to adopt Houston's reasoning, the government would be liable for attorney's fees whenever it loses a tax case, a result the Act clearly does not intend. (citation omitted);

Sierra Club v. Secretary of the Army, 820 F. 2d 513, 517 (1st Cir. 1987):

> [T]he test of reasonableness in the precincts patrolled by the EAJA is different from that applied for purposes of determining whether agency action or inaction is "reasonable" or "unreasonable," i.e., arbitrary and capricious, under, say, the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq ... Congress was painstaking in creating a distinct legal standard "substantially justified" -- for EAJA use, rather than merely echoing the familiar "arbitrary and capricious" refrain. We have equated that standard with a test of reasonableness -- but it remains, nonetheless, a test tailored to the dictates of the EAJA. (citations and footnote omitted)

Accordingly, the Commission must scrutinize the record before it is to determine whether respondent has satisfied its burden [1] of establishing that its position with respect to the underlying controversy was substantially justified. In so doing, the Court's conclusion that the Commission's decision was unreasonable under the standards for judicial review pursuant to the Administrative Procedure Act must be taken into consideration, but it is not conclusive.

Before addressing the particular point relied on by the Court in reaching its decision, the Commission wishes to emphasize that it is not attempting to relitigate the Court's decision. It was rendered final due to the

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[1] Sheeley v. DHSS, 150 Wis. 2d 320, 442 N.W. 2d 1 (1989).

settlement agreement that occurred while the matter was pending before the Court of Appeals, and it (the Court's decision) is dispositive with respect to the matters that were before the Court. However, some analysis of the Court's decision is inevitable in order to evaluate the extent to which the problems with the Commission's decision perceived by the Court can be attributed to respondent's underlying position.

Turning to the particular points with which the Court found fault with the Commission's decision, the Court relied heavily on what it concluded was a legal error in the decision:

> Thus here Mr. Murray is properly classified as an AE Manager-1 unless one of the exclusions shows that this is not the best fit for his actual job.
>
> Here, the Commission relied upon the first exclusion and found Mr. Murray's job does not preform predominantly executive and managerial functions as defined in Section 111.81 of the statutes. In doing so, the Commission made a clear error of law in reaching the conclusion it did at page 19 of its decision and I quote from that decision. "The statutory definition of management indicates that it is the bureau level rather than the section level which has been selected as serving as the basis for defining where management responsibilities begin."
>
> It must be remembered that Section 111.81 does not by legislative directive govern the determination made here. Section 111.81 was referenced in an administrative rule as a tool, as a help to the administrative agency, but it is a statute governing or relating to a different body of law all together. It incorporated this -- the Legislature did not itself say that this was the governing principle that would apply to determining classification allocations in civil service. The DER classification specifications themselves in reference to this specific issue defined the level at which the management responsibilities begin, and they specifically recite that a section chief is where management begins. To read the reference to the statute in the exclusion section as the Commission has would write out the definition section as providing the standard and this is improper; especially is this so where the statute uses the broadly inclusive language "including such officials as", and then goes on to describe several examples rather than restrictive limiting language. T., pp. 6-7.

At a later point in its discussion of the Commission's decision, the Court refers to the Commission having "been infected, if you will, by its view that management responsibilities begin at the bureau level." T., p. 12.

While in the Commission's opinion, it did not intend either to reach or rely on the conclusion the Court discusses, above, [2] the actual question on this

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[2] The Commission's decision analyzes a number of factors in determining whether appellant's position falls within the scope of the concept of "management." It did not intend to rely on §111.81(13) to exclude his position from this category merely because it is not at the bureau director level. Under

request for costs is not whether the Commission reached an erroneous conclusion of law, but first, whether respondent relied on this contention as part of its case, and second, if so, whether such reliance was substantially justified under the circumstances.

In its posthearing brief, respondent never argued that "management responsibilities begin at the bureau level," as the Court characterized the Commission's decision. Rather, respondent's brief recognized that the §111.81(13), stats., definition of management does not arbitrarily cut off management at the bureau level, but is to be read in the context of the entire class specification which is consistent with the concept of a section chief as "managerial":

> Sec. 111.81(13), Stats., defines "management" as including "personnel engaged predominantly in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads, and employes exercising similar functions and responsibilities as determined by the [Wisconsin Employment Relations] commission."
>
> There is no question from this definition that division administrators, bureau directors and institutional heads are considered to be "management". It is also clear that employees who perform functions and responsibilities <u>similar</u> to division administrators, bureau directors and institutional heads may be "management", if the WERC so determines. For classification purposes, then, the issue is <u>whether Mr. Murray's duties and responsibilities are similar</u> to the functions performed by division administrators, bureau directors or institution heads.
>
> The class specs for A/E Manager 1 also identify six allocation patterns at this level and include a listing of representative positions. The allocations include positions which function as (1) a bureau director of a small, specialized and highly complex statewide architecture/engineering program, (2) as a chief A/E for a small, complex agency A/E services program; (3) as a full-time deputy to an A/E Manager 2; (4) as an assistant director to an A/E Manager 3, (5) as a <u>sec-</u>

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the class specification and the statute incorporated by reference, a bureau director would be presumed to be managerial; a section chief could be if it "exercises similar functions and responsibilities." §111.81(13) Therefore, the Commission considered whether appellant's position "exercises similar functions and responsibilities" to a bureau director, as §111.81(13) provides. The statement at p. 19 of the Commission's decision that "[t]he statutory definition of 'management' indicates that it is the bureau level, rather than the section level, which has been selected as serving as the basis for defining where management responsibilities begin" is in the context of summing up the factors on both sides of the key issue. The Commission did not intend to apply this point to the exclusion of the rest of the class definition. Rather, the Commission considered as one factor whether the duties and responsibilities of appellant's position were comparable to the management functions exercised at the bureau director level.

> tion chief/district chief in a major complex agency A/E services program, or (6) any other comparable A/E Manager position. (emphasis added) Respondent's posthearing brief, pp. 13-14.

Based on the foregoing and other parts of the record, it is clear that respondent did not rely on the misperception of the law the Court attributed to the Commission.

The Court also observed that "the Commission found that two individuals occupied positions within the same division or bureau as Mr. Murray does and perform very, very similar functions to that performed by Mr. Murray and both of those people are section chiefs and both of them are classified at the CE Supervisor - 5 level." T., p. 9. The Court noted that because of the parties' stipulated issue (limiting consideration to either CE - Sup. 4 or A/E Mgr. 1), the Commission did not have the option of placing appellant's position at the same level, [3] but that "it [the Commission] provides no explanation for how it could conclude that the best fit for Mr. Murray was at a level below these two individuals when it was undisputed that he had greater management responsibilities than they did." T., p. 10.

Again, looking at respondent's position on this matter with respect to the classification of these two positions, the record reflects the following definitions for CE Sup. 4 and 5:

> Civil Engineer Supervisor 4
>
> This is professional supervisory work in the field of civil engineering performing advanced 2 level work or directly supervising a medium unit (6 to 10 FTE) of senior engineers OR a small unit (1 to 5 FTE) of advanced 1 engineers.
>
> Civil Engineer Supervisor 5
>
> This is professional supervisory work in the field of civil engineering directly supervising a large unit (11 or more FTE) of senior engineers OR a medium unit (6 to 10 FTE) of advanced 1 engineers OR subordinate level engineer supervisors.

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[3] The Court apparently perceived CE Sup. 4, CE Sup. 5, and A/E Mgr. 1 as a continuum for classification purposes, and expressed the view that, but for the parties' stipulation to limit the issue to the CE Sup. 4 and A/E Mgr. 1 classifications, the Commission could and should have concluded CE Sup. 5 was the most appropriate classification. However, as discussed below, the CE Sup. and A/E Mgr. 1 classification series are distinctly conceptually different series, and appellant's position did not satisfy the specific criterion for classification at the CE Sup. 5 level of supervising subordinate Senior or Advanced 1 engineers or engineer supervisors.

The distinguishing criterion for classification at the CE Sup. 5 level versus the 4 level is the number and level of subordinates supervised. It is clear that appellant's position satisfies the first CE Sup. 4 allocation by performing "supervisory work in the field of civil engineering performing advanced 2 level work," and that appellant does not supervise any engineers or engineer supervisors, as would be required for classification at the CE 5 level.

Given these facts and these distinctions between the two levels, it follows that respondent had a reasonable basis in fact and law for maintaining appellant at the CE Sup. 4 level in contradistinction to these two positions at the CE Sup. 5 level. To the extent the argument would be made that respondent should have relied on a comparison of the appellant's managerial functions with the managerial functions of these positions in its determination of whether appellant qualified as a "manager" so as to meet the A/E Mgr. statement of inclusions, respondent had a reasonable basis in law and in fact for its approach, because the CE Sup. classification series does not encompass positions that are "predominantly executive and managerial" as does the A/E Mgr. series, but rather "encompasses professionals in the field of civil engineering that are supervisors over a unit of engineers, or other comparable function in the field of engineering." (CE Sup. class specification statement of inclusions). Therefore, although appellant's managerial responsibilities may exceed those of these two CE Sup. 5 positions, this at best is one piece of evidence that supports appellant's claim to have been predominantly managerial; it does not have the same significance as a similar comparison to another A/E Mgr. 1 position.

The distinctions between the CE-Sup. and A/E Mgr. series also run to the Court's comment that: "[w]hile the Schlough position did not have that quality of supervisor [i.e., Schlough had no supervisor with technical expertise in the engineering field] these positions ignored by the Commission [the two CE Sup. 5 section chiefs] show that this is not the per se disqualifying factor that the Commission made it." T., p.10. Again, because these positions are in a different series (CE Sup.) than the classification appellant sought (A/E Mgr.), and their series does not incorporate the "predominantly executive and managerial" criterion found in the A/E Mgr. series, respondent had at least a reasonable basis in law and fact supporting the extent to which it declined to rely on these

CE Sup. 5 positions in deciding to deny the reclassification of appellant's position to AE Mgr. 1.

The Court also criticized the following discussion from the Commission's decision:

> A review of the appellant's position description reflects certain "executive and managerial" worker activities. For example, activities A1, A4, A9, C1, C4, C6, C8, and E1 and goal D fall within the scope of "executive and managerial" functions. But not all of the appellant's activities are in this category and other than the appellant's testimony that activity B1 represented approximately 10% of his overall time allocation, there is no evidence which permits a precise tabulation of the time spent on each activity. Commission Decision, pp. 16-17.

The Court stated that: "to the extent the Commission relied upon its finding that there was no precise tabulation of the time spent by Murray on each activity ... this stands in the face of the unrebutted testimony of Murray and his supervisors. This is an instance where no reasonable person could have made the finding the Commission did from the evidence before it." T., pp. 10-11.

Although the Court, concluded the Commission's "finding" was not supported by substantial evidence in the record, utilizing the test employed on a Chapter 227, stats., judicial review, [4] this does not automatically equate to a conclusion that the Commission's observation lacked a reasonable basis under the EAJA, [5] no less a conclusion that the respondent's posture was similarly problematical. To the extent that respondent's position with respect to the major issue in this proceeding (whether appellant qualified as a manager for purposes of inclusion in the A/E Mgr. series) subsumed or relied on the subject matter related to the Commission's observation about the record evidence, respondent's position had a reasonable basis in law and in fact.

The record clearly reflects that appellant's position description does not have a breakdown of the percentages of time attributable to each specific worker activity. The record also reflects that neither appellant nor his supervisor testified as to the specific percentages of time attributable to each specific worker activity. The Commission interprets the underscored part of the Court's statement that "this [finding] stands in the face of <u>unrebutted testimony of Murray and his supervisors</u>" (emphasis added), T., pp. 9-10, as a ref-

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[4] <u>See e.g.</u>, <u>Copland v. Dept. of Taxation</u>, 16 Wis. 2d 543, 554, 114 N.W. 2d 858 (1962).

[5] <u>See e.g.</u>, <u>Sierra Club v. Secretary of the Army</u>, 820 F.2d 513 (1st Cir. 1987).

erence to their conclusory testimony that appellant met the "predominantly managerial" criterion. In any event, assuming that the Court concluded that this relatively general testimony was inconsistent with, and rendered unreasonable the Commission's "finding" or observation that "there is no evidence which permits a precise tabulation of the time spent on each activity," Commission decision, p. 17, the Court's conclusion appears to be more of a criticism of the Commission's analysis of the record rather than running directly to any underlying position of respondent. Respondent certainly had a reasonable basis in law and in fact to have contended that appellant's position was not predominantly managerial, based on, among other things, the lack of specificity in appellant's position description, the fact that the position description for his supervisor (Mr. Eagon) indicates he has the management responsibility for the bureau, including appellant's section, and the testimony of one of respondent's personnel specialists that there is a difference between managing a program for a unit such as appellant's, where the policies have been in place for some time, and performing "executive and managerial" responsibilities as contemplated by the specifications. The other evidence supporting respondent's position includes Mr. Pankratz's testimony concerning the criteria he used to determine whether a position met the definition of predominantly managerial. The Court explicitly concluded that it was appropriate to have considered this testimony as evidence in determining whether appellant's position was predominantly managerial.

The Court also expressed the view that the Commission attached "undue significance ... to the Schlough position" while ignoring "people at the AE Manager 1 level who did have supervisors above them who had specialized expertise as is true in the case of Mr. Murray," as well as "a large number of section chiefs within the Department of Transportation who also have people above them with specialized expertise and yet these people within DOT are classified at a management level." T., p. 12. While the Court concluded that the Commission's evaluation of the evidence in this regard was unreasonable, this conclusion again is not necessarily applicable to respondent's position on the underlying controversy.

Respondent had a reasonable basis in fact and law for attempting to distinguish the positions to which the Court refers. Mr. Schlough's position could be differentiated on the basis of not having a supervisor with technical engineering expertise, as well as supervising engineers performing advanced 2

level work and employes from other disciplines. The record did contain references to other A/E Mgr. positions which resemble appellant in having supervisors with specialized engineering expertise. The fact that these positions had this characteristic does not affect the comparison per se between appellant's and Schlough's positions, because the fact remains that this quality of supervision would be a factor distinguishing the Schlough position from the appellant's position, although obviously it could not be a distinguishing factor between appellant's position and those A/E Mgr. 1 positions. Also, the record does not reflect that respondent ever relied on the argument that the nature of supervision over Schlough (no supervisor with technical engineering expertise) was an absolute requirement for an A/E Mgr. 1 classification.

As for the DOT positions, the record contained neither position descriptions for these positions nor class specifications for their series. Thus, to the extent that the respondent did not rely significantly on these jobs, this record supports the conclusion that it had a reasonable basis for failing to do so. For example, the DOT jobs could be significantly different from appellant's in certain respects which are recognized in the class specifications for that series and which have nothing to do with the type of supervision received, but which contribute to their classification.

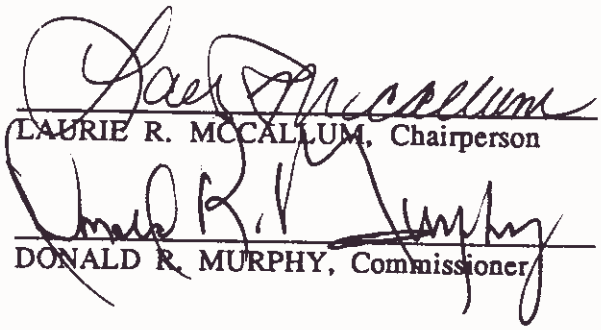
In conclusion, while the Court concluded that the Commission's decision of a mixed question of law and fact did not pass muster under the standards applicable to an Administrative Procedure Act judicial review, the record reflects that respondent's position with respect to the underlying controversy had a reasonable basis in fact and in law. In addition to all the evidentiary matter of record supporting respondent's position, it is significant that the Court appeared to rely substantially on what it concluded was an erroneous conclusion of law by the Commission. Yet the record reflects that this legal conclusion, as characterized by the Court, was never advanced by, and cannot be attributed to, the respondent.

ORDER

Appellant's request for attorney's fees and costs is denied, and this matter is finalized in all respects.

Dated: April 6, 1995

STATE PERSONNEL COMMISSION



LAURIE R. MCCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the

Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95

STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL PEARSON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN-SYSTEM,
Respondent.

Case No. 84-0219-PC

RULING ON APPELLANT'S PETITION FOR ENFORCEMENT OF COMMISSION'S ORDERS

This matter is before the commission on appellant's petition for enforcement of certain orders of the commission. Both parties have filed briefs and supporting documents.

In an "INTERIM RULING ON PETITIONS FOR DECLARATORY RULING" dated August 5, 1996, the commission summarized the background of this case at that time as follows:

> This case commenced as an appeal pursuant to §230.44(1)(d), Stats., of respondent's failure to have appointed appellant to a vacant Maintenance Supervisor 1-Locksmith position. In its final decision and order entered on September 16, 1985, the commission concluded that respondent's decision not to have promoted appellant constituted an abuse of discretion, and that appellant was entitled as a remedy to appointment to the position in question (or a comparable promotional position) when it next became vacant.
>
> The status quo as to this position remained unchanged for a number of years until the incumbent (William Critchley) retired in 1995. The appellant subsequently sought to invoke the commission's jurisdiction to enter an order restraining respondent from taking any action with respect to the position other than appellant's appointment. The parties then agreed that respondent would take no action with respect to the position in question while their dispute would be submitted to the commission on the parties' respective petitions for declaratory ruling. Id.

In a nutshell, respondent contended that subsequent to Mr. Critchley's retirement, it had refrained from filling the position he had occupied because it was considering possible changes in its locksmith operation that could eliminate the need to fill the position at all. Appellant contended that respondent had been acting in bad faith to find a way to avoid ap-

pointing him to the vacant position and thus deliberately circumvent the commission's original order. The commission resolved this dispute as follows:

> When Mr. Critchley retired, his position became "vacant" as that term is commonly understood. Since the commission's decision and order required that appellant be appointed to this position when it became vacant, it would appear that respondent should have made the appointment at the time of Mr. Critchley's retirement. However, respondent appears to assert that there is no vacancy until it decides the position should be filled, and that the commission has no authority as a remedy for a §230.44(1)(d), stats., appeal like this to require it to fill a vacant position under the circumstances . . . Section ER-MRS 1.02(34), Wis. Adm. Code, provides the following definition: " 'Vacancy' means a classified position to which a permanent appointment may be made after the appointing authority has initiated an action to fill the position." In *Givens v. DILHR,* 87-0039-PC (3/10/88), affirmed, *Givens v. WPC,* Dane Co. Cir. Ct. 88CV2029 (1/6/89); the commission addressed the meaning of this rule . . . as follows:
>
>> Respondent argues that . . . a "vacancy" does not exist unless there is: (1) a position and (2) a request that the position be filled. In the opinion of the commission, however, respondent tortures the clear language of the code provision to reach this conclusion. In the commission's opinion, such language requires that the appointing authority have the *authority* to initiate an action to fill the position and the *authority* to make a permanent appointment to the position once such an action is initiated in order for the position to be considered vacant. In other words, it is the existence of this authority, not the exercise of it, which triggers the language of the code provision.
>
> This precedent conflicts directly with the respondent's approach in the instant case. Furthermore, respondent's contention that an interpretation of the commission's order which would require it to appoint appellant to the vacant position would somehow interfere with its prerogatives to make management decisions about the position in question, and how to deal with the locksmith program, is misplaced. Respondent is free to decide in good faith to merge, downsize, etc., as it sees fit. If such action were to involve the elimination of the Supervisor 1-Locksmith vacancy, that would not be prohibited by the commission's original decision and order in this case. However, appellant is entitled to an immediate promotion to this vacancy. Id, pp. 3-4 (footnote omitted).

The instant petition is grounded on §230.44(4)(c), Stats., and asks the commission for "enforcement of its orders of September 16, 1985, and August 5, 1996, on grounds that

[r]espondent . . . has failed to comply with the Commission's orders and has acted in bad faith in order to avoid compliance." In the alternative, appellant seeks to appeal (apparently pursuant to §230.44(1)(d), Stats.)[1] respondent's actions. Appellant seeks the following relief:

> Appellant requests that the Commission order the UW-Madison to immediately appoint Mr. Pearson to the Maintenance Supervisor 1-Locksmith position which has been the subject of the parties' litigation since 1985; or, if it has been eliminated, to a comparable position; or if the position has been eliminated and no comparable position is available, to immediately begin the process of restoring the position in question or creating a comparable position, with an acting appointment for Mr. Pearson to this position until [it] is restored and permanent appointment when the process is completed.
>
> Appellant further asks that the Commission order Respondent to provide assurance that its actions constitute a final reorganization plan which may not be changed without good cause shown until Appellant reaches retirement age.
>
> Appellant further asks the Commission to order payment of back wages from June 1, 1995, when Respondent should have appointed Mr. Pearson to the position in question.

In its response to the petition, respondent contends that the commission has no authority under §230.44(4)(c), Stats., to enforce its orders, but that enforcement must be sought in circuit court. However, respondent then states that it "encourages the Commission to conduct a hearing to determine whether or not the Respondent has acted in good faith in the implementation of its orders and whether enforcement action should be sought through the circuit court." Respondent requests an evidentiary hearing because it "disputes many of the statements attributed to its employes by the Appellant and denies the inferences drawn from its actions. . . The decision to seek judicial enforcement of an order is so serious and unprecedented that developing a full record of the actions of the Respondent and its motivations would be the wisest and most efficient course of action."

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[1] Appellant has not developed this contention, and the Commission is unable to discern how appellant's concerns about respondent's compliance with the Commission's order could be considered an appeal under §230.44(1)(d), Stats. ("[a] personnel action after certification which is related to the hiring process in the classified civil service . . . .")

Respondent's contention that §230.44(4)(c), Stats., does not give the Commission the authority to enforce its own orders is correct. In *Guzniczak v. DHSS,* 83-0210, 0211-PC, 4/6/88, the commission held:

> It is true that [§230.44(4)(c)] states that the Commission may issue an "enforceable" order. However, said section does not state that the Commission does the enforcing. To the contrary, the above section has been interpreted to mean that the Commission cannot enforce its own orders. In *Wisconsin Department of Employment Relations v. Wisconsin Personnel Commission,* Case No. 85CV3022 (Dane Co. Cir. Ct., 12/27/87), the Court held:
>
>> The various provisions of sec. 230.45, Wis. Stats., which enumerate the powers and duties of (the Commission), however, limit (the Commission's) power to only "hear appeals." That section does not empower (the Commission) to enforce anything . . . enforcement actions referred to in sec. 230.44(4)(c) are to be brought only in circuit court.

Notwithstanding the foregoing conclusion, since the parties have briefed all of the issues, and have evinced an interest in having the Commission rule on the questions relating to the implementation of the remedial order, the Commission will proceed to address the major issues raised by the parties on this petition. However, the Commission can not definitively address certain issues which turn on disputes of material fact.

With respect to appellant's claim that he is entitled to back pay from June 1, 1995, when he alleges respondent should have appointed him to the supervisory position, this remedy is not available under the civil service code for this type of transaction, *see,* §230.43(4), Stats.; *Seep v. Personnel Commission,* 140 Wis. 2d 32, 409 N.W. 2d 142 (Ct. App., 1987).

Appellant's main contention is that respondent violated the Commission's order by reconfiguring the Maintenance Supervisor 1-Locksmith position that had been occupied by Mr. Critchley prior to offering it to him.[2] Appellant argues that the new PD (position description) consists of 20% supervisory activities and 80% nonsupervisory, while Mr. Critchley's PD had been 90% supervisory and consulting, and only 10% nonsupervisory.

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[2] The Commission will not address appellant's allegation that this restructuring was done in bad faith in order to avoid having to promote him, because of the parties' conflicting factual positions on this question.

Appellant further asserts that the new PD is inconsistent with the Maintenance Supervisor 1-Locksmith class specification. In a somewhat related vein, appellant also objects to respondent's expressed intent to eliminate altogether the Maintenance Supervisor 1-Locksmith position (At the time respondent offered appellant the position, he was advised that the position would be eliminated in the near future due to a reorganization and associated change in the way the locksmith shop would be supervised.). Finally, appellant alleges that the elimination of the Maintenance Supervisor 1-Locksmith position would result in his layoff.[3]

As noted above, the parties sharply disagree as to what has occurred and what would have occurred had appellant accepted respondent's offer. However, restricting itself to the undisputed facts, the Commission can make a number of observations about whether respondent has complied with the Commission's August 5, 1996, ruling.

In that decision, the Commission stated that:

> [R]espondent's "contention that an interpretation of the Commission's [September 16, 1985] order which would require it to appoint appellant to the vacant position would somehow interfere with its prerogatives to make management decisions about the position in question, and how to deal with the locksmith program, is misplaced. Respondent is free to decide in <u>good faith</u> to <u>merge, outsource, downsize, etc</u>., as it sees fit. If such action were to involve the <u>elimination</u> of the Supervisor 1-Locksmith vacancy, that <u>would not be prohibited</u> by the Commission's original decision and order in this case. However, appellant is entitled to an immediate promotion to this vacancy. *Id.*, p. 4 (footnote omitted) (emphasis added).

As is expressed clearly by the foregoing, the Commission's original order ran only to the personnel transaction that falls within the Commission's subject matter jurisdiction -- i. e., the promotional process used to fill the position. Just as the good faith[4] total elimination of this position would not have been prohibited by the Commission's order, neither would a good faith revision in the position's PD. In this regard, respondent contends that the PD in question merely was changed to reflect the changes that had occurred in the posi-

---

[3] Respondent diametrically disagrees, contending that appellant will be able to bump into a nonsupervisory locksmith position (vacant or not) at the time the supervisory position is eliminated.

[4] If the position were eliminated merely to deny a promotion to appellant, then the decision would cross over from the realm of program management and become a personnel management decision in violation of the Commission's remedial order.

tion as the former incumbent's (Mr. Critchley's) role had changed over the years so that he was spending less time on supervisory duties per se, and more on what typically would be considered nonsupervisory locksmith activities: "a consideration of the functions he actually performed and a review of the Locksmith-Journey position standard showed that only 20% of the duties qualified as supervisory duties." Respondent's response to enforcement petition, pp.8-9 (footnote omitted). Appellant disagrees that Mr. Critchley's duties have changed to this extent. If it becomes necessary to resolve this dispute, it apparently would require an evidentiary hearing.

It is not clear, however, that resolution of this dispute actually would be necessary, in the context of the elimination of this position.[5] Respondent's Classified Personnel Office (CPO) approved the Maintenance Supervisor 1-Locksmith classification and pay rate with respect to this revised PD. If appellant had accepted the appointment as offered by respondent, the classification level and salary of the position which would be operative for purposes of appellant's layoff rights -- i. e., transfer, demotion, bumping, etc. -- would have been just established by the CPO on the basis of the revised PD. Regardless of what appellant may think about the actual level of the duties and responsibilities reflected in the new PD, it would appear that the recently established class and salary level would be controlling regarding appellant's layoff rights.

The parties also disagree about whether respondent's decision to eliminate the position and to take a different approach to supervision of the locksmith shop was made in good faith, and have submitted many pages of argument and supporting documents related to the management of the locksmith program in the context of the overall physical plant operation. As noted above, the Commission can not resolve this disputed factual issue without holding an evidentiary hearing.

Related to the foregoing issue is the dispute about respondent's assertion, at the time it offered the position to appellant, that he would not lose his employment with the elimination of the position in question. It appears likely to the Commission that respondent correctly outlined what would occur upon elimination of the position.

---

[5] As will be discussed further below, this is also a bone of contention between the parties.

As an incumbent in a supervisory position, appellant's rights with respect to a layoff situation would be governed by the civil service code rather than by a collective bargaining agreement, *see* §111.93(3), Stats. In his new position, appellant would have "permanent status in *a* class," §ER-PERS 22.08, Wis. Adm. Code (emphasis added), and would *not* be "serving an original appointment probationary period," §ER-PERS 22.04(3), Wis. Adm. Code. Therefore, he would be subject to the basic protections of an employe facing layoff. This includes the right to transfer or demote into a vacant position, or to "bump" (displace) an employe in another position, §§ER-MRS 22.08(1),(2), and (3), Wis. Adm. Code[6].

Appellant's concern about losing his employment in the event he were to have taken the promotion and then have faced the elimination of the supervisory position, apparently is posited on the assertion that respondent was revising his locksmith PD as well as the supervisor's PD, and appellant's reconfigured locksmith position "could be reallocated to a higher pay range. In that case it would not be available to Pearson if he had taken the locksmith supervisor position by the University's deadline and that position were then eliminated. Wiggins v. DOD, 82-0246-PC (7/21/83)." Appellant's submission in support of enforcement order, p. 21. The Commission can not perceive how such an eventuality could affect appellant's rights to transfer or demotion in lieu of layoff, although it conceivably could affect appellant's bumping rights under a certain set of circumstances.

With respect to transfer, if appellant's newly reconfigured Locksmith position were at the same or counterpart pay range as appellant's new supervisory position, he presumably could transfer into it in lieu of layoff. With respect to demotion, if it were at a lower level, he presumably could demote into it in lieu of layoff. As to appellant's bumping rights, presumably the only way these could be affected would be if three things occurred -- first, if, contrary to management's representations, respondent were to have filled appellant's old position; second, if the classification of the newly reconfigured position were to have been changed to a classification in a higher pay range than the pay range (or counter-

[6] Pursuant to §§ER 29.03(5)(a), (8)(bm),(c), Wis. Adm. Code, it appears likely that in such an eventuality appellant would retain his supervisory pay rate.

part pay range) of the position's previous classification[7]; and third, if the incumbent in the position were to have been regraded[8] to the higher classification and pay range, rather than having the position be opened to competition[9].

In conclusion, given the unusual posture and history of this case, the Commission makes the following observations. As should be apparent from the foregoing discussion, it appears that much, if not all of the parties' dispute about the nature of the position either has been or would be[10] rendered moot by the elimination of the position. Also, if appellant could establish that respondent's decision to eliminate this position were motivated by a bad faith interest in denying appellant a promotion, it is by no means clear what kind of remedy would be possible or appropriate. Finally, it appears to the Commission that appellant's concerns that he would have ended up unemployed if he had taken this job (which respondent denies would have happened), could have been alleviated by an agreement between the parties which could have had the effect of having guaranteed appellant both a degree of employment security and the benefit of the red-circled supervisory pay rate. Under all these, and other circumstances of record, the Commission urges the parties to explore a plenary settlement of this matter before embarking on further litigation.

In the event that the parties are unable to settle this matter and either or both wish the Commission to conduct further proceedings, it is suggested that a petition for declaratory ruling or other pleading be filed setting forth the jurisdictional basis for the proceeding.

---

[7] Pursuant to §ER-MRS 22.08(3)(a), Wis. Adm. Code, an employe may exercise the right of displacement into "[a] position in the same or counterpart pay range in which the employe had previously attained permanent status in class."

[8] "[T]he language of §230.15, Stats., as well as of §332.040 of the Wisconsin Personnel Manual, reflect strong policy considerations in favor of using the competitive examination process when there has been an assignment of duties which amount to a wholesale change in a position." *Sannes v. DER*, 92-0085-PC, 08/23/93.

[9] If the position were to be opened to competition during the time appellant were to be facing layoff, he presumably would be able to demote into the position while maintaining his pay rate.

[10] I. e., depending on the course of future litigation.

ORDER

Appellant's petition for enforcement is denied. In light of the parties' positions on further proceedings, discussed above, the Commission will retain jurisdiction over this matter for 20 days from the date of service of this order. If no further pleading or motion is filed within this period, this matter will be finally dismissed.

Dated: February 12, 1997

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT
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STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * *

GEORGE SHOWSH,

Appellant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Respondent.

Case No. 87-0201-PC

* * * * * * * * * * * * * * * *

RULING ON PETITION FOR REHEARING

On November 28, 1988, the Commission issued an interim decision and order in the above matter which adopted, with certain amendments, the proposed decision and order issued by the examiner and reduced the appellant's five-day suspension to a two-day suspension. In a decision and order issued on January 26, 1989, the Commission denied the appellant's motion for costs filed under §227.485, Stats.[1] On February 14, 1989, the appellant filed a petition for rehearing. Both parties subsequently filed additional arguments relative to the petition. The appellant's petition for rehearing alleges material errors in both the November 28th interim decision and in the January 26th decision and order.

Interim Decision and Order Issued November 28, 1988

The appellant's initial contention is that the Commission was required to give deference to the conclusions reached by the hearing examiner

[1] The effect of the January 26th decision was that of a final decision and order. One effect of the January 26th decision was also to make the November 28th decision final relative to the determinations of due process and just cause for the suspension imposed against the appellant.

relative to the existence or non-existence of a predisciplinary hearing.

> The decision as to whether a predisciplinary hearing was held or not rest [sic] on the evaluation of the testimony presented. Since all of the evidence presented on this issue was verbal this is a issue of creditability [sic].
>
> The members of the Personnel Commission who rendered the final Order and Decision did not have the opportunity to observe the demeanor of the witnesses, and pass first hand on their creditability. Therefore they should defer to the hearing examiner in this matter. The hearing examiner did not find the testimony creditable that a predisciplinary hearing occurred. The members of the Commission who did not observe and hear this testimony should be bared [sic] from over turning the hearing examiner on the issue of creditability. Petition, page 2.

The predisciplinary meeting being referred to by the appellant was described by the hearing examiner in finding of fact 21 in his proposed decision and order dated August 23, 1988:

> 21. Sometime in October 1987, Mr. Dennison [appellant's supervisor] met with appellant. He told appellant that there was a possibility that disciplinary action would ensue, although he did not state specifically that appellant was the target of the possible discipline. Mr. Dennison told appellant that it was a meeting to gather as much information as possible, and asked him what he had to say about his involvement in the incidents or "situations around the June 29th and July missed inspections." He did not advise appellant he had a right to be represented at said meeting.

In his proposed decision, the examiner went on to conclude that this October 1987 meeting did not constitute a constitutionally adequate predisciplinary hearing. In turn the examiner would have rejected the five-day suspension.

After the proposed decision was issued and the parties were provided an opportunity to file objections thereto, the Commission adopted the proposed findings of fact, except that findings 9 and 10 were amended to more accurately reflect the record, but then went on to reach a different conclusion as to the adequacy of the predisciplinary hearing:

> However, while the Commission concludes that the five day suspension was subject to the protection of the due process clause and required some kind of pre-deprivation procedure under Cleveland Bd. of

> Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985), it also concludes the proposed decision errs in its determination that the predisciplinary hearing here provided was inadequate. Given the limited nature of the property interest deprivation involved, and the availability of a postdisciplinary trial-type hearing, it is not necessary that the predisciplinary hearing be at all extensive. Appellant was given an opportunity to meet with and explain to his supervisor what he knew about the matters in controversy, after having been advised that disciplinary action might result. While it is possible that this meeting might have been inadequate under Loudermill for a pretermination hearing, it at least ensured that management did not act without knowing appellant's version of the underlying facts. Given the limited nature of the property interest deprivation, and the availability of a full hearing after appellant appealed the suspension, there was no denial of appellant's right to procedural due process in what occurred.

The Commission substituted its conclusions of law for those set forth in the proposed decision.

Had the Commission modified the examiner's findings of fact as to what occurred during the October 1987 meeting between the appellant and his supervisor, the appellant's argument about deference to the examiner would be relevant.[2] However, here the Commission adopted the examiner's finding and reached a different legal conclusion as to whether what occurred met the due process requirements established by Loudermill (supra). As a result, the appellant's contention that the examiner's observation as to witness credibility is inapplicable.

The appellant also argues that the Commission erred in concluding that the October, 1987 meeting between the appellant and his supervisor was a constitutionally adequate predisciplinary hearing. Before issuing its November 28th interim decision, the Commission considered similar arguments

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[2] In Pieper Elec., Inc. v. LIRC, 118 Wis. 2d 92 (Ct. of App., 1984) the court of appeals held that "[w]here the credibility of a witness is at issue and a commission reverses its examiner and makes contrary findings [of fact]," the commission must determine the examiner's impression of the material witnesses and must explain its disagreement with the examiner.

set out in the proposed decision and order. The Commission perceives no basis for altering its conclusion that due process was provided the appellant here.

Decision and Order on Motion for Costs Issued January 26, 1989

In its November 28th ruling, the Commission specifically indicated that its decision was being issued as an interim decision so the prevailing party would have an opportunity to submit an application for fees and costs pursuant to §227.485, Stats. On December 22nd, the appellant filed an application for attorney's fees and costs that was accompanied by an affidavit by appellant's counsel and an itemization of hours. On January 12, 1989, the respondent filed objections to appellant's application. Included in its objections were arguments that the respondent was substantially justified in taking its position and that the appellant had failed to assert that his annual income met the limitations imposed in §227.485(7), Stats.

In its January 26, 1989 decision and order, the Commission denied the appellant's motion for costs because the Commission concluded that the respondent agency's position was "substantially justified" under §227.485(3), Stats. The Commission went on to note that there was an additional reason for denying the motion:

> Pursuant to §227.485(7), Stats., an individual is not eligible to recover costs "if the person's reported federal adjusted gross income was $150,000 or more in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the case...." Since appellant provided neither an assertion, an affidavit, not any evidence to this effect with his motion, and did not reply to respondent's objection on this ground, the Commission must conclude that appellant is not eligible under this subsection.

Appellant now contends that it was the respondent who had the burden of establishing that the appellant earned $150,000 or more, rather than the

appellant who had the burden of establishing that he earned less that $150,000.[3] The respondent correctly notes that it has no way of determining how much income the appellant derives from sources other than through his employment with the respondent. Even if the appellant did not have a responsibility, at the time he filed his motion for fees and costs, to file an affidavit setting forth his federal adjusted gross income, he clearly had such a responsibility once the respondent raised appellant's income as an issue. The appellant was the party seeking the fees and costs and was also the only party in position to provide the information to establish eligibility under the law.

The appellant contends that because neither the Equal Access to Justice Act (§227.485, Stats.) nor the letter from the Commission setting forth the schedule for filing the motion for costs specifically established a period for the appellant to respond to respondent's January 12th objections, his failure to file a response should not "be held against" him:

> If the Personnel Commission had unresolved issues after the filing of papers from both parties, it has within its power the right to call for a motions hearing and have the parties argue to those issues. Petition, page 4.

The appellant's argument assumes that the Commission could perceive a factual dispute between the parties. However, the appellant's motion for fees and costs made no mention of the $150,000 requirement and the appellant failed to indicate any disagreement with the respondent's statement that the appellant had failed to provide any proof of eligibility

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[3] Appellant's contention relates only to the secondary basis on which the Commission denied his motion for costs. None of the appellant's arguments relate to the primary basis, the conclusion that the respondent's action was "substantially justified."

under the requirement. There was no indication of any "unresolved issues" and the fact that §227.485(5), Stats., does not specifically provide for a reply by the party filing a motion for costs does not preclude such an opportunity upon request. Here, there was no such request nor any indication of disagreement with the respondent's objections.

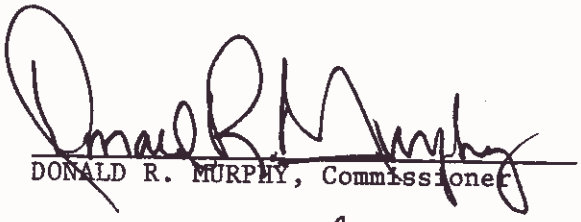
ORDER

Appellant's petition for rehearing is denied.

Dated: March 14, 1989 STATE PERSONNEL COMMISSION

KMS:rcr
DPM/2

LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * * *

ROBIN E. ZENTNER,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 93-0032-PC

* * * * * * * * * * * * * * * * * *

RULING ON FEE APPLICATION AND FINAL ORDER

This matter is before the Commission on appellant's Motion for Payment of Fees filed July 6, 1994. Both parties have filed briefs.

In the June 23, 1994, ruling on the merits of this matter, the Commission addressed the question of the effective date of the reallocation of appellant's position from Civil Engineer Advanced 1 to Civil Engineer Advanced 2. In summary, appellant transferred into the position in question after the previous incumbent (Gerald Marx) had transferred out. Before that, Mr. Marx had initiated an appeal of the reallocation of the position which had occurred with an effective date of June 17, 1990. On February 25, 1993, subsequent to the transfer, the Commission decided Mr. Marx's appeal in his favor, and in response to this decision, respondent reallocated the position with an effective date of June 17, 1990. However, this effective date was made applicable via regrade only with respect to Mr. Marx's employment status, not Mr. Zentner's. Respondent set the effective date of Mr. Zentner's regrade as March 21, 1993 -- i.e., subsequent to the date of the Commission's decision of Mr. Marx's appeal. Mr. Zentner subsequently filed the instant appeal challenging this effective date.

The Commission's decision on the merits of this appeal involved an interpretation of DER's own effective date guidelines as set forth in Chapter 332.060 of the Wisconsin Personnel Manual, Administration, Classification, Compensation, which provides that reallocation regrade actions taken under now §ER 3.01(2)(e), Wis. Adm. Code (reallocation based upon "correction of an error in the previous assignment of a position") "will be made effective at the beginning of the first pay period following effective receipt of the request." The Commission rejected respondent's contention that the earliest possible date

for such a "request" with respect to Mr. Zentner would have been when it received the Commission's decision in the Marx case -- i.e., on or about February 26, 1993. The Commission observed that the only request for a §ER 3.01(2)(e), reallocation of the position had been made in 1990 when Mr. Marx filed his appeal of the reallocation of his position following the engineering survey, and that:

> Respondent's regrade action in relation to appellant was based on the reallocation of the Marx Position. In other words, the underlying basis for appellant's regrade was to correct the error which occurred on June 17, 1990. Accordingly, appellant is entitled to be regraded and to be compensated at the CE Adv 2 level, effective the date he became the incumbent in that position -- April 21, 1991. The Commission knows of no logical or legal authority which would support any other result. Commission decision, p. 4.

The Commission also rejected respondent's argument that such an effective date would create a competition problem because it would nullify the lateral nature of Mr. Zentner's transfer into the position in 1991. It noted that the transfer was valid at the time it was made, and that utilizing a retroactive date for classification purposes does not require a retroactive effect for a staffing transaction. The Commission also observed that if this potential competition problem were a valid concern, it would be equally valid even under the effective date for regrade (March 21, 1993) used by respondent, because this would leave the effective date of the reallocation of the position as June 17, 1990, prior to Mr. Zentner's transfer.

Pursuant to §227.485(2), Stats., costs are to be awarded to the prevailing party in a case of this nature unless the Commission finds that respondent "was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Section 227.485(1)(f) provides: "'[s]ubstantially justified' means having a reasonable basis in law and fact." In Sheely v. DHSS, 150 Wis. 2d 320, 338, 442 N.W. 2d 1 (1989), the Supreme Court held as follows:

> Losing a case does not raise the presumption that the agency was not substantially justified ... when a state agency makes an administrative decision and the agency's expertise is significant in rendering that decision, this court will defer to the agency's conclusions if they are reasonable; even if we would not have reached the same conclusions. (footnote and citations omitted)

With respect to the instant case, the facts were undisputed. The legal question turned on an interpretation of a policy which DER has promulgated and administers. Neither party nor the Commission cited any precedent interpreting this policy. The difficulty involved in resolving this issue is well described by the following excerpt from appellant's brief on the merits:

> In its Brief, respondent cites no court or Personnel Commission decisions either in support of or contrary to its position. Indeed, this appeal appears to present a case of first impression, and appellant is unable to cite cases of precedential value with respect to the issues raised in this appeal. None of the various regulations cited above address with clarity or specificity the precise situation which arises on this appeal, nor do they suggest any clear direction to take in analyzing the facts of this case. The confusing interplay of the various regulations, and their ambiguity with respect to the facts presented here, is rather poignantly betrayed by the respondent's own confusion (as demonstrated in its Brief) ... At the very least, the existing regulatory scheme is of debatable applicability and is highly ambiguous as regards the situation presented by this appeal ... There appearing to be no precedent or any statute or regulation which directs a particular result in this case, resort must be had to a review of the statutes and regulations which address reallocation and regrading generally, and if no inference can be drawn from these regulations, resort must be had to logic and common sense. Appellant's brief, pp. 7-8.

While the Commission ultimately ruled in appellant's favor in this case, under these circumstances, as exemplified by this portion of appellant's brief, it does not find that respondent's position did not have a reasonable basis in law. There is no provision in any of the statutes, rules or policies potentially governing this transaction which specifically addresses the question this case presents -- i.e., the effective date of the regrade or an employe who transfers into a position prior to the completion of an ultimately successful appeal by the prior incumbent seeking a higher classification level for the position. Respondent's use of §332.060 of the Wisconsin Personnel Manual, was not without a reasonable basis, albeit it required a construction of the word "request" (which was not defined in the policy) which the Commission considered unconvincing. Contrary to appellant's contention, an opposite finding is not compelled by the language in the Commission's decision on the merits at p. 4 that it "knows of no logical or legal authority which would support any other result." This comment reflects to some extent the ambiguous nature of the law in this area referred to in appellant's brief. The Commission did not mean to imply that there was no reasonable basis for respondent's

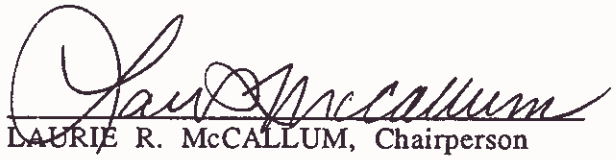
approach, but rather that neither the briefs nor the Commission's own analysis had led to any logical or legal basis which would have required a different result.

ORDER

Appellant's motion for payment of fees filed July 6, 1994, is denied, and the Commission's June 23, 1994, decision and order is finalized as the final disposition of this matter.

Dated: August 18, 1994

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

AJT:rcr

JUDY M. ROGERS, Commissioner

Parties:

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to

§227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. 01-1899

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,
Petitioner-Respondent,

v.

STATE OF WISCONSIN PERSONNEL COMMISSION,
Respondent-Respondent-Co-Appellant,

DALE R. BRENON,

Appellant.

DALE R. BRENON,
Petitioner-Appellant,

v.

STATE OF WISCONSIN PERSONNEL COMMISSION,

Respondent-Respondent.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE MICHAEL NOWAKOWSKI, PRESIDING

BRIEF OF THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. 01-1899

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner-Respondent,

v.

STATE OF WISCONSIN PERSONNEL COMMISSION,

Respondent-Respondent-Co-Appellant,

DALE R. BRENON,

Appellant.

DALE R. BRENON,

Petitioner-Appellant,

v.

STATE OF WISCONSIN PERSONNEL COMMISSION,

Respondent-Respondent.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR DANE COUNTY, THE HONORABLE MICHAEL
NOWAKOWSKI, PRESIDING

BRIEF OF THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

ISSUES PRESENTED

(1) Could the Commission reasonably refuse to consider the after-acquired evidence of Brenon's unauthorized removal of documents from UWM?

The Circuit Court answered in the negative.

(2) Could the Commission reasonably conclude that UWM was substantially justified in taking the position that Brenon was not denied due process when he was suspended for ten days without pay?

The Circuit Court answered in the affirmative.

(3) Could the Commission reasonably conclude that UWM was substantially justified in taking the position that Brenon's employment should be terminated?

The Circuit Court answered in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Board of Regents of the University of Wisconsin System believes that oral argument is unnecessary. The briefs fully present the issues on appeal and fully develop the theories and legal authorities on each side. Oral argument would be of such marginal value that it does not justify the additional expenditure of court time or costs to the litigants. *See* Wis. Stat. § 809.22(2)(b).

The court's opinion should be published. Although two of the three issues presented involve no more than the application of well-settled rules of law to a recurring fact situation, *i.e.*, whether the State of Wisconsin Personnel Commission could reasonably conclude that the University of Wisconsin-Milwaukee (UWM) was substantially justified in taking its positions with respect to Dale R. Brenon's suspension and termination, *see* Wis. Stat. § 809.23(1)(b), the court's opinion will clarify the law with

respect to an issue of statewide and continuing public interest if the court decides whether the Personnel Commission can consider after-acquired evidence in state civil service cases. *See* Wis. Stat. § 809.23(1)(a).

STATEMENT OF THE CASE

A. Nature of the case and disposition in the circuit court.

This is an appeal from an order of the circuit court for Dane County, the Honorable Michael Nowakowski, presiding, which was entered on May 31, 2001, and which affirmed in part and reversed in part a decision of the Personnel Commission concerning Brenon's civil service appeal of his suspension and termination by UWM. The Circuit Court affirmed the Commission's decisions that (1) UWM violated Brenon's due process rights by failing to provide him with adequate notice and a pre-disciplinary hearing prior to his suspension, (2) there was just cause to discipline Brenon for his conduct but a termination was excessive and a ten-day suspension without pay was more appropriate, (3) UWM was substantially justified in taking the position that Brenon was not denied due process when he was suspended for ten days without pay, and (4) UWM was substantially justified in taking the position that Brenon's employment should be terminated. The Circuit Court reversed the Commission's decision that it could refuse to consider the after-acquired evidence of Brenon's unauthorized removal of documents from UWM. Brenon appeals from that part of the Circuit Court's order affirming the Commission's decision with respect to the "substantially justified" issue; Brenon and the Commission appeal from that part of the Circuit Court's order reversing the Commission's decision with respect to the after-acquired evidence issue.

B. Procedural history of the case and statement of facts.

In October 1974, Brenon was employed by UWM in its police department (R. 13: 39, p. 1).[1] At all times relevant to this case, Brenon served with permanent status in class as a police sergeant, and his supervisor was Lieutenant Richard Sroka (R. 13: 39, p. 2).

On November 25, 1995, officer Kenneth Peters informed Lieutenant Pamela Hodermann in writing that Brenon had told him two racially and sexually derogatory jokes (the "Million Man March" jokes) (R. 13: 39, p. 2). Subsequently, officers James Leaman, David Boyke, and John Jensen separately informed Hodermann in writing that Brenon had told them each a racially derogatory joke (R. 13: 39, pp. 2-3).

On December 4, 1995, Lieutenant Sroka met with Hodermann and UWM Police Chief Phillip Clark (R. 13: 39, p. 4). Sroka had been on vacation the previous ten days (R. 13: 39, p. 4). Sroka was provided with the written reports to Hodermann, and Clark directed Sroka "to continue the Brenon investigation" (R. 13: 39, p. 4). On December 5, 1995, Clark directed Sroka to meet with Brenon to "get his side of the story" (R. 13: 39, p. 4).

On December 5, 1995, Sroka sent an electronic message to Brenon that stated:

> Dale, I need to meet with you on Friday morning 12/08/95, regarding some recent personnel issues that I have just been made aware of . . . No big deal, won't take up much of your time, but; please wait.

---

[1] The facts are those found by the Commission, which were deemed undisputed by the Circuit Court (R. 24, p. 2). The Commission's administrative record is part 13 of the record on appeal, and the Commission's administrative record itself is divided into 54 parts. References in this brief are to the record on appeal and to the Commission's administrative record.

(R. 13: 39, p. 4).

On December 8, 1996, Sroka met with Brenon and advised Brenon of the reports regarding the "Million Man March" jokes (R. 13: 39, p. 4). Brenon admitted that he told some of the jokes and he said that he was sorry (R. 13: 39, p. 4). Sroka reprimanded Brenon, told him that such conduct was not satisfactory, and directed him to cease and desist (R. 13: 39, pp. 4-5). Brenon agreed to stop (R. 13: 39, p. 4). Sroka told Brenon that he believed the matter was closed (R. 13: 39, p. 5).

While Brenon waited, Sroka reported his meeting with Brenon, including the oral reprimand, to Clark (R. 13: 39, p. 5). Clark directed Sroka to prepare a ten-day suspension letter (R. 13: 39, p. 5). Sroka informed Brenon that Clark had directed him to prepare a suspension letter (R. 13: 39, p. 5). Immediately afterward, at Brenon's request, Clark met with Brenon (R. 13: 39, p. 5). Clark did not change his directive to Sroka (R. 13: 39, p. 5).

On December 20, 1995, Brenon received a letter advising him that he was suspended for ten days without pay, effective January 22, 1996 (R. 13: 39, p. 1). The suspension letter stated in pertinent part:

> This disciplinary action is based on your conduct, as related by four officers of this Department, that during the first week of November, 1995, you related racially demeaning jokes to them while in the performance of your duties as a police sergeant. Regardless of the motivation for relating such jokes, this conduct exhibits unprofessional behavior, demonstrates a lack of sensitivity and creates a hostile environment within a diverse workplace.

(R. 13: 39, pp. 1-2).

On December 23, 1995, police cadet Lisa Panas reported to Clark and Sroka that she had been subjected to numerous sexist jokes and remarks, as well as racist remarks, by Brenon (R. 13: 39, p. 5). On December 28, 1995, officer Dawn Neuman reported to the UWM Office

of Diversity and Compliance that she and Panas had been harassed by Brenon, and that Brenon told sexual jokes and made sexual remarks (R. 13: 39, p. 5).

On January 3, 1996, Brenon was suspended with pay pending an investigation of the allegations against him by Neuman and Panas (R. 13: 39, pp. 5-6). Hodermann conducted the investigation and interviewed several officers (R. 13: 39, p. 6).

On January 12, 1996, Clerk and UWM labor relations manager Shannon Bradbury interviewed Brenon regarding his conduct both before and after December 8, 1995 (R. 13: 39, p. 6). Brenon admitted mimicking the speech of George Esler (an African American officer), making some variant of the statement "I'm going to drain Lucky," and passing out jokes, but he denied telling racial jokes after notification of his suspension (R. 13: 39, p. 6). On January 31, 1996, Clark notified Brenon to report to a pre-disciplinary hearing on Feburary 5, 1996 (R. 13: 39, p. 6). The notice identified the hearing subject matter as allegations of Brenon making sexually explicit and demeaning comments and jokes to subordinates, allegations of retaliation against subordinates, and continuing inappropriate activity subsequent to his suspension (R. 13: 39, p. 6).

On February 5, 1996, Brenon met with Clark and Bradbury (R. 13: 39, p. 6). Clark explained that "this is an investigative type interview and this is a pre-disciplinary hearing" (R. 13: 39, p. 6). Clark informed Brenon of allegations by employees that he had told racial and sexual jokes after notice of his suspension, that he had created a hostile work environment, that he had talked about his sex organ, and that he retaliated against employees who had filed complaints against him (R. 13: 39, p. 6). Clark informed Brenon that they were considering a disciplinary action ranging from a thirty-day suspension without pay to termination (R. 13: 39, p. 6).

By letter dated February 9, 1996, UWM terminated Brenon's employment (R. 13: 39, p. 6). The termination letter stated in pertinent part:

> On December 19, 1995, you were given a 10 day suspension for telling inappropriate ethnic and racially demeaning jokes to your subordinates during November, 1995 . . . . This termination is based on other complaints of your conduct, untruthfulness uncovered in the course of the investigation of those complaints and your retaliation against subordinates who cooperated in those investigations. Specifically, complaints were received that subsequent to your learning of your 10 day suspension, you continued to tell jokes to subordinate officers substituting "Irishman" for other ethnic groups. Additionally, new complaints were received about your making sexually explicit and demeaning comments, telling ethnically and sexually demeaning jokes.
>
> . . . [Y]ou would do this "joke" grunting and making masturbating motions in front of both male and female employees. On other occasions, you referred to your penis as "Lucky," describing its size and making comments such as, "I'm going to drain Lucky," to both male and female employees.

(R. 13: 39, p. 7).

On February 20, 1996, Brenon filed an appeal with the Commission, that he later amended on March 18, 1996, alleging that neither his suspension nor his termination was based on just cause within the meaning of Wis. Stat. § 230.44(1)(c) (R. 13: 47-48). In a conference report dated April 4, 1996, the Commission identified the following issues for hearing: (1) whether there just cause for the suspension of Brenon, and, if so, whether the degree of discipline imposed was excessive, and (2) whether there was just cause for the termination of Brenon, and, if so, whether the degree of discipline imposed was excessive (R. 13: 46).

On June 24, 1996, in a pre-hearing deposition, Brenon was asked about his practice of copying documents at work and keeping the copies at his home (R.

13: 54a, Ex. R-1, pp 13-14). He denied that he had "boxes and boxes of documents at home . . . [that he] had copied from work" (R. 13: 54a, Ex. R-1, p. 14). UWM's attorney demanded that Brenon produce files on individuals that he maintained in his home and that he return all copies of confidential university records in his possession that he was not given specific authorization to remove from the department (R. 13: 54a, pp. 131, 140).

Hearings on Brenon's appeal were held on August 1, 2, and 12, 1996, before Commissioner Donald R. Murphy (R. 13: 50-52, 53a-53d). On October 6, 1997, Commissioner Murphy issued his proposed decision and order (R. 13: 39). Commissioner Murphy proposed that the Commission reject Brenon's ten-day suspension without pay, and modify the termination of Brenon's employment to a suspension of ten days without pay (R. 13: 39).

Commissioner Murphy proposed that the ten-day suspension be rejected because UWM violated Brenon's due process rights by failing to provide him with adequate notice and a pre-disciplinary hearing prior to his suspension, *citing Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)(R. 13: 39, pp. 8-10). Nonetheless, Commission Murphy also addressed the merits of the suspension issue (R. 13: 39, p. 10). Commissioner Murphy concluded that Brenon did not exercise good judgment as a supervisor in telling racial jokes, that his telling of racial jokes had "a tendency to impair his performance of the duties of his position or the efficiency of the group with which he work[ed]," *see Safransky v. Personnel Board*, 62 Wis. 2d 464, 474, 215 N.W.2d 379 (1974), and, therefore, that there was just cause to warrant some disciplinary action (R. 13: 39, p. 10). Commissioner Murphy further concluded that, given the circumstances, a ten-day suspension without pay was excessive and that a "more appropriate sanction" would have been an oral or written reprimand (R. 13: 39, p. 11).

Regarding the termination of Brenon's employment, Commissioner Murphy found that Brenon simulated masturbation in front of other employees, and that he falsely denied having done so, but that Brenon did not tell racial jokes after notice of his suspension, that he did not retaliate against other employees, that he was not otherwise untruthful during the investigation of the complaints against him, and that while his insensitive and "demeaning" attempts at humor and comments to other officers and subordinates reflected poor judgment, they had to be considered in view of the fact that such "banter was common in the workplace" (R. 13: 39, pp. 11-17). Commissioner Murphy considered Brenon's record of past discipline including a four-day suspension in March 1979 for being disrespectful to an officer in charge, a written warning in November 1991 for intimidating employees, a letter of reprimand in February 1992 for being unprofessional and rude to a female student, a two-day suspension in April 1992 for yelling at a subordinate and for sending an ill officer on patrol, an oral warning in January 1993 for telling a joke about nuns dressed as altar boys, and a written warning in November 1993 for making sarcastic remarks when an officer called in sick (R. 13: 39, p. 16). Commissioner Murphy also considered that Sroka and the majority of Brenon's subordinates respected his competency as a police officer and enjoyed a good relationship with him (R. 13: 39, p. 16).

Commissioner Murphy concluded that Brenon's pantomime (of masturbation) and his method of announcing his departure to the men's room were "tacky" and that such behavior need not be tolerated, but that, after consideration of the facts and circumstances in the case, the discharge was excessive (R. 13: 39, p. 16). Commissioner Murphy concluded that a ten-day suspension without pay was a more appropriate discipline (R. 13: 39, p. 17).

On February 12, 1998, the full Commission adopted Commissioner's Murphy's proposed decision and order with minor modifications (R. 13: 34).

On June 23, 1998, the Commission entered an interim ruling denying Brenon's application for fees and costs, and granting leave to UWM to conduct discovery with respect to the issue of remedy (R. 13: 29). The Commission decided that Brenon was not entitled to fees and costs under Wis. Stat. § 227.485 because UWM was "substantially justified", *i.e.*, had a reasonable basis in law and fact, for its decisions to suspend and to terminate Brenon (R. 13: 29, pp. 2-3). *See Sheely v. DHSS*, 150 Wis. 2d 320, 337, 442 N.W.2d 1 (1989). The Commission stated:

> In regard to the ten-day suspension, the Commission's decision that just cause had not been demonstrated hinged on its conclusion that the pre-disciplinary process followed by [UWM] was not sufficient to satisfy due process requirements. The sufficiency of this pre-disciplinary process is thus the proper focus of our inquiry here. . . .
>
> Under the facts presented here, **[Brenon] was given notice of the specific allegation against him, i.e., the Million Man March joke he had repeated; was given an opportunity to answer the allegation during his meeting with Mr. Sroka; was made aware as a part of his meeting with Mr. Sroka that the purpose of the meeting was to discuss this particular allegation and what consequence should follow; was provided notice, although not until the end of his meeting with Mr. Sroka, of the fact that a ten-day suspension was being contemplated; and was provided an opportunity, through his meeting with Chief Clark, to persuade the employer to impose a lesser penalty.** The Commission concluded that this pre-disciplinary process possessed enough of the attributes of a sufficient due process proceeding to support a conclusion that [UWM] has a reasonable basis in law and fact for contending that the just cause standard had been met in this regard. As a result, the application for fees and costs must fail as it relates to the ten-day suspension.
>
> In regard to the discharge, it was reasonable for [UWM] to have relied upon representations made by [Brenon's] co-workers to the effect that he

> was continuing to engage in the type of behavior cited as the basis for his previous discipline. In addition, since discharge was the next step in the progressive discipline process, it was reasonable for [UWM] to have decided to discharge [Brenon] based on these representations by co-workers. Although, at hearing, certain of these representations were not corroborated, [UWM] had no reason to doubt the reliability of those representations at the time that discharge was imposed, i.e., not only did they come from several apparently independent sources but they were also consistent with a pattern of behavior that [Brenon] had exhibited over a period of time. As a result, the application for fees and costs is denied as it relates to the subject discharge.

(R. 13: 29, pp. 2-3)(emphasis added).

On July 20, 1998, in opposition to Brenon's motion for immediate reinstatement, UWM's attorney wrote a letter to Commissioner Murphy that stated in pertinent part:

> . . . [Brenon's] presence in the workplace would be disruptive and cause irreparable harm to the university. After Brenon was terminated, it was brought to my attention that during his employment, he very likely had copies and removed documents from the workplace containing confidential student and employee information which he had no right to remove. Informal attempts to convince him to return all copies of such documents were unsuccessful. In order to protect the privacy of individuals named in said records and mitigate the potential liability for UWM because of Brenon's actions in this regard, the State of Wisconsin has commenced a replevin action in Milwaukee County Circuit Court.
>
> . . .
>
> If ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him, for unauthorized possession of university property with regard to the records issue. This would unnecessarily complicate all pending matters. In the interests of judicial efficiency the parties should be permitted to pursue

> the replevin action and the appeal process, **accepting that an order to remit backpay may result**.

(R. 13: 7, p. 6)(emphasis added).

On July 28, 1998, Commissioner Murphy conducted a telephone status conference with respect to the issue of remedy, and set a schedule for both discovery and for written submissions regarding back pay and benefits (R. 13: 27). Between September 18, 1998, and February 11, 1999, the parties made several submissions with respect to remedy (R. 13: 15-26). On February 11, 1999, UWM wrote a letter to Murphy alleging that Brenon had been incomplete and dishonest in his discovery responses and that "[t]his necessitates . . . a hearing on the issue of back pay" (R. 13: 14).

On April 28, 1999, Commissioner Murphy conducted a telephone pre-hearing conference in which he proposed the following statement of the issues for hearing:

> Remedy.
> Sub–issues:
> 1. What is the sum of [Brenon's] back pay and other credits?
> 2. What is the sum of [UWM's] mitigation damages and setoffs?
> 3. What is the total sum of [Brenon's] remedy?

(R. 13: 12).

On May 14, 1999, UWM's attorney sent Brenon's attorney a written settlement offer that stated in pertinent part:

> After the final decision we also intend to reinstate your client and initiate the discipline process because of his gross violation of the records policy. That will likely end in the termination of his employment. . . .

(R. 13: 8, pp. 11-12).

On May 18, 1999, Commissioner Murphy conducted a hearing on the issue of remedy (R. 13: 49). UWM's attorney asked Brenon whether he had a practice of making copies of documents that came across his desk, when he worked as a sergeant at UWM (R. 13: 49, p. 23). Brenon's attorney objected on the ground of relevance (R. 13: 49, p. 23). UWM's attorney responded that the question went to Brenon's credibility and "also to remedy in mitigation" (R. 13: 49, p. 24). When Commissioner Murphy sustained an objection to the question, UWM's attorney made the following offer of proof:

> The questions that we would have asked this witness would have been verified by answers he gave in his deposition in . . . June 24, 1996 in which he was asked about records he had removed from the University of Wisconsin-Milwaukee that were produced . . . by him in discovery in the case on the merits.
>
> Records that he was not entitled to have at home – He took it home. He made copies of confidential records of investigative files. That was first discovered in his response to our request for production of documents.
>
> Chief Clark when he saw these responses was upset that these records had been removed from the campus . . . . The Attorney General's office filed a civil lawsuit, a replevin action to get documents returned from Brenon which has not occurred to this date. . . .
>
> . . .
>
> Anyway Brenon's deposition . . . verifies that he admitted removing documents without authorization. And the chief's testimony would have been verified that he would have terminated him had he known about that prior to termination. . . .
>
> . . .
>
> We would have also introduced our Exhibit R-22 to show . . . how much the damages should have been under [the after-acquired evidence] theory which is $17,514.43 to cut off the liability as of June 24, 1996

> because that is the date that Brenon was confronted with the evidence at his deposition, and he admitted misconduct.

(R. 13: 49, pp. 24-33).

On June 18, 1999, Commissioner Murphy issued his proposed decision and order with respect to the remedy (R. 13: 10). Commissioner Murphy ordered UWM to pay Murphy the amount of $159,533.64 as back pay, plus additional back pay and interest until Brenon was reinstated (R. 13: 10, pp. 3, 9). Regarding the ruling to exclude the after-acquired evidence, the proposed decision states: "[t]o have ruled otherwise would have been in deprivation of appellant's job property rights without due process of law" (R. 13: 10, p. 8).

On September 1, 1999, the Commission issued its interim decision and order, affirming Commissioner Murphy's proposed decision with respect to the remedy (R. 13: 6). Regarding Commissioner Murphy's ruling to exclude the after acquired evidence, the Commission stated:

> The Commission concludes that this ruling of the examiner was proper. To have allowed this evidence would have unfairly required [Brenon] to have tried to address a significant new issue in this case – in a nutshell, whether he had violated work rules by having improperly removed documents from the workplace, and whether such conduct would have led to his discharge in June 1996 – without any prior notice that it would be raised in this proceeding.
>
> [UWM] argues that [Brenon] should have been on notice because he had been questioned on the subject during a June 1996 deposition, and [UWM's] attorney had mentioned this in a July 20, 1998, letter to the Commission in opposition to [Brenon's motion for reinstatement. . . .
>
> The Commission does not agree that the foregoing notified [Brenon] that the issue of after-acquired evidence (concerning purloined documents)

would be litigated as part of the damages phase of this case. Rather, this suggests that the document issue would continue to be pursued in [UWM's] separate replevin action, and, if [Brenon] were restored to his employment pursuant to the commission's decision, would be raised by a new disciplinary action against appellant. Similarly, while, as [UWM] contends, the questioning of [Brenon] concerning the documents during [his] June 1996 deposition, and the filing of the replevin action, should have put [him] on notice that [UWM] took the document issue seriously, these factors would not have put [him] on notice that the issue would be raised in the context of the damages phase of this case. This conclusion is further supported by the procedural history of this case. [UWM] did not raise the after acquired evidence issue during either the second discovery phase of this proceeding relating to remedy, or when the parties agreed to submit the issue of remedy on briefs to the examiner. This briefing process was complicated by a series of motions and document submissions, and the parties agreed to table all motions and resolve the remedy issue by a hearing before the hearing examiner. The parties agreed to the following statement of the issues for hearing: "(1) What is the sum of [Brenon's] back pay and credits? (2) What is the sum of UWM's] mitigating damages and setoffs? (3) What is the total sum of [Brenon's] remedy? Again, there was no mention of after acquired evidence, and [Brenon] was justified in anticipating that the issue of the purloined documents would be addressed in the pending replevin action and/or a new disciplinary action following [Brenon's] restoration to his former job. Finally, [Brenon] points to [UWM's] statement in a May 14, 1999, memo and settlement offer about what process would be followed if [Brenon] were to be restored as a result of the commission's decision on the merits: "After the final decision we also intend to reinstate your client and initiate the discipline process because of his gross violation of the records policies." This statement is inconsistent with the notion that [Brenon] should have been aware that the records issue would be raised in the hearing on damages. . . .

[UWM] also contends that even if the hearing examiner's ruling on the after-acquired evidence had been proper, the examiner should at

> least have continued the hearing to obviate the problem of notice to the appellant by giving him time to prepare to respond to the missing documents issue. As [Brenon] points out . . ., **[UWM] did not request a continuance at the time when the issue of the after acquired evidence was before the examiner. Also, given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated. There is also a question as to whether it would violate the civil service code to sanction what would be in effect the retroactive addition of reasons for the discharge of [Brenon].** *See, e.g., Liether v. WGC,* 93-0095-PC, 10/20/93 (once written notice of reasons for discharge are provided and an employe is discharged on that basis, new charges can not be added as an additional basis for discharge); *Alff v. DOR,* 78-0227-PC, 3/8/79 (respondent could not amend discharge letter to add two charges which were not known to the respondent prior to the discharge letter). However, because the commission concludes that lack of notice precludes litigation of the issue of the missing documents at this point in the remedy process, it will not address the question of whether injecting the issue into this case at this time would violate the civil service code.

(R. 13: 6, pp. 8-11)(emphasis added).

On October 1, 1999, Brenon filed another motion for costs. On October 22, 1999, UWM filed a motion asking the Commission to reconsider its decisions on reinstatement and back pay based upon the recent discovery of new information (R. 13: 3). The motion stated in pertinent part:

> For the first time on September 29, 1999, UWM received copies of approximately 24,000 documents in 10 boxes (most of them the size of file boxes) that Dale Brenon copied and took from UWM during his 20 plus years of employment at UWM. The boxes mostly contain confidential documents that Mr. Brenon did not have a right to copy for his personal use . . . .

> During discovery of this case in May and June, 1996, UWM asked Mr. Brenon for "copies or originals of any and all documents which [he] removed from the UWM Police Department and are now under his possession or control." In response to all the discovery requests, Mr. Brenon produced documents that would fill approximately one file box. . . .
>
> Mr. Brenon only made his recent disclosure to UWM upon order of the replevin court (State of Wisconsin v. Dale R. Brenon, 98-C-2690).
>
> The Personnel Commission should apply the after acquired evidence rule . . . .
>
> . . .
>
> The Personnel Commission should also reconsider its decision on damages. If Mr. Brenon had complied with discovery, UWM would have been able to show that his eligibility for damages was cut off in June, 1996.
>
> We respectfully request that the Personnel Commission . . . limit back pay to the period of February 11, 1996, to June 24, 1996.

(R. 13: 3, pp. 1-2).

On November 19, 1999, the Commission issued its ruling denying UWM's motion for reconsideration and denying Brenon's motion for costs, and its final order directing UWM to reinstate Brenon with back pay and interest (R. 13: 1). Regarding UWM's motion for reconsideration, the Commission stated in pertinent part:

> . . . *Hoell* and *McKennon* are distinguishable on two bases.
>
> **First, in the instant case we have a distinct issue relating to lack of notice and waiver not present in those cases. Here, [UWM] has known since June 1996 that [Brenon] had removed documents from the workplace, and never raised an after acquired evidence issue in this proceeding until the hearing on remedy on May 18, 1999. In fact, as discussed in the interim**

decision, [UWM] has specifically advised during the course of this proceeding that it intended to raise the issue of the purloined documents in a new disciplinary action after [Brenon's] restoration. The only factual difference between now and June 1, 1996 is that now [UWM] implies it is aware as a result of newly discovered evidence that [Brenon] took ten boxes of documents rather than one. However, [UWM] earlier had asserted in a July 20, 1998, letter to the Commission in opposition to [Brenon's] motion for reinstatement that it had an independent basis for terminating [Brenon] on the basis of the one box of documents that then were known. [UWM] at that time stated that "[i]f ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him, for unauthorized possession of university property with regard to the records issue." As also was discussed in the Commission's September 1, 1999, interim decision, [UWM] reiterated this position in a May 14, 1999, memo. This statement provided notice to [Brenon] at that time that [UWM] was aware that its recourse with regard to the allegedly purloined documents would be to proceed with a new disciplinary action against [Brenon] after he had first been reinstated – i.e., after the entry of the Commission's final order.

Under these circumstances, the "newly-discovered" evidence—the actual physical return of the file boxes of documents – does not constitute a material difference that should permit [UWM] to raise the issue of the improperly-removed documents at this stage in these proceedings.

Second, this case involves an appeal of a discharge under the civil service code, not a WFEA [Wisconsin Fair Employment Act] discrimination claim. [UWM] can not take disciplinary action against [Brenon] without complying with the requirements of the civil service code and the due process clause. **The appointing authority can not add additional reasons for discharge after the facts of the initial notice of termination, appellant's *Loudermill* hearing, and the hearings before the Commission.** *See Alff v.*

> *DOR*, 78 –0227-PC, 3/8/79; *Liethen v. WGC*, 93-0095-PC, 10/20/93. ***See also State ex rel. Tracy v. Henry*, 219 Wis. 53, 262 N.W. 222 (1935).** [T]he latter case, . . . **is consistent with the proposition that [UWM] would have the right to proceed to discharge [Brenon] on the basis of the purloined documents, but only after first having restored him with back pay from the date of the original termination to the date of restoration. For the Commission to now deny restoration and limit [Brenon's] back pay to the time from the original discharge (February 11, 1996) to the date of the discovery of the missing documents (June 24, 1996) amounts effectively to an unlawful retroactive discharge of the nature involved in *Tracy*.**

(R. 13: 1, pp. 3-6)(emphasis added).

Regarding Brenon's request for attorney's fees and costs related to activity in the case performed since the interim order dated June 23, 1998, the Commission stated:

> In his brief in support of his motion for costs incurred in this proceeding before the Commission since its June 23, 1998, interim decision denying [Brenon's] first motion for costs, [Brenon] focuses primarily on [UWM's] litigation of the replevin action. As has just been discussed, costs are not recoverable in this proceeding before the Commission for [Brenon's] litigation expenses incurred in the replevin action. The only reference [Brenon] makes to [UWM's] handling of the Commission proceeding itself since June 23, 1998, is the contention that [UWM] deviated from and had never sought to be relieved from "its stipulation to let [the Commission] decide the back pay issue based on the briefs filed in the early fall of 1998." . . . However, the record on this point ultimately does not support [Brenon's] contention.
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> . . .
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> . . . [UWM] ultimately did not sustain its burden on the issue of mitigation. However, losing a case does not mean that a party was not substantially justified in its position. *See, e.g., Stern v. DHFS*, 212 Wis. 2d 393, 397, 569 N.W.2d 79 (Ct. App. 1997).

> Given the apparent discrepancies in [Brenon's] financial records in the amount of about $78,000, [UWM] had a reasonable basis for proceeding as it did.

(R. 13: 1, pp. 6-10)(footnotes omitted).

On December 17, 1999, Brenon and the Board commenced separate proceedings under Wis. Stat. §§ 227.52-227.57, for judicial review of those parts of the Commission's decision that were adverse to them. The proceedings were consolidated and, on May 31, 2001, the Circuit Court by Judge Michael Nowakowski issued its decision and order (R. 24). The Circuit Court affirmed the Commission's decision in all respects except with respect to the after-acquired evidence issue. With respect to that issue, the Circuit Court concluded ruled that the after-acquired evidence rule may be applied in state civil service cases, that UWM did not waive the opportunity to raise the issue of after-acquired evidence, and that the Commission abused its discretion by refusing to consider the after-acquired evidence that UWM sought to present (R. 24, pp. 20-30).

Brenon and the Commission now appeal regarding the after acquired evidence issue, and Brenon appeals regarding the "substantially justified" issue.

ARGUMENT

I. THE COMMISSION UNREASONABLY REFUSED TO CONSIDER THE AFTER-ACQUIRED EVIDENCE OF BRENON'S UNAUTHORIZED REMOVAL OF DOCUMENTS FROM UWM.[2]

In *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995), a case arising under the federal Age Discrimination in Employment Act (ADEA), the court addressed the question of whether **all** relief must be denied when an employee is unlawfully terminated because of age but the employer later discovers evidence of wrongful conduct by the employee that would have led to termination of the employee if it had been discovered earlier. In that case, the employer learned, while deposing the employee in her age discrimination lawsuit, that she had copied and taken home several confidential documents during her final year of employment. A few days after the deposition, the employer sent the employee a letter stating that the copying and removal of the documents was in violation of her job responsibilities and advising her (again) that she was terminated. The letter also stated that if the employer had known of her misconduct, it would have terminated her at once for that reason.

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[2] The Commission recognizes that a question of law is presented, that a reviewing court is not bound by an agency's conclusions of law, and the issue clearly is one of first impression that the Commission has never addressed, but the Commission nonetheless contends that this court must apply a "due weight" standard of review (Commission's brief, pp. 8-9). The Commission's contention is unpersuasive. The Circuit Court correctly decided that the issue of whether the after-acquired evidence doctrine applies in this case is a legal question of first impression that is subject to *de novo* review (R. 24: 21). *See Kelley Co., Inc. v. Marquardt*, 172 Wis. 2d 234, 245, 493 N.W.2d 68 (1992).

The court held that such after-acquired evidence of wrongdoing does not bar the employee from **all** relief, and that a violation of the ADEA could not be "so altogether disregarded." *See McKennon*, 513 U.S. at 357-57. Nonetheless, the court concluded that equity required that the after-acquired evidence of wrongdoing be taken into account "lest the employer's legitimate concerns be ignored altogether." *See id.* at 361. Accordingly, the court concluded:

> . . . [A]s a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, **and will terminate**, in any event and upon lawful grounds.
>
> The proper measure of backpay presents a more difficult problem. Resolution of this question must give proper recognition to the fact that an ADEA violation has occurred which must be deterred and compensated without undue infringement upon the employer's rights and prerogatives. The object of compensation is to restore the employee to the position he or she would have been in absent the discrimination, . . . but that principle is difficult to apply with precision where there is after- acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it. Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. **The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered.** In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party. An absolute rule barring any recovery of backpay, however, would undermine the ADEA's objective of forcing employers to consider

> and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination.
>
> **Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge**. . . .

See id. at 361-62 (emphasis added).

Significantly, the court ruled that in such cases of after-acquired evidence of wrongdoing, reinstatement is not appropriate and backpay runs from the date of the unlawful discharge to **the date the new information was discovered**. Although the employer in *McKennon* literally discharged the employee a second time, the court did not rule that such a formality was required. The court recognized this also when it stated that it is pointless to order the reinstatement of an employee who the employer **will terminate** in any event and upon lawful grounds. *See id.* at 362.

In Brenon's case, as in *McKennon*, UWM discovered while deposing him in June 1996, that he had copied and taken home confidential documents without authorization. UWM was prepared to prove that UWM would have terminated Brenon if it had known about his conduct (R. 13: 49, pp. 24-33). The Commission refused to permit UWM to present its after-acquired evidence on the grounds that UWM waived its right to present such evidence (R. 13: 1, pp. 4-5, and R. 6, pp. 8-11), and that the after-acquired evidence rule does not apply in cases arising under state civil service law (R. 1, pp. 6-7). Such refusal was unreasonable and was properly reversed by the circuit court for two principal reasons.

First, UWM did **not** waive the issue of after-acquired evidence. Although UWM first learned of Brenon's wrongful conduct during his deposition in June

1996, the hearing in this case was bifurcated on the issues of liability and remedy, the issue noticed for the remedy hearing was "Remedy" (and one sub-issue was "what is the sum of [Brenon's] remedy"), the after-acquired evidence rule relates to the appropriate remedy, *see McKennon*, 513 U.S. at 361-62, and UWM attempted to present its after-acquired evidence at the remedy hearing (R. 13: 49, pp. 24-33). Moreover, to the extent that Brenon legitimately was surprised that the after-acquired evidence issue would arise in the remedy hearing, the Commission reasonably could have continued the hearing and permitted Brenon an opportunity to prepare to litigate the issue. Contrary to the Commission's position, the burden was not on UWM to seek such a continuance.

As the Circuit Court explained in its decision in this case, citing *Magyar v. WHCLIP*, 211 Wis. 2d 296, 303-04, 564 N.W.2d 766 (1997), excluding relevant evidence in the case of surprise is a "drastic measure" and usually should be avoided by granting a continuance so that the surprised party will have more time to prepare (R. 24: 27). Any unfair surprise is outweighed in this case by the probative value of the evidence, *i.e.*, "[i]f UWM is able to prove the elements of its claim, the back pay award it owes to Brenon may be as little as $17,514.43 rather than the $159,533.64 the Commission awarded in the absence of the after-acquired evidence" (R. 24: 27-28). Moreover, the Commission in this case failed to explain why a continuance was not possible or how much delay would have resulted from granting a continuance (R. 24: 28-29). Finally, the Commission did not purport to exclude the after-acquired evidence as a sanction for any "egregious" noncompliance by UWM with any ambiguous duty to have disclosed the after-acquired evidence issue prior to the hearing on remedy (R. 24: 29-30).

Second, and of greater significance for this case and for future cases, the after-acquired evidence rule **does** apply in cases arising under state civil service law. The Commission argues, to the contrary, that UWM should not

be permitted to present after-acquired evidence because it effectively operates as a second termination of Brenon, and because a state employee with permanent status in class like Brenon cannot be terminated, as a matter of constitutional due process and state civil service requirements, without a pre-termination hearing and a statement of reasons for the termination, neither of which have occurred in Brenon's case. The Commission cites *State ex rel. Tracy v. Henry,* 219 Wis. 53, 262 N.W. 222 (1935), in support of its argument.

The difficulty with the Commission's position is that it fails to afford sufficient weight to the State's legitimate concerns, and the requirements of equity, that after-acquired evidence of wrongdoing be taken into account when crafting a remedial order. *See McKennon,* 513 U.S. at 361-62. There is no persuasive reason why the after-acquired evidence rule should not be applied in cases under Wisconsin civil service law to the same extent that it applies in cases arising under federal and state laws prohibiting employment discrimination. The State's interest in not unjustly rewarding state employees who engage in wrongdoing is no less compelling than the comparable interest of all other employers.

When an employer seeks to rely upon after-acquired evidence of wrongdoing, the employer is not formally terminating the employee for a second time; the employer is only seeking, as a matter of equity, to reduce the amount of back pay that the employee may recover for the original termination. In order to prevail, the employer need only establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge. *See McKennon,* 513 U.S. at 361-62.

As the Circuit Court observed, the *Tracy* case cited by the Commission does not require a contrary conclusion (R. 24: 22). In its learned decision, the Circuit Court

addressed both *Tracy* and the other arguments advanced by the Commission:

> The court in Tracy was not addressing or deciding whether the after-acquired evidence doctrine was applicable in determining the proper remedy for the wrongly discharged public employees. It was addressing and did decide whether, as the state contended, a subsequent discharge for valid reasons could be applied retroactively so as to defeat the employee's right to be reinstated. It resolved that issue by concluding it could not. If anything, however, the decision in Tracy is entirely consistent with the decision in McKennon. The court affirmed the trial court's order that required reinstatement and back pay up to the time of reinstatement for all of the inspectors who had not been sent a subsequent discharge letter. But for those who had been sent such a letter, the trial court's order, also affirmed, provided that they receive back pay only up to the "date of the alleged subsequent discharged." 219 Wis. at 58. The legitimate interests of the employer were protected while the wrongful nature of the original discharge was not ignored. The state was not required to reinstate the employees and pay back pay up to the reinstatement only so that it could then terminate them for the subsequently discovered good reasons. The employees, on the other hand, were not deprived of any remedy for their clearly illegal original discharge even though the state later discovered valid reasons to terminate them which had existed prior to that original discharge.
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> . . . In Tracy the state had not been required to restore the employees to their former jobs before discharging them for the after-acquired reasons. The court expressly approved a court order that required no such artificial formalities. Second, to apply the after-acquired evidence doctrine to the calculation of Brenon's back pay award would not amount to an "unlawful retroactive discharge" like that in Tracy. In Tracy what the court found unlawful was the state's effort to make the subsequently discovered valid reasons for discharge retroactive all the way back to the original discharge thereby defeating completely the claim of the employees. That is not what UWM seeks to do here; and if it is

> successfully, that is not the effect that its effort would have.
>
> The Commission . . . contends that this case should be distinguished from McKennon on the basis that the employer there was a private business while here UWM is a public employer. There is no question that this difference is present, but it is a difference without significance. In McKennon the Supreme Court focused on the equitable nature of the context within which a court operates in constructing a remedy for improper discharge. 513 U.S. at 360. It balanced legitimate interests that both employees and employers have in such circumstances, but none of them arose from the employer's status as a private business. More importantly, the "employer's legitimate concerns" that the Supreme Court was seeking to not ignore, id. at 361, are no different for UWM than they were for the Nashville Banner Publishing Company . . . . It is true that a tenured public employee like Brenon has greater substantive protection from discharge than does an at-will employees like Christine McKennon, but again this differnece has no bearing on the rationale for the after-acquired evidence doctrine. Where an original discharge is improper, as it was in McKennon and was here, the employer, whether private or public, will still have the burden to demonstrate that the "wrongdouing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it as the time of the discharge." Id. at 363-63. Because of this requirement, civil servants lose no protection when an attempt is made to use the doctrine . . . . [There is] most assuredly no reason why the balanced approach of the after-acquired evidence doctrine should not be applied in calculating back pay in wrongful discharge civil service cases. While no case has confronted the issue here in Wisconsin, I predict that if and when that occurs, the appellate courts will conclude that the doctrine is applicable in this context.

(R. 24: 22-26)(footnote omitted).

In summary, this court should hold that the after acquired evidence rule **does** apply in cases arising under Wisconsin civil service law, and that UWM did not waive

the opportunity to present such evidence in this case. Consequently, this Court should affirm the Circuit Court's order that remanded this case to the Commission for a new hearing on the after-acquired evidence issue

II. THE COMMISSION'S DETERMINATION OF WHETHER AN AGENCY IS SUBSTANTIALLY JUSTIFIED IN TAKING A POSITION MUST BE AFFIRMED IF IT IS REASONABLE.

Wisconsin Statute § 227.485(3) authorizes the Commission to award costs to the prevailing party in a contested case unless the Commission finds that the state agency which is the losing party was "substantially justified" in taking its position or that "special circumstances" exist that would make the award unjust.[3] The issue of whether a state agency was "substantially justified" in taking its position is a question of law. *See Susie Q Fish Co. v. Dept. of Revenue*, 148 Wis. 2d 862, 868, 436 N.W.2d 914 (Ct. App. 1989).

Although a reviewing court is not bound by a decision-making agency's interpretation and application of a statute, the court will defer and give great weight to the agency's interpretation of the statute when (1) the agency is charged by the legislature with the duty of administering the statute, (2) the interpretation of the agency is one of long-standing, (3) the agency employed its expertise or specialized knowledge in forming the interpretation, and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *See id.* at 593-94.; *Kannenberg v. LIRC*, 213 Wis. 2d 373, 384-85, 571 N.W.2d 165 (Ct. App. 1997),

[3] In this case, the Board and UWM argued, and the Commission decided, that UWM was "substantially justified" in taking its positions. Consequently, the "special circumstances" standard does not apply in this case.

quoting *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). A reviewing court also will give great weight to an agency's interpretation if it is "intertwined with factual determinations or with value or policy determinations." *See Kannenberg*, 213 Wis. 2d at 385. Under the great weight standard of review, the agency's reasonable interpretation of the statute will be upheld if it is not contrary to the clear meaning of the statute, even if the reviewing court were to conclude that another interpretation of the statute was more reasonable. *See id.*

A reviewing court will give a lesser amount of deference, due weight, when the agency has some experience in the area but has not developed the expertise that necessarily places it in a better position than the court to make judgments regarding the interpretation of the statute. *See id.* Under the due weight standard of review, the agency's reasonable interpretation of the statute will be affirmed if it comports with the purpose of the statute, unless the reviewing court concludes that there is a more reasonable interpretation. *See id.* Finally, a reviewing court will give no weight to the agency's interpretation of the statute and will employ a de novo standard of review when the issue before the agency is one of first impression or when the agency's position has been so inconsistent as to provide no real guidance. *See id.* at 385-86.

In this case, the Commission's determination of whether UWM was substantially justified in taking its positions is entitled to great weight. The Commission is charged by law with adjudicating civil service appeals under Wis. Stat. § 230.44(4), including the determination of whether a state agency is substantially justified in taking its position before the Commission. *See* Wis. Stat. § 227.485(3). The Commission's interpretation and application of Wis. Stat. § 227.485(3) are of long-standing, and the Commission has employed expertise and specialized knowledge in interpreting and applying the statute. *See Escalada-Coronel v. DMRS,* Case No. 82-00590-PC (3/18/87); *McCready and Paul v. DHSS*, Case Nos. 85-0126-PC and 85-0127-PC (9/10/87); *Anderson et*

al v. DER, Case No. 86-0098-PC (11/18/87); *Manthei et al. v. DER*, Case Nos. 86-0116, etc.–PC (1/13/88); *Givens v. DILHR*, Case No. 87-0039-PC (3/28/88); *Showsh v. DATCP*, Case No. 87-0201-PC (3/14/89); *Duello v. UW-Madison,* Case No. 87-0044-PC-ER (3/9/90); *Kumrah v.* DATCP, Case No. 87-0058-PC (4/17/90); *Christofferson et al. v. DER,* Case No. 90-0058,etc.-PC (2/17/91); *Arneson v. UW*, Case No. 90-0184-PC (5/14/92); *Zentner v. DER*, Case No. 93-0032-PC (8/18/94); *Olson et al. v. DER*, Case No. 92-0071, etc.-PC (3/9/95); *Murray v. DER*, Case No. 91-0105-PC (4/6/95); *Higgins v. Wisconsin Racing Board*, Case No. 91-0020-PC (3/31/94); *Shew v. DHSS,* Case No. 92-0506-PC (3/29/94); *Rentmeester v. Wisconsin Lottery*, Case No. 91-0243-PC (9/9/94); *Davis v. ECB*, Case No. 91-0214-PC (12/5/94); *Lyons v. WGC*, Case No. 93-0206-PC (2/20/95); *Van Ruden et al v.* DER, Case Nos. 91-0149-PC, etc. (11/17/95); *Smith v. DMRS*, Case No. 90-0032-PC (1/5/96); *Briggs v. DNR and DER*, Case No. 95-0196-PC (10/2/96); *Fulk et al. v. DHSS and DER,* Case No. 95-0004, etc.-PC (5/28/96); *Pearson v. UW*, Case No. 84-0219-PC (2/12/97). *Klemmer v. DHFS*, Case No. 97-0054-PC (10/9/98). In view of this long-standing interpretation and application of the statute, the Commission's interpretation and application will provide uniformity and consistency. Consequently, the Commission's determination of whether UWM was substantially justified in taking its positions must be affirmed if it is reasonable. *Cf. Susie Q Fish Co.*, 148 Wis. 2d at 868-69.[4]

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[4] By comparison, a circuit court's determination of whether a state agency was "substantially justified" in taking its position is reviewed using an abuse of discretion standard of review. *See Sheely v.* DHSS, 150 Wis. 2d 320, 337, 442 N.W.2d 1 (1989); *DILHR v. LIRC*, 155 Wis. 2d 256, 270, 456 N.W.2d 162 (Ct. App. 1990). A circuit court's exercise of discretion will be affirmed if the court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

III. THE COMMISSION REASONABLY COULD CONCLUDE THAT UWM WAS SUBSTANTIALLY JUSTIFIED IN TAKING THE POSITION THAT BRENON WAS NOT DENIED DUE PROCESS WHEN HE WAS SUSPENDED FOR TEN DAYS WITHOUT PAY.

A. An agency's position is "substantially justified" if it has a reasonable basis in law and fact.

An agency's position is "substantially justified" if it has a reasonable basis in law and fact. *See* Wis. Stat. § 227.485(2)(f); *Sheely*, 150 Wis. 2d at 337. The agency must demonstrate (1) a reasonable basis in truth for the facts alleged, (2) a reasonable basis in law for the theory propounded, and (3) a reasonable connection between the facts and the legal theory advanced. *See Sheely,* 150 Wis. 2d at 337. Losing a case does **not** raise the presumption that the agency was not substantially justified. *See id.* at 337-38. Nor does advancing a novel but credible extension or interpretation of the law. *See id.* at 338. Finally, when determining whether an agency's position was substantially justified, it is appropriate to look to "'the record of both the underlying government conduct at issue and the totality of circumstances present before and during litigation.'" *See Bracegirdle v. Dept. of Reg. & Lic.*, 159 Wis. 2d 402, 425, 464 N.W.2d 111 (Ct. App. 1990), *quoting Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987); *Stern v. DHFS*, 212 Wis. 2d 393, 401 n. 5, 569 N.W.2d 79 (Ct. App. 1997).

B. UWM was substantially justified in taking the position that Brenon was not denied due process when he was suspended for ten days without pay.

Although the Commission rejected the ten-day suspension of Brenon on the ground that UWM violated Brenon's due process rights by failing to provide him with adequate notice and a pre-disciplinary hearing prior to his suspension (R. 13: 39, pp. 8-10; R. 13: 34, pp. 5-7), the Commission nonetheless determined that UWM was substantially justified in taking the position that the suspension did not violate Brenon's due process rights.[5] The Commission found that Brenon was given notice of the specific allegation against him (repeating the "Million Man March" joke), he was given the opportunity to answer the allegation at the meeting with Sroka, he was made aware that the purpose of the meeting was to discuss the allegation and what consequence should follow, he was provided notice at the end of the meeting that a ten-day suspension was being contemplated, and he was provided an opportunity, through his meeting with Chief Clark, to persuade UWM to impose a lesser penalty (R. 13: 29, 3). In view of these findings, the Commission concluded that "this pre-disciplinary process possessed enough of the attributes of a sufficient due process proceeding to support a conclusion that [UWM] had a reasonable basis in law and fact for contending that the just cause standard had been met in this regard" (R. 13: 29, p. 3).

Brenon appears to challenge the Commission's determination primarily on the ground that the evidence

[5] Since the Commission rejected the suspension on due process grounds, it did not reach the merits of the issues presented, *i.e.*, whether there was just cause for the suspension and whether a ten-day suspension was excessive. Consequently, it is unnecessary to address whether UWM was substantially justified in taking the position that there was just cause for a ten-day suspension.

does not support the Commission's finding that the meeting with Chief Clark provided Brenon with an opportunity to persuade UWM to impose a lesser penalty. Brenon cites Sroka's testimony for the proposition that the level of discipline was out of Clark's hands and had been decided by the UWM "administration" (R. 13: 52, p. 603). To the contrary, however, the evidence of record supports the Commission's finding.

Chief Clark testified that he told Sroka that he considered the allegations against Brenon very serious, that if the allegations in fact were true, he was considering discharge, but that, if it were true and Brenon were remorseful, then he would consider a ten-day suspension (R. 13: 51, pp. 382, 406). Clark testified that **he** made the ultimate decision on discipline, after consulting with Sroka and with UWM Human Resources to find out what the past practice was in such cases (R. 13: 51, pp. 383-84, 408, 411, 414-15). Clark testified that he later informed Assistant Chancellor Don Melkus of his decision to suspend Brenon for ten days (R. 13: 51, p. 384).

Clark specifically denied that when he spoke with Sroka, he already had talked to "administration" about potentially terminating Brenon (R. 13: 51, pp. 406-07). He denied that he had been talked out of termination by "administration" which is how the ten-day suspension was arrived at (R. 13: 51, p. 408). He denied that he told "administration" that he wanted to terminate Brenon (R. 13: 51, p. 408). He denied that he told Sroka that he wanted to terminate Brenon but that "administration" would not back him (R. 13: 51, p. 410). He denied that he told Sroka that it was out of his hands, that it was not going to be a simple warning, and that there was going to be a suspension (R. 13: 51, p. 414).

Stroka testified that after Clark told him to prepare the ten-day suspension letter, Clark did **not** indicate that the matter of discipline was out of his hands (R. 13: 52, pp. 597-98). Stroka also testified, however, that Clark stated to him that it was good that Brenon had admitted

the jokes because if he hadn't, the administration wanted him fired (R. 13: 52, p. 598). When asked for the second time whether Clark had indicated to him in any way that the matter of the level of discipline was out of his hands, Stroka testified "Not in those words, but with what I testified to before, I took that to mean that." (R. 13: 52, p. 603).

In view of Clark's specific denial that the matter of the level of discipline was out of his hands, and in view of the Stroka's testimony that Clark never told him otherwise, then, despite Stroka's conjecture, the Commission could reasonably credit Clark's testimony. In addition, although the Commission also credited Brenon's testimony that Clark told him "this is a done deal. I will not reconsider," and also told him "if it's overturned, it's overturned" (R. 13: 34, p. 7; R. 13: 52, p. 661), such testimony is not inconsistent with the Commission's finding that the meeting with Chief Clark provided an adequate opportunity for Brenon to persuade UWM to impose a lesser penalty than a ten-day suspension.

In summary, the Commission reasonably could determine that UWM was substantially justified in taking the position that Brenon was not denied due process when he was suspended for ten days without pay.

IV. THE COMMISSION REASONABLY COULD CONCLUDE THAT UWM WAS SUBSTANTIALLY JUSTIFIED IN TAKING THE POSITION THAT BRENON'S EMPLOYMENT SHOULD BE TERMINATED.

Although the Commission determined that there was just cause to discipline Brenon for only some of the conduct for which his employment was terminated by UWM, and although the Commission determined that a ten-day suspension was a more appropriate level of

discipline than termination, the Commission nonetheless determined that UWM was substantially justified in taking the position that Brenon's employment should be terminated (R. 13: 29, p. 3; R. 13: 34, 39, pp. 13, 16-17). The Commission found that Brenon had simulated masturbation while joking about another officer, on at least one occasion, and that he misrepresented the truth about the incident to Chief Clark (R. 13: 34, 39, p. 17). The Commission found that Brenon made reference to having to "drain Lucky" when announcing that he was going to the men's room (R. 13: 34, 39, pp. 13, 17). The Commission further found that UWM reasonably relied upon representations by Brenan's co-workers that he was continuing to engage in the type of behavior cited as the basis for his previous discipline (R. 13: 29, p. 3). The Commission found that although certain of these representations were not corroborated at hearing, UWM had no reason to doubt the reliability of the representations when it decided to terminate Brenon's employment because the representations not only came from several apparently independent sources but because they also were consistent with a pattern of behavior Brenon had exhibited over a period of time (R. 13: 29, p. 3). Finally, the Commission decided that it was reasonable for UWM to terminate Brenon's employment, based upon these representations, because it was the next step in the progressive discipline process (R. 13: 29, p. 3).

Brenon argues that UWM was not substantially justified in taking the position that Brenon's employment should be terminated because his suspension was excessive and therefore termination was not the next step in the progressive discipline process. As the Commission reasonably concluded, however:

> [I]t was reasonable for [UWM] to have relied upon representations made by [Brenon's] co-workers to the effect that he was continyuing to engage in the type of behavior cited as the basis for his previous discipline. In addition, since discharge was the next step in the progressive discipline

> process, it was reasonable for [UWM] to have decided to discharge [Brenon} on these representations by co-workers.

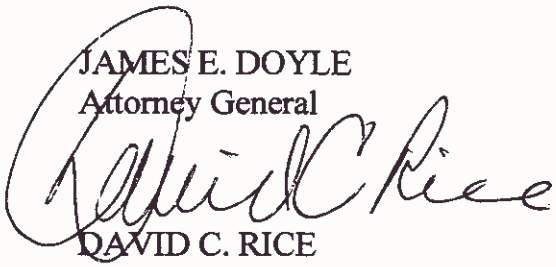
(R. 13: 29, p. 3).

Consequently, the Commission reasonably could conclude that UWM was substantially justified in taking the position that Brenon's employment should be terminated.

CONCLUSION

The Board respectfully requests that the court affirm the order of the Circuit Court in its entirety.

JAMES E. DOYLE
Attorney General



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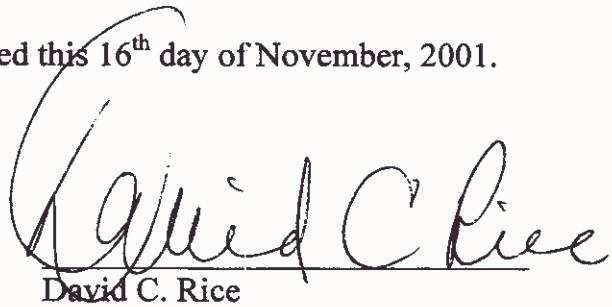
Dated this 16th day of November, 2001.



David C. Rice
Assistant Attorney General

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT IV

Appeal No. 01-1899

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner-Respondent,

v. Circuit Court Case No. 99-CV-2959

STATE OF WISCONSIN PERSONNEL
COMMISSION,

Respondent-Respondent-Co-Appellant,

DALE R. BRENON,

Appellant.

DALE R. BRENON,

Petitioner-Appellant,

v. Circuit Court Case No. 00-CV-661

STATE OF WISCONSIN PERSONNEL
COMMISSION,

Respondent-Respondent.

Appeal from Final Judgment
Dane County Circuit Court, Case Nos. 99-CV-2959 and 00-CV-661
Honorable Michael N. Nowakowski Presiding

PETITIONER-APPELLANT, DALE R. BRENON'S, REPLY BRIEF

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STATEMENT OF FACTS

By letter dated January 15, 1999, Senior University Legal Counsel represented to Commissioner Murphy of the Personnel Commission that a hearing was "imperative" because "issues of material fact exist regarding wages earned from other sources." (R. 13; A.App. 67) UWM argued in that letter that appellant had refused to comply with discovery requests regarding his bank accounts, that he had not signed answers to discovery requests and that he had refused to answer questions about bartering of services. (Id.) Further, UWM's counsel claimed that Sgt. Brenon misrepresented his income since secretly subpoenaed bank records revealed $80,000 in deposits from 1996 through 1998. Commissioner Murphy ultimately, after hearing testimony on these issues, found no wrong doing whatsoever on Sgt. Brenon's part. (R. 13:6; A.App. 9-19)

More importantly, however, in this letter, UWM identified very specifically why it was seeking a hearing. Commissioner Murphy granted this request for a hearing. From January 15, 1999 through to the date of the hearing, UWM never sought to amend its request for a hearing to include after-acquired evidence theories. Commissioner Murphy's prehearing notice also reflects UWM's request. (R. 13:12)

While UWM's brief spends much of its time attempting to rationalize why UWM failed to provide notice to the Personnel Commission and/or to Sgt. Brenon, the brief fails to deal with the fundamental issue: Why should UWM be relieved of its

requirement to provide notice to Sgt. Brenon of the grounds for termination? Based on the record before this court, there is simply no logical explanation to suggest a valid and equitable reason why the ambush tactics of UWM should be validated by this court. The mere fact that UWM, after years of aggressive litigation, was confronted with a substantial back pay award does not in any way indicate that fairness requires a party to be surprised at a hearing and, to his or her detriment, requires that party to request a continuance because of the failure of the other party to provide notice.

ARGUMENT

I. STANDARD OF REVIEW.

A reviewing court should not substitute its judgment for that of the agency if the agency's conclusion has a rational basis. American Motors Corp. v. LIRC, 119 Wis.2d 706, 710, 350 N.W.2d 120, 122 (1984). Further, appellate courts are to give weight to legal conclusions reached by an administrative agency when the agency's expertise was significant to the determination. Nottleson v. DILHR, 94 Wis.2d 106, 116, 287 N.W.2d 763, 768 (1980).

The Personnel Commission has experience and expertise in applying the civil service statute and in analyzing due process considerations. The Personnel Commission concluded that Sgt. Brenon's interests under the civil service code and the requirements of due process precluded UWM from introducing

after-acquired evidence in an attempt to limit back pay. (R. 13:184-186; R. 13:10-20) Because the Commission has expertise in addressing these types of employment issues and because the Commission's decision to exclude the after-acquired evidence had a rational basis based in part on the civil service statute and the Commission's experience in applying it, its decision is entitled to deference and should be affirmed.

II. EQUITABLE PRINCIPLES SUPPORT THE PERSONNEL COMMISSION'S DECISION TO EXCLUDE THE SURPRISE EVIDENCE.

While equity seeks to do justice and to avoid injustice, one must look more closely at the circumstances surrounding what UWM views as justice. UWM, without support from the record, suggests that this case was bifurcated on the remedy issues. In August of 1996, the original "just cause" hearing was held. At that time there was no discussion that the decision on back pay would not be made for another three years. When UWM rested its case, there was no request to hold open issues related to back pay. Despite having learned several months prior to hearing that Sgt. Brenon had taken documents home, there was no request in August of 1996 to present that issue at any subsequent hearing.

A. He Who Seeks Equity Must Do Equity.

Before UWM can seek equitable relief in this case, it must show why it had no duty to notify the Personnel Commission and/or Sgt. Brenon that it was relieved from the requirements of §230.34(1)(b), Wis. Stats. and State Ex Rel

Tracy v. Henry, 219 Wis. 53, 262 N.W. 222 (1935). No equitable principle can possibly be served by allowing UWM to not only fail to raise this issue throughout the stipulated briefing schedule on back pay but to allow UWM to affirmatively misrepresent to Sgt. Brenon that the document issue would be raised in a separate disciplinary action. As noted by the Personnel Commission, UWM's attorney indicated that the document issue would be raised in a post-reinstatement hearing. (R. 13:8, pp. 11-12)

UWM asserts that McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995), apparently stands for the proposition that procedural requirements can be ignored. There is nothing in that case to suggest that interpretation. In fact, the facts of McKennon clearly suggest otherwise. In McKennon, the plaintiff was deposed on December 18, 1991.

> A few days after these deposition disclosures, the Banner sent McKennon a letter declaring that removal and copying of the records was in violation of her job responsibilities and advising her (again) that she was terminated.

McKennon, 513 U.S. 352, 353 (1995). The factual background reveals that the employer in McKennon, although not subject to the civil service rules, nonetheless submitted notice to the employee of the additional grounds for termination promptly after discovery of the misconduct. Unlike the employer in McKennon, UWM is subject to the civil service rules and is required by statute to provide such notice. The notice

provision is not an erroneous one. It is in no way burdensome for UWM to provide such notice in a timely fashion. On the other hand, there is no legitimate reason for UWM to wait three years and then surprise Commissioner Murphy and Sgt. Brenon with a new issue at a hearing that it had requested on other grounds.

It is clear from the decision that McKennon is uniquely an ADEA case. There is nothing in McKennon to suggest that it is overruling years of precedent relating to civil service rules around the country. More importantly, the requirements of §230.34(1)(b), Wis. Stats. were not in any way revised by the legislature in the face of McKennon.

UWM took a calculated risk in failing to comply with State Ex Rel Tracy and the civil service statute. It cannot now be heard to complain that as a result of its own strategies it was precluded from addressing what it now claims to be a significant issue. The fact that UWM failed to notify anyone of this "issue" underscores the fact that it is now being raised only in the face of a significant back pay award.

B. Sgt. Brenon Is Not Required To Request A Continuance.

UWM attempted to raise a new issue and introduce evidence not previously raised in UWM's attorney's request for a hearing. Counsel for Sgt. Brenon appropriately objected. Commissioner Murphy excluded the evidence. The only time that Sgt. Brenon would be required to request a continuance is if

Commissioner Murphy allowed the admission of the evidence. At that point, Sgt. Brenon would have to request a continuance to meet the evidence or be barred from complaining later of the lack of opportunity to do so. Wisconsin Judicial Bench Book, Vol. 2, CV 10-9. In addition, §802.09(2), Wis. Stats., further indicates that the objecting party may seek a continuance if the court allows the amendment of pleadings and the court holds that "the admission of such evidence would not prejudice the objecting party in maintaining the action or defense upon the merits." Logic dictates that it is the party whose is prejudiced, in this case arguably UWM, that must seek a continuance. UWM failed to do so at the May 18, 1999 back pay hearing.

C. Reversal Of The Personnel Commission's Decision Will Encourage Litigants To Delay Justice.

As previously discussed, there is no legitimate reason for allowing nearly a three-year delay in providing notice to Sgt. Brenon of new grounds for termination. Additionally, there are numerous reasons why this court should not endorse such tactics.

In this case, UWM continually raised hurdles to Sgt. Brenon's reinstatement. Time and again, motions were raised to delay the process. In this case, UWM went so far as to commence collateral litigation. As previously noted, despite stipulating to the back pay issue being decided upon briefs, UWM sought further delay by seeking a hearing, not on "after-

acquired evidence" but rather on evidence it sought to present to the Commissioner in its reply brief. UWM's tactics again sought to preclude Sgt. Brenon from defending against the evidence offered against him. Commissioner Murphy granted UWM's request for hearing solely to address the issues UWM's attorney raised in her January 15, 1999 letter.

UWM is attempting to create a precedent that employers seeking to delay or avoid reinstatement need merely raise new issues at remedial hearings to delay ultimate dispositions. This attempt must fail. This court should keep in mind that the "after-acquired evidence" issue is not a minor one that can be dealt with solely by an exhibit or one witness. Sgt. Brenon had not been afforded discovery on this issue. No depositions of his supervisors had taken place to determine whether there even was a policy preventing Sgt. Brenon from taking work home. Sgt. Brenon had not named witnesses on this issue. Even if a continuance had been granted, it would not have been a brief adjournment given that discovery and a new hearing schedule would have been required. Given the likelihood of abuse of such a process, this court should not in any way condone the methods or tactics utilized by UWM.

III. THE PERSONNEL COMMISSION ERRED IN DENYING ATTORNEY'S FEES.

A. UWMPD Was Not Substantially Justified In Taking The Position That Sgt. Brenon Was Not Denied Due Process When He Was Suspended For Ten Days Without Pay.

On review, this court must award attorney's fees and costs unless UWMPD can satisfy this court that it was "substantially justified" in the position it took. Section 227.485(6), Wis. Stats. UWM and the Personnel Commission both argue that UWMPD was substantially justified in taking the position that Sgt. Brenon was not denied due process when he was suspended without pay for ten days because the process they did provide "possessed enough of the attributes of a sufficient due process proceeding." However, a thorough review of the evidence reveals that the process that was provided to Sgt. Brenon was inconsistent with the department's established internal policies and rules and that this process seriously violated Sgt. Brenon's rights as a civil service employee.

UWM argues that because Sgt. Brenon was given notice of the allegations against him and given the opportunity, through his meeting with Chief Clark, to answer the allegations and persuade UWM to impose a lesser penalty, he was provided with enough meaningful process to satisfy the "just cause" standard. However, this argument fails to take into account several important considerations including what actually

occurred during this meeting between Sgt. Brenon and Chief Clark.

At the 1996 hearing conducted by the Personnel Commission, Chief Clark could not recall what occurred during the meeting with Sgt. Brenon, whereas Sgt. Brenon could recall what occurred. Sgt. Brenon testified he told Chief Clark that he (Brenon) was shocked and surprised that a 10-day suspension would be imposed and he (Brenon) felt the level of discipline was wrong and too severe. Further, according to Sgt. Brenon's testimony, Chief Clark informed him that the decision to suspend him was a "done deal" and was out of his hands since the administration had already made the decision. Clearly, the requirements of due process were not satisfied by Sgt. Brenon's meeting with Chief Clark. Chief Clark was not the ultimate decisionmaker on Sgt. Brenon's discipline and the decision had already been made at the time that Sgt. Brenon met with Chief Clark to discuss the suspension. This meeting can hardly be considered meaningful due process.

UWM also failed to follow established internal department policies and rules when it imposed the ten-day suspension on Sgt. Brenon. Sgt. Brenon was not provided with a pre-disciplinary hearing or with any other meaningful opportunity to be heard on the allegations against him. Further, UWM failed to follow the union rules with respect to investigation of complaints which it applies to both union and non-union

employees. (Depo. of Pamela S. Hoderman, June 25, 1996, at 29-30.) The union rules require that discipline be imposed progressively, with the first step being a reprimand. (R.13:52:500-501; A.App. 151-152) Instead of verbally reprimanding Sgt. Brenon, UWM immediately imposed a ten-day suspension. Further, UWM violated the one year look back rule by reviewing Sgt. Brenon's entire record when determining what discipline should be imposed. (R.13:52:668; A.App. 176) Additionally, Sgt. Brenon's immediate supervisor, Lt. Sroka, was essentially kept out of the process contrary to the department's established rules and policies.

An agency's action has no reasonable basis in law and is not substantially justified if the agency fails to follow its own rules. Stern v. Wis. Dept. of Health & Human Servs., 212 Wis. 2d 393, 400-401, 569 N.W.2d 79, 82-83 (Ct. App. 1997); Whiting v. Bowen, 671 F.Supp. 1219, 1231 (W.D. Wis. 1987). Here, UWM was not substantially justified in its actions because it failed to provide due process, and failed to follow the guidelines for disciplinary procedure imposed by the collective bargaining agreement which it voluntarily applied to non-union employees. Further, UWM manipulated the entire process to its advantage. For these reasons, Sgt. Brenon should be awarded attorney's fees. Such an award will act to deter UWM and other agencies from abusing their authority and

will help to protect other employees from experiencing similar manipulations of the system.

B. UWMPD Was Not Substantially Justified in Terminating Sgt. Brenon.

In order to rule against Sgt. Brenon on the issue of attorneys' fees, the Personnel Commission really had to stretch the facts to show that UWM was substantially justified in terminating Sgt. Brenon because it would have been the next step in the progressive discipline process. However, termination was not the next step in the progressive discipline and was clearly inappropriate in light of the fact that the first suspension was not justified and was excessive. The issues of substantial justification of UWM's actions with respect to the ten-day suspension and the termination are inseparable. If UWM was not substantially justified in suspending Sgt. Brenon, then it was clearly not substantially justified in terminating him. For the reasons stated in the previous section, UWM was clearly not substantially justified in imposing the ten-day suspension and, thus, was not substantially justified in terminating Sgt. Brenon. Consequently, Sgt. Brenon should be awarded attorney's fees.

CONCLUSION

Based on the foregoing arguments, Sgt. Brenon respectfully requests that this court affirm the Personnel Commission's decision to exclude the "after-acquired evidence" theory and grant Sgt. Brenon's request for attorney's fees.

Dated this 5th day of December, 2001.

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COURT OF APPEALS OF WISCONSIN
DISTRICT IV
Appeal Case No. 01-1899

Circuit Court Case Nos. 99 CV 2959, 00 CV 661

99 CV 2959
BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner-Respondent,

v

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent-Respondent-Co-Appellant,

DALE R. BRENON,

Appellant.

---

00 CV 661
DALE R. BRENON,

Petitioner-Appellant,

v

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent-Respondent.

REPLY BRIEF OF RESPONDENT-RESPONDENT-CO-APPELLANT STATE OF WISCONSIN PERSONNEL COMMISSION

Appeal from the circuit court for Dane County, Michael Nowakowski, Judge.

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REPLY ARGUMENT

THE PERSONNEL COMMISSION'S DECISION TO EXCLUDE AFTER-ACQUIRED EVIDENCE IN BRENON'S REMEDY HEARING HAD A RATIONAL BASIS.

Of the issues presented in this appeal, the one that is novel is whether the after-acquired evidence rule of ***McKennon v. Nashville Banner Pub. Co.***, 513 U.S. 352, (1995), applies in a civil service case in the State of Wisconsin. The Commission concluded that civil service and due process requirements and the Wisconsin Supreme Court decision of ***State ex rel Tracy v. Henry***, 219 Wis. 53, 262 N.W. 222 (1935) precluded the rule's application. the circuit court, however, disagreed.

Because the Commission's decision that ***McKennon's*** after-acquired evidence rule does not apply was a reasonable interpretation of civil service statutes, due process, and ***State ex rel Tracy***, this court should affirm the decision of the Commission and reverse the decision of the circuit court.

UWM and the Personnel Commission disagree on the standard of review to be applied in this case. The Commission contends that although the issue is novel, the Commission has experience in analyzing due process concerns and civil service statutes. Accordingly, the Commission contends that its decision is entitled to deference. (See Brief of Respondent-Respondent-Co-Appellant State of Wisconsin Personnel Commission, p. 8-9).

UWM, however, contends in a footnote of its brief that because the issue is one of law and of first impression, it is subject to de novo review. (See Brief of the Board of Regents of the University of Wisconsin System, p. 21, fn. 2). The reasoning contained in UWM's brief belies its contention.

UWM states that "the difficulty with the Commission's position is that it fails to afford sufficient weight to the State's

legitimate concerns, and the requirements of equity, that after-acquired evidence of wrongdoing be taken into account when crafting a remedial order." (Brief of the Board of Regents of the University of Wisconsin System, p. 25, citing ***McKennon***, 513 U.S. at 361-362). UWM's argument reinforces why the Commission's decision is entitled to deference.

Ordinarily, when evaluating equitable remedies, the standard of review is one of abuse of discretion of the trial court. See ***Reed v. Reed,*** 205 Wis. 2d 558, 563-4, 556 N.W. 2d 768, 770 (Ct. App. 1996).

> An appeal to equity requires a weighing of the factors or equities that affect the judgment-a function which requires the exercise of judicial discretion. 'The basis of all equitable rules is the principle of discretionary application.'

Id. 205 Wis. at 564, 556 N.W. 2d at 770.

The Personnel Commission does not go so far as to argue that the decision of whether after-acquired evidence may be considered in a remedy hearing is a discretionary decision. However, the equitable concerns present in such a decision, and explicitly acknowledged by UWM, lends support to the Commission's contention that its decision is entitled to deference. As stated by the Wisconsin Supreme Court in ***American Motors Corp. v. LIRC***, 119 Wis. 2d 706, 710, 350 N.W. 2d 120, 122 (1984):

> Although this court is not bound by an agency's conclusions of law, we hesitate to substitute our judgment for that of the agency and a question of law if the agency's conclusion has a rational basis.

This court should conclude that the agency's decision has a rational basis. The Commission concluded that a civil service employee's interests In the civil service code and the requirements of due process precluded application of the after-acquired evidence rule to limit the remedy. [R13:184-186, R13:10-20]. In ***McKennon***, the U.S. Supreme Court did not

consider the employee's interest because the employee was "at will" for a private employer and thus had no property interest in continued employment. Accordingly, the McKennon court had no need to address the due process concerns of ***Cleveland Board of Education v. Loudermill***, 470 U.S. 532 (1985) and other similar cases. In ***Loudermill***, the Supreme Court reiterated the rule of law that civil service employees not only have a property interest in continued employment, but that they cannot be deprived of this interest without due process. ***Loudermill***, U.S. at 538. The Supreme Court has noted the significance of this interest. Id., 470 U.S. at 543. Further, the Supreme Court noted the employees' interests in adequate due process.

> Some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes affect.
>
> ....
>
> The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether permissible course of action is also an appropriate one. This is one way in which providing "effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect . . .[H]is discretion will be more informed and we think the risk of error substantially reduced."

Loudermill, 47 U.S. at 543, fn. 8 (quoting ***Goss v. Lopez***, 419 U.S. at 583-84).

The Commission did not make its decision in a vacuum. While UWM would like the Commission to have afforded more weight towards the employer's interests, as described by

Loudermill in the above quotation, Brenon had significant interests in his continued employment and in receiving due process before his right to employment was eliminated. The trial court's suggestion that the employee's due process concerns could be addressed by a hearing before the Commission in the context of his pending appeal of the initial discharge fails to take into consideration the employee's interests, discussed in ***Loudermill***, in having an opportunity to be heard before the employer makes its final decision to terminate. Furthermore, as noted by the court in the preceding quote, the ***Loudermill*** hearing serves the employer's interests in avoiding an erroneous decision. The Commission appropriately considered all of these considerations and concluded that application of the after-acquired evidence rule would effectively be a second discharge of Brenon without due process and in violation of the civil service code. Because the conclusion of the Commission has a rational basis, it should be affirmed.

Dated this 3rd day of December, 2001.

Respectfully submitted,

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CERTIFICATION

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Dated this 3rd day of December, 2001.

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