STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOSEPH J. McCORISON, Complainant,

vs.

WISCONSIN DEPARTMENT OF TRANSPORTATION
DIVISION OF STATE PATROL, Respondent.

Case 638
No. 63613
PP(S)-342

Decision No. 31052-A

Appearances:

Glen A. Jones, N127W13176 Oakwood Drive, Germantown, Wisconsin 53022-2235, appearing on behalf of Joseph J. McCorison.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, State of Wisconsin, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On April 28, 2004, Complainant filed a complaint with the Wisconsin Employment Relations Commission, alleging that Respondent had committed unfair labor practices in violation of Sec. 111.84(1)(e), Stats., by terminating Complainant's employment as a State Trooper. By June 18, 2004, Glen A. Jones, President of Local 55 of the Wisconsin State Patrol Union, confirmed that Complainant had selected him to serve as his representative. On August 23, 2004, the Commission appointed Richard B. McLaughlin, a member of its staff, to serve as Examiner. Respondent filed an answer to the complaint on September 7, 2004. Hearing on the complaint was conducted in Madison, Wisconsin on September 29 and 30, 2004. At the first day of hearing, Complainant amended the complaint to include an allegation that Respondent violated Sec. 111.84(1)(a), Stats., by failing to issue appropriate warnings to Complainant prior to meetings held on January 26, 2004. Also during the first day of hearing, I indicated to Complainant and Respondent that I would issue a copy of the complaint to a representative of AFSCME Council 24, AFL-CIO, Wisconsin State Employees Union

(WSEU). Nancy L. Delaney filed a copy of the transcript of each day of hearing on October 15, 2004. The parties filed briefs and reply briefs by January 4, 2005. I mailed a copy of the complaint and answer in a letter dated February 7, 2005, to the Assistant Director of the WSEU, requesting that I be advised "as soon as practicable" whether WSEU "has any objection to the matter proceeding to decision". In a letter to the parties and to WSEU dated February 18, 2005, I stated that I had received no answer to the February 7, 2005 letter and considered the record closed.

FINDINGS OF FACT

1. Joseph J. McCorison is an individual who resides at 330 Fourth Street, P.O. Box 359, Glidden, Wisconsin 54257.

2. The State of Wisconsin Department of Transportation, Division of State Patrol (DSP) is an employer which maintains its principal offices at 4802 Sheboygan Avenue, Room 551, P.O. Box 7912, Madison, Wisconsin 53707. The Division of State Patrol administratively structures the State of Wisconsin into Districts. District 7 maintains its headquarters at 7102 Green Valley Road, Spooner, Wisconsin 54801. Lee A. McMenamin is a DSP Captain, and serves as Commander of District 7. Nicholas R. Wanink is a DSP Lieutenant who reports to McMenamin. William B. Heino is a DSP Sergeant, who reports to Wanink. DSP District 7 hired McCorison as a Trooper effective June 16, 2002, and discharged him effective February 25, 2004. For several months prior to his discharge, Heino was McCorison's direct supervisor.

3. Certain DSP employees, including those in the position of State Patrol Trooper, are included in a bargaining unit represented by AFSCME Council 24, AFL-CIO, Wisconsin State Employees Union (WSEU). The State and WSEU are parties to a collective bargaining agreement, which includes, among its provisions, the following:

ARTICLE IV
GRIEVANCE PROCEDURE

. . .

SECTION 9: Discipline

4/9/1 The parties recognize the authority of the Employer to . . . discharge or take other appropriate disciplinary action against employees for just cause. . . .

4/9/2 An employee shall be entitled to the presence of a designated grievance representative at an investigatory interview (including informal counseling) if he/she requests one and if the employee has reasonable grounds to believe or has been informed that the interview may be used to support disciplinary action against him/her. . . .

SECTION 10: Exclusion of Probationary Employees

> **4/10/1** Notwithstanding Section 9 above, the retention or release of probationary employees shall not be subject to the grievance procedure except those probationary employees who are released must be advised in writing of the reasons for the release and do, at the discretion of the Personnel Commission, have the right to a hearing before the Personnel Commission.

Complainant filed a grievance under the provisions of the labor agreement, but waived further processing of the grievance to place the matter before the Commission under its jurisdiction under the State Employment Labor Relations Act (SELRA). Complainant and Respondent agreed that the processing of the complaint under SELRA would be the sole forum through which Complainant would seek Commission jurisdiction, thus waiving any claim to a hearing before the Personnel Commission.

4. The DSP maintains over one-hundred twenty policies governing the administration of the department. Included among them is Policy 2-2, a twelve page policy that governs "Authorization, Use And Care Of Weapons." Section VI of Policy 2-2 is entitled "Procedure" and Subsection C of that section states the following:

> 1. District Commanders and section heads may approve the carrying of a Division owned and authorized, concealed handgun by off-duty personnel. Authorization may be made when the officer's life or the life of a member of the immediate family has been threatened. Use of off-duty firearms will be limited to actions normally associated with the officer's official duties. The request for authorization to carry a concealed off-duty firearm must be accompanied by a memorandum which specifically details the reason for the request. . . .
>
> 8. Use of personally owned firearms by off-duty officers is regulated by state law, Department of Transportation and Division of State Patrol Work Rules and other applicable policies.
>
> a. The Division of State Patrol recognizes the exemption of a "peace officer" from carrying a concealed weapon as specified in ss. 941.23, Wis. Statutes. . . .
>
> c. The Division of State Patrol does not encourage any State Patrol Officer to carry a personally owned, concealed weapon when off-duty. . . .

Policy 11-15 governs "Off Duty Conduct". Section IV of that policy is entitled "General Provisions", and contains, among its provisions, the following:

C. Before any investigation of alleged off duty misconduct is commenced, verbal approval must be received from the appropriate Bureau Director or higher level.

In some cases it may be necessary, for the benefit of the Division, the Department, or the employee, that the employee be placed on leave in pay status or reassigned during the course of the investigation. Unless an emergency exists, approval of the appropriate Bureau Director or higher level is required before such action is taken. Such action shall be promptly confirmed in writing.

D. Any of the following criteria for initial investigation could be the basis for recommending and approving an investigation:

1. The employee is alleged to have engaged in conduct which is subject to punishment under the laws or administrative rules of the State of Wisconsin or the work rules of the Department or Division.

2. The employee is alleged to have engaged in conduct which has the potential of, or is currently impairing the ability of the employee to objectively complete work assignments or to handle confidential information.

3. The employee is alleged to have engaged in conduct which has the potential of, or is currently diminishing public confidence and respect for the Division of State Patrol.

4. The employee is alleged to have engaged in conduct which has the potential of, or is currently damaging the efficiency of the Division of State Patrol.

5. The employee is alleged to have engaged in conduct which has the potential of, or is currently damaging the interest of the State as an employer.

Section V of Policy 11-15 is entitled "Procedure" and specifies the responsibility of certain command staff to request, approve and implement investigations. Policy 7-1 governs "Investigation Of Personnel Complaints" and contains the following among its provisions:

III. GENERAL PROVISIONS

Complaints may be received by mail, electronic mail, telephone, anonymously or in person. . . .

Complainants, for one reason or another, may wish to remain anonymous. While certain individuals submit anonymous complaints for the purpose of retaliation due to enforcement action received, other people may have a valid complaint and a real or perceived fear of retribution. For this reason, the Division of State Patrol cannot simply ignore all anonymous complaints. Anonymous complaints shall be given due consideration of their merits. While the validity of anonymous complaints can be suspect and does not allow for clarification or the opportunity to obtain additional information, they can however, have validity. In fairness to the employee, an anonymous complaint that does not allege a violation of law and does not warrant further investigation, will be discussed with the employee and then placed in the complaint file. An anonymous complaint that is not investigated shall not result in a performance report or disciplinary action. One copy shall be provided to the employee and the Local Union President. . . .

IV. PROCEDURE

A. Upon Receipt of a Complaint:

1. Complaints may be received from a variety of sources or in a diverse number of formats.

2. The receiving employee shall summarize the complaint on the Personnel Commendation and Complaint Form, SP4561.

3. The complaint shall be referred to the District Commander, Bureau Director or the Superintendent to determine the necessity of further investigation.

4. The complainant will be notified by letter or telephone (recorded line if practical) that the complaint has been received and will be investigated in accordance with Division policy. This notification will include the following complaint advisory:

"You have the right to make a complaint against a State Patrol employee for improper conduct. The Wisconsin State Patrol has a complaint investigation Policy and Procedure. You may, upon request, view or obtain a copy of our complaint investigation policy and procedure. You have the right to file a complaint and have it investigated if you believe an. employee of the Wisconsin State Patrol has acted improperly. It is against the law (s.946.66) to

make a complaint against a law enforcement officer that you know to be false."

5. The complaint deemed to warrant further investigation shall have a Division complaint number assigned.

6. Four photocopies of the complaint shall be made.

   a. The original shall be kept in the district or bureau complaint file.

   b. One copy shall be mailed or given to the investigating supervisor or to the unit(s) that either should or could better do the investigation.

   c. One copy shall be sent or given promptly to the employee against whom the complaint was made.

   d. One copy will be sent to the Local Union President if the employee is in a represented position.

B. Preparation for Investigation of a Complaint:

1. The immediate supervisor of the employee against whom the complaint is made ordinarily will conduct personnel complaint investigations. There may be circumstances which require the investigation to be conducted by someone other than the immediate supervisor. The District Commander or Bureau Director will determine the appropriate investigator.

2. The investigator will read the complaint carefully to determine the issue(s) involved. All questions or issues raised by the complainant should be addressed and answered. In preparing the investigation, the investigator will make a list of questions or issues to assure that each will be addressed during the investigation. This list will be provided to the affected employee.

3. The investigator will identify the complainant and all witnesses to be contacted and interviewed. In the event follow-up interviews are conducted by telephone with witnesses or complainants, the investigator will attempt to conduct the interview on a recorded line. These

recordings will be maintained in accordance with the applicable Records Disposal Act provisions.

4. If the complaint is not clear, the investigator will attempt to call or make personal contact with the complainant to clarify the issues or questions.

C. Conducting the complaint investigation process:

The investigation and interviews will be conducted in a professional manner. The interview of an employee will be held at a reasonable hour and with the employee in duty status. If there is a time constraint, the employee will be placed on duty. Interviews of the complainant and witnesses will be a mutually agreed upon location at a reasonable hour.

The investigator/interviewer must always be cognizant of the fact there is a difference between the procedures used in a personnel investigation and those used in a criminal investigation. Should evidence of a criminal infraction come to light during an investigation, the District Commander and Bureau Director shall consult with the Superintendent as to what course the investigation will take. The employee must be afforded all constitutional and/or contractual rights that apply.

Once the issues of the complaint have been established, the person conducting the investigation will personally contact the employee(s) against whom the complaint was made. The investigator will provide the employee with information regarding the current scope of the investigation. The employee will be given a copy of the complaint and will have adequate opportunity to read and review it. The following process should be followed:

1. The employee shall respond to the complaint in writing.

2. The scope of the employee's response shall be limited to the facts of the complaint being investigated. The employee shall accurately report his/her actions and/or observations.

3. The employee shall respond within two working days to the complaint. An extension may be permitted by the complaint investigator.

> 4. Upon completion of the District investigation and if the Local Union President determines a separate and independent investigation is to be made, the employer will make available to the Local Union President or his/her designee, the names, addresses and phone numbers of the complainant(s) and all other principals involved. Such investigations shall be conducted within a reasonable amount of time as determined by management. . . .

Policy 7-1, unlike the other policies set forth above, resulted from negotiations between DSP and WSEU representatives. Negotiation on "procedures for the administrative investigation of citizen complaints" is authorized at Section **11/2/8/J** of the labor agreement noted in Finding of Fact 3. DSP administrators conduct informal investigations on a variety of personnel matters, and do not consider the provisions of Policy 7-1 to bind them regarding informal investigations generated from a source within DSP. DSP administrators consider such investigations internal investigations. DSP administrators consider investigations generated from non-DSP sources to be external, or personnel investigations. DSP and WSEU representatives disagree on when, and how often, the provisions of Policy 7-1 should be considered to govern internal or external investigations.

5. On January 22, 2004, Wanink and a DSP Sergeant ate lunch at a restaurant in Ashland at which Charlotte VandeZande, the wife of a retired State Trooper, worked as a waitress. She informed Wanink that McCorison was the subject of many rumors, including that he was involved in an inappropriate relationship with a seventeen year old high school student; that he had been stopped off-duty for traffic violations, purportedly under the influence of alcohol; and that he had used his DSP cruiser for personal reasons, including transporting his girlfriend. Wanink understood from this discussion that she did not have personal knowledge of any of the allegations, but was relaying rumors she had heard from others. He understood that she wished to remain anonymous, but thought that the rumors were undercutting the reputation of the DSP. Sometime during the evening of January 22, McCorison left a radio message with Heino that he needed a call-back on an urgent matter

6. On January 23, 2004, Heino attempted to reach McCorison by phone using numbers McCorsion had supplied him, including one for the residence of Genave Haugen and her mother, Deborah Haugen. Heino and McCorison spoke repeatedly on January 23. During this series of conversations, McCorison informed Heino that his girlfriend's ex-boyfriend committed suicide on the evening of January 22, and members of the victim's family, including an older brother, held McCorison responsible. McCorison felt threatened, and informed Heino that he wanted permission to carry his DSP weapon while off-duty. He stated that he had personal access to a Glock Model 21, but wished to carry his service weapon because it carried more rounds. Heino informed McCorison that DSP addressed requests to carry a weapon off-duty under Policy 2-2. Heino offered McCorison and his girlfriend access to the DSP Employee Assistance Program, and informed McCorison that he had the right to carry a personal weapon off-duty. McCorison advised Heino that he could wait until the following

Monday to receive formal approval under Policy 2-2. Heino summarized his conversations with McCorison concerning authorization to carry his service weapon while off-duty in e-mails that he issued to Wanink and to McMenamin on January 23. Sometime during the morning of January 23, 2004, Heino spoke with Wanink concerning McCorison's request to carry his DSP weapon off-duty. Wanink informed him of the rumors VandeZande relayed to him the prior day. In a memo to McMenamin dated January 23, McCorison formally stated his request thus:

> On Thursday, January 22, 2004, there was an incident . . . involving my girlfriend's ex-boyfriend. The incident being he committed suicide. The individuals older brother evidently made comments regarding my personal safety being in jeapordy. The older brother places a lot of the blame on me for this having taken place. This coming from a Bayfield County Corporal . . . who was at the scene. So it is pursuant Policy . . . 2-2 . . . I am requesting authorization to carry my state issued firearm off duty and concealed.

7. Prior to January 22, 2004, McCorison had been the subject of rumors regarding relationships involving girls under eighteen years of age. In November of 2003, the Chief of Police of Washburn asked to meet with Heino concerning McCorison. Heino understood the Chief's concerns to be that McCorison was hanging around Washburn; was socializing with high school students; and was dating underage girls, possibly sixteen or seventeen years old. Beyond this, Heino understood the Chief's concern to be that McCorison was patrolling Washburn too often and taking enforcement actions on nuisance-level violations. Heino understood the Chief to be concerned because the amount of State Patrol activity within Washburn had prompted discussion at the Washburn City Council. The rumors regarding McCorison's dating an underage girl were not the first Heino had heard. Sergeant Rich Reichenberger of the DSP had heard the same type of rumors relayed by the Washburn Chief of Police, and informed Heino that he had attempted to counsel McCorison that he was developing a bad reputation. Heino discussed each matter with McCorison on November 7, 2003, specifically advising McCorison that dating an underage girl was dangerous, and specifically discussed Wisconsin Statutes on statutory rape with him. Prior to Monday, January 26, 2004, McCorison identified his girlfriend to Heino as Jenna Haugen, a seventeen-year old high school student, and confirmed that the suicide victim had threatened suicide in a past breakup with Haugen. During the weekend of January 23, Heino discussed the suicide with the Bayfield County Sheriff, who confirmed that the family of the suicide victim blamed McCorison. Heino viewed the situation as sufficiently serious to restrict McCorison's duty to Ashland County, to keep him and the grieving family, who lived in Washburn, apart.

8. During the morning of Monday, January 26, 2004, McMenamin spoke with Wanink and Heino regarding McCorison's request to carry his DSP weapon off-duty. The discussion included the suicide that prompted the request and rumors surrounding McCorison's association with underage girls, including the victim's ex-girlfriend, Genave Haugen. McMenamin had to leave District Headquarters for personal business that day. Prior to leaving, he instructed Heino and Wanink to interview McCorison regarding the rumors so that he could make an informed decision regarding McCorison's request to carry a DSP weapon

off-duty. McMenamin directed Wanink to make sure that McCorison had a WSEU representative available, if McCorison requested one. McMenamin did not specifically direct Heino or Wanink to follow Policy 7-1. McMenamin viewed the investigation as informal, and did not believe the inquiry rose to the level of the formal procedures of Policy 7-1.

9. Heino phoned McCorison at the Haugen residence after the meeting with McMenamin, directing McCorison to report to District 7 offices at 1:00 p.m. Heino did not inform McCorison of the specific reasons for the meeting, other than to note it as a 10-5, which is a code reference that connotes a relay of information. A Dispatcher radioed Dennis Lewis, a DSP Trooper and a WSEU Steward, to report to District 7 offices to be available for the meeting. No officer identified the purpose of the meeting to Lewis prior its start. At roughly 1:00 p.m., McCorison reported to District 7 headquarters. Wanink met him in a break room, then led him to McMenamin's office, where the meeting took place. Wanink advised him that he could have a WSEU representative with him during the meeting if he wanted. McCorison requested that Lewis attend, and Heino brought Lewis to the meeting. Wanink started the meeting by stating his view of its purpose, including McCorison's request to carry his service weapon off-duty and the rumors that had surfaced regarding McCorison. Wanink and Heino understood McCorison and Lewis to acknowledge their understanding by nodding after Wanink's introduction. Wanink had a series of written questions prepared for the meeting. A tape recorder was available in the room, but Wanink informed Lewis and McCorison that the meeting was informal and would not be taped. Wanink first asked about when and whether McCorison had been the subject of a traffic stop. The interview then turned to his relationship with high school girls, ending with questions concerning Genave Haugen, including her date of birth. McCorsion responded truthfully. Neither Wanink nor Heino ordered McCorison to stay in the room or to answer any question. Wanink ultimately asked McCorison if he had had sex with Genave Haugen, and McCorison responded in the affirmative. At about the same time during the questioning, Wanink asked McCorison if he still felt threatened and still wished to carry his DSP weapon off-duty. McCorison withdrew the request. Wanink called the meeting to an end after McCorison admitted he had a sexual relationship with Genave Haugen. At no time during this meeting did Heino or Wanink inform McCorison of his rights under GARRITY V. NEW JERSEY, 385 U.S. 493 (1967), or MIRANDA V. ARIZONA, 384 U.S. 436 (1966) or Section **4/9/2** of the labor agreement. At no time during this meeting did Heino or Wanink inform McCorison that the meeting was investigatory. Investigatory interviews are typically tape-recorded. At no time during the meeting did Lewis or McCorison request that the questioning end or that McCorison be advised of his rights under law or contract. At no time prior to Wanink's declaration that the meeting was ended, did Lewis or McCorsion request to leave the meeting.

10. Lewis was concerned about the meeting. After Wanink ended it, Lewis left to confer with more experienced WSEU representatives regarding McCorison's situation. After doing so, he informed Wanink and Heino that he objected to the conduct of the meeting, and specifically that Wanink and Heino had failed to inform McCorison of his rights. Heino and Wanink responded that the matter would have to be investigated independently, and that McCorison's job status had not changed as a result of the meeting.

11. Sometime after Lewis informed Wanink of his objections to the meeting, McCorison came alone to the doorway of Wanink's office. McCorison was visibly upset and was crying. Wanink invited him into the office, and closed the door behind them. Wanink informed McCorison that an investigation would have to take place, and that he would keep McCorison apprised of its progress. He complimented McCorison on his honesty, informing him that no one could take his credibility from him. McCorison discussed his relationship with Genave Haugen in some depth, including their consideration of marriage. Wanink discussed the illegality of the sexual relationship and ordered McCorison to cease any sexual relationship with Genave. Because McCorison remained distraught, Wanink dismissed him, in pay status, for the balance of the work shift.

12. Sometime late in the afternoon of January 26, 2004, Wanink phoned McMenamin to inform him of the interview with McCorison. McMenamin advised Wanink to start an investigation. Wanink secured a complaint number for the investigation and assigned the investigation to Heino, informing him that if he interviewed VandeZande that he should use Form SP4561, in case McMenamin determined to consider the investigation a personnel investigation bound by Policy 7-1. He also instructed Heino not to use any of the admissions made by McCorison during the January 26 interview.

13. On January 27, 2004, DSP personnel confiscated McCorison's DSP cruiser. On January 27 and 28, Heino conducted a series of interviews regarding McCorison. Those interviews included the Bayfield County Sheriff; the Bayfield County District Attorney; the Washburn High School Principal; and various law enforcement officers from the DSP and Washburn Police. Heino interviewed Genave and Deborah Haugen on January 27 and again on January 30. Genave and Deborah Haugen acknowledged that McCorison's relationship with Genave included consensual sex. Each valued McCorison's support for the family in difficult times. The balance of the interviews established that McCorison's relationship with Genave was widely known and discussed in the community, including rumors that Genave was pregnant. Heino interviewed a retired DSP Sergeant, Eric Erickson, on January 28. Erickson informed Heino that in the Spring of 2003, a representative of Washburn High School advised him that McCorison was involved in a relationship with a girl who was not yet eighteen years old. Erickson was then McCorison's direct supervisor, and discussed the rumor with him. McCorison asserted the girl was eighteen years old. Erickson counseled him regarding the dangers of such a relationship, but ultimately confirmed that the girl was eighteen years old. The counseling discussion took place in Erickson's DSP cruiser. On January 28, Heino interviewed VandeZande, using form SP4561, including the complaint number secured by Wanink, to document the complaint. On January 28, McMenamin participated in a teleconference with the DSP administration in Madison concerning McCorison's work status. The meeting concluded with a directive to place McCorison on administrative leave pending the outcome of the investigation. McCorison was put on administrative leave on January 29. Heino inspected the cruiser and its contents on January 29. He found a photo of Genave Haugen, but no physical evidence indicating an illegal relationship between McCorison and Haugen or improper personal use of the cruiser by McCorison. On January 29, McMenamin informed Wanink that the investigation was an internal investigation, not a personnel

investigation under Policy 7-1. On January 29, Heino directed McCorsion to respond in writing to the allegations that he had an inappropriate sexual relationship with Genave Haugen; that he had been stopped while off duty for traffic violations; and that he had used his cruiser for unauthorized personal reasons. McCorison was given two days to respond, but responded the following day. He admitted the inappropriate sexual relationship with Genave Haugen, noting that it was consensual. He admitted to being stopped on two occasions while off-duty regarding potential traffic violations, but noted that he did not receive any citation. He denied using his cruiser for personal reasons, other than to give a high school student a ride to school on a cold day.

14. On February 4, 2004, Wanink and Heino conducted an investigatory interview with McCorison and Lewis. The interview was taped, and McCorison received oral and written notice of his rights under Section 4/9/2 of the labor agreement and under GARRITY. McCorison acknowledged having sex with Genave, knowing that she was under eighteen years of age. He also acknowledged having sex with her after the January 26 order from Wanink not to do so. He responded to the allegations regarding off-duty traffic stops as well as personal use of his DSP cruiser. On February 9, 2004, Heino and Wanink conducted a CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 118 LRRM 3041 (1985) hearing with Lewis and McCorison to determine mitigating circumstances regarding potential discipline. McCorison acknowledged that he and Genave had made mistakes but never wished to put his career in jeopardy. He noted that he had responded honestly to DSP management about a relationship that was important to him and to Genave personally, but had no impact on his competence as a Trooper. He addressed all of the allegations against him, and offered DSP a written statement of his position. The statement concluded ". . . take disciplinary action if you must, but please don't take my career."

15. In a letter to McCorison dated February 25, 2004, McMenamin stated the following:

> You are hereby terminated from your probationary employment as a trooper . . . effective February 25, 2004.
>
> This action is based upon overwhelming evidence obtained during an investigation confirming your participation in illegal acts of sexual contact with a 17-year old girl beginning on December 29, 2003. You were being insubordinate by continuing to participate in illegal acts of sexual contact with the same girl after being ordered to cease such contacts on January 26, 2004 by your Deputy District Commander. . . .

The letter cites two work rules. The first is Article I, Section 1 of the DSP work rules, which reads thus:

> Employees shall conduct themselves both on and off duty, in such a manner as not to reflect unfavorably on the Division. Unbecoming conduct shall include that which tends to bring the Division disrepute or reflects discredit upon the employee as a member of the Division, or that which tends to impair the operation and efficiency of the Division or employee.

The second is Article I, Section 1 of DOT work rules, which reads thus:

> Insubordination, including disobedience, failure or refusal to follow written or oral instruction of supervisory authority . . .

McCorison received the letter of termination on February 25, 2004.

16. The probationary period for a DSP Trooper is two years. McCorison received an evaluation at the twelve month stage of his probationary period. Erickson was then his immediate supervisor. The evaluation indicated that his work performance was satisfactory or better. There has not been at any time relevant to this matter any criminal charge against McCorison. The DSP investigation focused on McCorison's employment status as a probationary employee.

CONCLUSIONS OF LAW

1. Complainant, while employed by Respondent as a State Trooper, was an "Employee" within the meaning of Sec. 111.81(7), Stats.

2. Respondent is an "Employer" within the meaning of Sec. 111.81(8), Stats.

3. Respondent's termination of Complainant's employment and the investigation underlying it did not violate Sec. 111.84(1)(a), Stats. Or Sec. 111.84(1)(e), Stats.

ORDER

The complaint, as amended, is dismissed.

Dated at Madison, Wisconsin, this 10th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

STATE OF WISCONSIN (DEPARTMENT OF TRANSPORTATION – DIVISION OF STATE PATROL)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Parties' Positions

Complainant's Brief

Complainant contends that Sec. 66.0511, Stats., requires "each law enforcement agency to have a policy for complaint investigations." The statute does not divide complaints into internal and external sources. DSP management deliberately chose to treat the complaint against Complainant as "an internal investigation", which is not governed by Policy 7-1, which was itself negotiated between DSP and WSEU representatives. This choice tainted the process Complainant was subject to, slurring "the lines between a personnel investigation and a criminal investigation."

Heino, for example, "used his position to obtain information that he was not legally entitled to obtain." He asserted he was investigating Complainant's request to carry his weapon off duty to obtain information that exposed Complainant's relationship to Haugen after Complainant had withdrawn the request. He also improperly claimed to be investigating a suicide to obtain information. Ultimately, DSP management selectively applied their authority to improperly obtain juvenile records and other information that could not have been obtained had they simply followed established complaint investigation procedure.

Beyond this, "Management ignored the employee's WEINGARTEN rights as well." At the end of the January 26 meeting, Wanink invited a "distraught" Complainant into his closed office, well after Complainant's steward had left. The events of January 26 are further complicated by the failure of DSP management to give Complainant a MIRANDA warning. Governing case law demands a MIRANDA warning if Complainant was in custody; was being interrogated for a crime; and was being interrogated for the purpose of self incrimination. The evidence establishes each of these elements.

DSP management testimony is inconsistent on this point. Testimony from the second day of hearing indicated that Wanink and Heino received instructions to investigate Complainant without regard to information obtained during the January 26 interviews. Testimony from the first day indicated that they did not use the contractual investigation procedure because they were acting from an internal source. Complainant is the only possible internal source. The absence of any MIRANDA warning prior to the January 26 conversation should preclude Respondent use of any information traceable to Complainant's statements on that day.

In spite of these procedural irregularities, Heino continued the DSP investigation, contacting Bayfield County's Sheriff and District Attorney before approaching the Haugens. In spite of having no legal basis for his questioning, Heino interrogated the Haugens to investigate Complainant. He used evidence improperly obtained from Complainant to lure the Haugens into admitting the existence of a sexual relationship between Complainant and Genave. There has never been any evidence of such a relationship outside of the admissions, improperly obtained, from Complainant and the Haugens. That Complainant has an exemplary work record highlights the level of impropriety of his termination.

It follows that Respondent denied Complainant due process in terminating his employment. The Commission should "reverse the decision of the Respondent, and return the Complainant to full employment status in his former position with the Respondent."

Respondent's Reply

After a review of the evidence and governing law, Respondent contends that it was not required to give a MIRANDA warning or provide GARRITY rights to Complainant at the January 26 meeting. Both demand the existence of a criminal investigation, and Respondent was investigating potential work rule violations. In any event, this proceeding is administrative and the law governing criminal proceedings has no bearing on it. Even if the matter was criminal, there was no basis for a MIRANDA warning, since there was no custodial interrogation and his freedom of action was not curtailed "to the degree associated with arrest". Nor are the facts sufficient to invoke GARRITY. Complainant provided voluntary statements, and was never ordered or directed to provide them. Even if MIRANDA or GARRITY applied, the "only sanction is that the confession or evidence gained is excluded from any criminal proceeding." Since this is an administrative proceeding, the evidence can still be used. In any event, there is no reliable proof that Respondent relied on evidence which could be excluded under MIRANDA or GARRITY.

Nor did Respondent violate Complainant's WEINGARTEN rights. The evidence will not show that Complainant could have reasonably believed discipline would result from the meeting, and Complainant never asked for a WSEU steward. Complainant's request to carry his service weapon off-duty prompted the January 26 meeting. The rumors that concerned DSP management were not new, and none of the meeting participants had reason to believe the meeting would become disciplinary. Complainant did not request Lewis' presence and was unaware of WEINGARTEN rights. At most, the evidence shows Complainant might have guessed that the rumors DSP management were investigating involved his dating a minor. In and of itself, this is not a work rule violation. Thus, Complainant took the chance that the meeting would involve no more than that. Nor can Complainant's discussion with Wanink be considered a WEINGARTEN violation. The meeting was not investigatory, and took place only because Wanink gave Complainant a chance "to compose himself outside of the public's view."

Even if WEINGARTEN applied, Respondent complied with it by offering Lewis' presence during the meeting.

Respondent's investigation was not improper. Complainant's request to carry a weapon off-duty prompted a fact-finding effort and that effort inevitably was tied to the rumors concerning his relationship to Genave Haugen. The line between an external and an internal investigation is vague at best, as shown by the fact that the Union "was back and forth as to how complaints by the public were to be handled." Here, the request for off-duty carry of a handgun demanded a fact-finding effort by McMenamin. The rumors of an illicit relationship were coincidental to this inquiry.

Complainant's request thus appropriately triggered an internal investigation. His admission demanded further investigation, which would have proceeded even had he not confessed the existence of a sexual relationship. The investigation could have, but did not rely on the confession. The confession is traceable to Complainant alone, and thus must be internal. The characterization of the investigation as internal was within McMenamin's discretion, which "must be afforded great deference." There was, in any event, no basis for an external investigation, since the rumors relayed to Heino had no demonstrated basis in "first hand information." Thus, there were no "allegations" on which to base an external investigation. Beyond this, Complainant had been the source of rumors no fewer than three times in the past. In each case, Respondent treated the matter "without a Personnel Complaint." The Union has itself challenged DSP management for too frequent use of formal investigations.

Even if DSP management followed the external investigation path, the results would have been the same. Only "two real differences" distinguish an external from an internal investigation. One is the service of a complaint on the employee and the Union. The second is that employer questions and employee responses are to be written. Complainant cannot show how he was prejudiced by a failure to receive the complaint. He received all the first-hand information a complaint would contain before he was asked to respond to it. In any event, the complaint was rooted in a relationship only two people could have reliable information about. That rumors swirled around the relationship cannot obscure that there was no prejudice to Complainant because "the rumor at issue did not involve a situation that could have various explanations". Complainant acknowledged, in any event, that he would have told the truth regardless of the type of investigation used. The external or internal nature of the investigation has no impact on the contractual process for investigating misconduct. Either type of investigation ends in the same fact-finding process.

Complainant was a probationary employee, who is not entitled to just cause. Complainant's admission of an illicit relationship could have warranted a summary termination on January 26. DSP management afforded him more due process than he had a right to claim.

Complainant's arguments cannot obscure that at most, DSP management made a minor, technical violation of the external investigation process. Such a violation has no bearing on the

propriety of the termination. Even if proven, the violation warrants no remedy "except a finding of a breach and a cease and desist" order.

Complainant's Response

Respondent attempts to link a conversation between Complainant and Erickson to an identification of an improper relationship with Genave have no support in the evidence. McMenamin and Wanink misread governing policies when they asserted they needed to investigate off-duty traffic stops of Complainant. Complainant was, in fact, prejudiced by Respondent's use of internal investigation procedures. The January 26 meeting would not have taken place, and Complainant would have had specific charges to address in writing together with sufficient time to contact legal counsel or Union assistance to address them. Respondent's admission that Complainant's request to carry his weapon off-duty was inextricably tied to the rumors about his relationship to Genave contradicts its contention that the investigation is traceable to only internal sources.

Nor can semantic gymnastics concerning an "allegation" as opposed to a "rumor" obscure that DSP Management chose to investigate Complainant based on a complaint from an external source. Whether or not the complaint reflects first-hand knowledge, its source was external. Beyond this, Respondent precluded Complainant from being able to investigate the source of the rumors against him. Respondent contentions that WSEU investigation of the source of the rumors would be a dead end cannot be considered persuasive: "Complainant would have appreciated the opportunity to learn that firsthand from the source, rather than from the Respondent's brief."

If the investigation was based on Complainant's request to carry his weapon off-duty, then the absence of questions concerning the gun during the January 26 meeting must be considered significant. Neither Lewis nor Complainant can recall such questions, and there is no reliable basis to believe the investigation concerned anything other than the possible existence of an improper relationship between Complainant and Genave. That Complainant had been subject to informal counseling on the point in the past cannot obscure that in this case the informal counseling involved superior officers in a coercive setting. Nor can Respondent's arguments obscure that the "informal" meeting of January 26 followed a written script that covered the statutory definition of sexual assault. Testimony that DSP supervisors were surprised by Complainant's responses cannot obscure that they acted to build a formal complaint against him, improperly using an informal process. DSP management's choice of the wrong procedure "to protect the integrity of their information gathering" cannot be held against Complainant.

Throughout the evidence, DSP management overstepped appropriate limits. In spite of the absence of the authority to investigate the potentially criminal nature of Complainant's relationship with Genave Haugen, Heino claimed to be investigating a suicide to generate information. Similarly, DSP management called an "informal" meeting on January 26, which manifests the coercive elements that should have triggered MIRANDA or GARRITY. Heino's and

Wanink's testimony that they did not use Complainant's admission against him cannot be credited. Nor can Respondent's assertion that Complainant could have refused to participate in the January 26 meeting. Since he was probationary, the "question of voluntary participation is no question at all."

Nor did Respondent take any action to ameliorate its improper questioning of Complainant on January 26. Complainant was never advised his improperly obtained admission would not be used against him. In fact, he was placed on administrative leave and stripped of his assigned cruiser before being given the opportunity to formally respond to the charges against him. Respondent failed to afford Complainant access to a Steward in filing his response, and failed to insulate its investigation procedures from the taint of an improperly secured confession.

Respondent's assertion that the WSEU's position is inconsistent should not obscure that the issue is whether Respondent "did willfully and knowingly violate state and federal law, and a negotiated agreement with the Union." The evidence establishes violations of all three standards, necessitating Complainant's reinstatement.

DISCUSSION

The amended complaint alleges violations of Secs. 111.84(1)(a) and (e), Stats. Complainant uses those sections to assert Respondent violations of state and federal law.

At the broadest level, Complainant contends that Respondent's investigation violates case law on improper governmental coercion of the waiver of constitutional rights. The Commission has jurisdiction to address issues of external law to apply statutes within its jurisdiction, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24748 (WERC, 9/87); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24748-A (WERC, 4/89), AFF'D MILWAUKEE BOARD OF SCHOOL DIRECTORS V. WERC, 163 Wis. 2D 739 (Ct.App, 1991). Since the Commission "only has those powers which are expressly or impliedly conferred on it by statute" BROWNE V. MILWAUKEE BOARD OF SCHOOL DIRECTORS, 83 Wis. 2D 316, 333 (1978), the Commission must have "a demonstrated basis under the provisions of" SELRA to make MIRANDA or GARRITY applicable to the amended complaint, see MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 20005-B (WERC, 2/84) AT 9; and see RACINE POLICEMEN'S PROFESSIONAL AND BENEVOLENT CORPORATION, DEC. NO. 12637 (Fleischli, 4/74) AT 8-9, AFF'D BY OPERATION OF LAW DEC. NO. 12637-A (WERC, 5/74).

Thus, as a legal matter, it is necessary to establish a basis under Sec. 111.84(1)(a) or (e), Stats., warranting application of MIRANDA or GARRITY. As a factual matter, Complainant focuses on the meetings of January 26, 2004. Under Complainant's view, Wanink and Heino improperly coerced a confession from McCorison regarding the sexual aspect of his relationship with Genave Haugen. The impropriety demands that Respondent be denied the use of evidence traceable to the confession. Although Complainant points to other flaws in the investigation, the improperly coerced confession dooms Respondent's case in Complainant's

view, since all of the evidence of an improper relationship is traceable to it, cf. ODDSEN V. BOARD OF FIRE & POLICE COMMISSIONERS, 108 Wis. 2D 143 (1982). In sum, Complainant attempts to use SELRA to warrant application of MIRANDA and GARRITY to the January 26 interviews to establish an exclusionary rule denying Respondent the use of McCorison's confession.

Standing alone, the citation of the cases does not establish a basis in SELRA to warrant their application to the January 26 interviews. The unfair labor practice provisions of SELRA enforce rights under Sec. 111.82 for employees to engage in lawful, concerted activity. The tie between lawful, concerted activity is evident regarding employee rights to representation at disciplinary interviews, as is discussed below.

However, the tie between the individual assertion of an individual constitutional right and lawful, concerted activity is not self-evident. As noted above, for the Commission to interpret external law, a demonstrated basis in SELRA is necessary. Thus, Complainant's attack, under GARRITY and MIRANDA, of an employment-based inquiry where no criminal investigation is ongoing or contemplated, has a tenuous basis in SELRA. Solely for the purpose of addressing Complainant's assertion of an exclusionary rule, the tie will be presumed here.

Some support for the exclusionary rule argued by Complainant can be found in the ODDSEN court's conclusion that "the coerced, involuntary confessions here extracted may not, under the circumstances, be used for any purpose" 108 Wis. 2d at 163. This pronouncement cannot, however, be divorced from the underlying facts, as the court's reference to "the circumstances" establishes.

More specifically, the circumstances of January 26, 2004 fall far short of the conduct that the ODDSEN court determined "was coercive as a matter of fact and as a matter of law and resulted in involuntary statements" 108 Wis. 2d at 156. The January 26 interviews resulted from McCorison's request to carry his service weapon off-duty, which brought the issue of his relationship with Genave Haugen and a series of rumors into question. McMenamin was obligated to exercise discretion in reviewing the request under Policy 2-2, which, at Section 8c, urges caution regarding off-duty carry. More specifically, McCorison's request to carry a weapon with more rounds than the weapon he had personal access to presumes a high level of risk regarding personal safety and a high level of personal responsibility regarding that risk. Although McCorison agreed that the matter did not have to be resolved on the weekend before January 26, the request was time-sensitive. Inquiry into the request was necessary.

Complainant highlights the coercive aspects of the interviews. Each interview took place behind a closed door, in the presence of at least one superior officer. Only the first involved the presence of a WSEU representative. This is touched on below, but the degree of coercion should not be overstated. At no point during the January 26 interviews did Wanink or Heino order McCorison to answer and at no point did they link his employment status to any question or answer. There was no implication, much less threat, of a criminal proceeding.

No criminal charges were pending, and no criminal investigation was ongoing. McCorison never asked to leave the room. When he admitted the sexual nature of the relationship, Wanink ended the interview. On Wanink's and McMenamin's direction, Heino conducted an investigation without regard to the confession. Complainant raises considerable issues regarding the investigation, but the evidence establishes that Heino had information beyond that supplied by McCorison on January 26 to support further inquiry. Nor will the evidence support a conclusion that Heino's investigation improperly relied on the January 26 interviews.

Nor can potential criminal action and valid employment-based investigation be equated as a matter of law under SELRA. Sec. 111.84(4), Stats., incorporates the procedures of Sec. 111.07, Stats. Secs. 111.07(2)(b)1 and 2, Stats., distinguish unfair labor practice from criminal proceedings regarding the use of evidence obtained under a Commission subpoena. The provision seeks to insulate employment-based inquiry from criminal inquiry, which implicates the loss of liberty and constitutional protection against self-incrimination. This provision is not directly applicable, but highlights that the legislature did not equate employment-based inquiry with criminal inquiry, as Complainant seeks. The cases cited by Complainant seek to assure that a public employee is not denied individual constitutional rights due to the public nature of their employment. It does not follow from this that a public employee enjoys a constitutional shield to valid employment-based inquiry.

Nor is there a strong policy basis for the use of MIRANDA and GARRITY as a function of due process. McCorsion's property interest in his employment is, at best, tenuous. Unlike the ODDSEN officers, he was a probationary employee. The property interest he had in his position is, consequently, diminished, see STATE EX REL DELA HUNT V. WARD, 26 Wis. 2D 345 (1964) and KAISER V. BOARD OF POLICE AND FIRE COMMISSIONERS OF THE CITY OF WAUWATOSA, 104 Wis. 2D 498 (1981).

In sum, there is no demonstrated basis in SELRA to bring GARRITY or MIRANDA to bear on the January 26 interviews. The January 26 inquiry is a valid, employment-based employer inquiry into the performance of a probationary employee, which does not implicate the operation of constitutional principles concerning due process of law, deprivation of liberty, or self-incrimination. Evidence traceable to an admission secured in an employment-based inquiry that does not pass constitutional muster may dictate the exclusion of that evidence from a criminal prosecution. It does not follow from this that every valid employment-based inquiry that may touch on potentially criminal activity demands GARRITY or MIRANDA warnings. Here, the basis for the inquiry and the level of coercion involved in the January 26 interviews will not support a conclusion that SELRA placed on Respondent a duty to give a GARRITY or MIRANDA warning.

In the absence of direct application of federal law governing waiver of constitutional rights, the allegations of the complaint focus on Complainant's rights under WEINGARTEN and the labor agreement. "WEINGARTEN rights" flow from NLRB V. WEINGARTEN, 88 LRRM 2689 (1975). The Commission addressed, in a series of cases, employee rights under MERA at Sec. 111.70(2), Stats., and under SELRA at Sec. 111.82, Stats., referring to WEINGARTEN

in that line of cases, see CITY OF MILWAUKEE, DEC. NO. 13558-B (Schurke, 1/76) AFF'D DEC. NO. 13558-C (WERC, 5/76); and WAUKESHA COUNTY, DEC. NO. 14662-A (Gratz, 1/78) AFF'D DEC. NO. 14662-B (WERC, 3/78). The Commission incorporated this line of cases into its application of SELRA rights, see STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, DEC. NO. 15716-C (WERC, 10/79); and STATE OF WISCONSIN, DEC. NO. 26739-B (Engmann, 11/91), AFF'D DEC. NO. 26739-C (WERC, 3/92). These cases do not restrict the Commission's analysis to WEINGARTEN, but the case name has become a short-hand reference to rights enforced under Sec. 111.84(1)(a), Stats.

More specifically, the Commission cases affirm the following analysis by the WEINGARTEN Court:

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal meaning that "(e)mployees shall have the right. . .to engage in. . . concerted activities for the purpose of. . .mutual aid or protection." 88 LRRM at 2692.

The WEINGARTEN Court also observed that the "employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action" 88 LRRM at 2691; that "the right arises only in situation where the employee requests representation" *Ibid.*; and that "exercise of the right may not interfere with legitimate employer prerogatives" *Ibid.* The Commission has applied these conditions in the line of cases noted above.

To constitute a violation of Sec. 111.84(1)(a), Stats., Respondent's behavior during the January 26 interviews must manifest conduct likely to interfere with, restrain or coerce Complainant's exercise of his Sec. 111.82, Stats., rights., DECS NO. 26739-B, C, *supra*. Conduct inconsistent with WEINGARTEN constitutes such behavior. The evidence will not, however, support a conclusion that the January 26 interviews manifest this conduct. Policy 2-2 demanded that McMenamin consider relevant circumstances regarding Complainant's request to carry his service weapon off-duty. Whether or not Respondent had to follow Policy 7-1 regarding the rumors surrounding Complainant's alleged relationship with underage girls or during traffic stops, some inquiry was necessary. Thus, there is no reason to doubt the legitimacy of Respondent's decision to interview McCorison on January 26.

Respondent's assertion that the interviews did not implicate WEINGARTEN rights is unpersuasive. That McCorison and his immediate supervisors had discussed and dismissed rumors of improper relationships in the past cannot obscure that the January 26 inquiry was more formal and carried with it a reasonable possibility that discipline could follow. That McCorison alone knew the truth of the rumors cannot obscure that he could reasonably suspect discipline was likely. Heino's credible testimony confirms that prior to the interview McCorison wondered whether his job was on the line. Although Respondent asserts it made Lewis available as a peer, his presence could have been secured by McCorison's request under WEINGARTEN.

More to the point, McCorison requested and was granted Lewis' presence at the first interview. This meets the WEINGARTEN requirement. He never made such a request for the second. Under the cases cited above, his request was necessary to trigger the operation of Sec. 111.84(1)(a), Stats.

At the broadest level, Complainant contends that the paramilitary nature of DSP operations makes each interview on January 26 inherently coercive. This ignores that neither superior officer asserted rank as a basis for any question or answer and ignores that each participant in the interview had been schooled in the investigatory techniques applied. It also overstates the evidence of coercion. Heino and Wanink had some reason to question the propriety of McCorison's relationship with Genave Haugen, but only McCorison was aware of the truth. When McCorison disclosed that truth, Wanink ended the first interview. Even though Lewis noted his objection to the first interview prior to the second, the fact remains that the second came about when McCorison voluntarily approached Wanink. This underscores a pattern by which McCorison volunteered damning information regarding the relationship. Prior to January 26, he gave Heino the phone number of the Haugen residence as a contact reference without regard to when the contact might be made, and volunteered information regarding Genave Haugen's age.

Focusing on the second interview, McCorison never requested Lewis. He freely approached Wanink, and spoke with him less as a superior officer than as a confidant. Wanink's credible testimony reflects he responded in kind. His order that McCorison refrain from sex was something other than coercion. At most, Wanink highlighted to McCorison that the relationship could prove fatal to his achieving permanent status as a Trooper. McCorison offered Lewis far less information than he offered his supervisors. The evidence reflects less coercion on this point than personal choice. McCorison consistently treated his supervisors as allies necessary for the advancement of his career. Whether or not Respondent can reasonably claim to use information obtained during the interviews, there is no persuasive factual basis to conclude that Respondent conducted either in a manner that violates the WEINGARTEN rights noted above. Thus, there is no violation of Sec. 111.84(1)(a), Stats.

Somewhat more troublesome is the application of Sec. 111.84(1)(e), Stats. Complainant's arguments essentially question whether Respondent violated the agreement by not using the procedures of Policy 7-1 and by failing to honor Complainant's procedural rights under the contract, whether or not WEINGARTEN rights are implicated.

Complainant has not demonstrated a Respondent violation of any procedural rights under the labor agreement. Section **4/9/2** provides an entitlement to "a designated representative" at "an investigatory interview (including informal counseling)" if the employee so requests and if the employee has a reasonable basis to believe the interview "may be used to support disciplinary action". As noted above, McCorison had a reasonable basis to believe the interviews might support discipline. He requested and received Lewis' presence for the first interview. Even assuming the second interview was investigatory, he did not request Lewis' presence. Against this background, there is no violation of Section **4/9/2**.

Section **4/10/1** makes the grievance procedure unavailable to enforce the provisions of Section **4/9/1**, which states a just cause requirement to discharge. Section **4/10/1** does refer to rights before the Personnel Commission, but Complainant does not argue, and Section **4/10/1** will not support, an inference that the rights of Section **4/9/1** extend to a probationary employee. Nor does the reference to the Personnel Commission establish a substantive right to just cause, see Secs. 230.28(1) and 230.44(1)(c), Stats. Nor does the presence of a satisfactory evaluation imply such a right, cf. Sec. 230.37(1), Stats. Beyond this, the jurisdiction of the Commission to act under Section **4/9/1** is dubious, see BOARD OF REGENTS V. WISCONSIN PERSONNEL COMMISSION, 103 Wis. 2D 545 (1981). In the absence of a substantive right to just cause, the evidence provides no basis to conclude that the termination violated the labor agreement and thus Sec. 111.84(1)(e), Stats.

Complainant's most forceful arguments concern the propriety of Respondent's investigation, particularly its use of an informal interview on January 26 rather than the formal procedures of Policy 7-1. Whatever force these arguments have as a matter of law enforcement policy, they lack an established basis in Sec. 111.84(1)(e), Stats. Complainant accurately notes that Policy 7-1 is negotiated, and has contractual authorization under Section **11/2/8/J** of the labor agreement. That authorization, however, falls short of establishing that Respondent was obligated to apply Policy 7-1. Nor should such an obligation be inferred on this record. DSP policies posed here can require inquiry for their application, but it is less than evident that Policy 7-1 is the exclusive method. For example, it is unclear why Policy 7-1 would be the sole means to conduct an inquiry under Policy 2-2. Had McCorison not agreed that his January 23 request could wait the weekend, virtually immediate action was required. Policy 7-1 is a dubious means to respond to a request for immediate action.

Beyond this, the policies do not demand exclusive use of Policy 7-1. Their use of the term "investigation" is expansive and unclear. Section IV D, highlights this. When Wanink asked VandeZande on January 22 about the rumors, was he receiving information (cf. Policy 11-15, Section VA1), or was he investigating (cf. Policy 11-15, Section IVD)? The term is expansive enough to encompass both. Policy 7-1, at Section IVA5, demands a "complaint number" if the complaint "warrants further investigation." The use of "further" presumes, without defining, what investigation should have already occurred. Beyond this, it is evident that WSEU and DSP differ on when to apply Policy 7-1. On a general level, WSEU representatives have questioned, at labor/management cooperation meetings, the overuse of the policy. More specifically here, McCorison benefited from the non-use of the formal policy at a series of informal counseling sessions with his superior officers on past rumors regarding his relationship with underage girls. There may be reason to distinguish those informal counseling sessions regarding citizen-based rumors from the rumors that prompted the January 26 interviews. Wanink conducted a more formal inquiry on that date. This cannot, however, obscure that Policy 7-1 is not the exclusive means to conduct an inquiry, even when the inquiry focuses on potentially illegal conduct.

More to the point, neither the labor agreement nor Policy 7-1 set forth the circumstances demanding its application. The policies noted above are largely silent on when Policy 7-1 must be used. Presumably, the silence of the policies reflects a need for flexibility based on the underlying circumstances. McMenamin has conducted dozens of informal inquiries not bound by Policy 7-1. What guidance Policy 7-1 provides appears at Section IVC, which cautions that the line between employment-based and criminal inquiry be respected. However, at the time of the January 26 interviews, no citizen complaint had emerged, since VandeZande neither wished to make one nor was willing to reveal her sources. That Heino used a form SP4561 to take her statement is not, standing alone, meaningful. DSP use of the form is mandated by Policy 7-1, but there is no indication the form cannot be used as a convenience for inquiries not bound by Policy 7-1. Beyond this, potentially illegal conduct was no more an issue than it had been in the past regarding McCorison. The parties' dispute regarding what constitutes an internal or an external, personnel investigation begs the issue. There is no persuasive evidence that the distinction has contractual force. In sum, the exercise of DSP management discretion not to employ Policy 7-1 to conduct the January 26 interviews does not establish a violation of any contractual provision.

Complainant's contention that it would have been better practice to use Policy 7-1 has persuasive force. The issue here, however, is not the implementation of law enforcement policy, but whether Respondent was contractually obligated to use Policy 7-1. As noted above, there is no contractual compulsion relevant to this point. Thus, there is no basis to find a Respondent violation of Sec. 111.84(1)(e), Stats.

Complainant's arguments attempt to use the alleged SELRA violations to undercut the quality of DSP management's investigation of McCorison. There is no persuasive evidence that Respondent failed to afford him WEINGARTEN and GARRITY rights in the interviews following those of January 26. At those interviews, Complainant disclosed the same information he disclosed on January 26. Thus, these events afford no basis for finding a violation of Secs. 111.84(1)(a) or (e), Stats.

The exclusionary rule sought by Complainant cannot obscure that Complainant had no substantive right to permanent status, which rested on his supervisors' evaluation of his job performance. Even if such a right did exist, Respondent had significant evidence to question Complainant's exercise of judgment without regard to the January 26 confession, and without regard to the potentially prosecutable nature of his relationship to Genave Haugen. Ultimately, Complainant admitted the relationship and trusted to the exercise of DSP management discretion regarding his employment status. Whether or not the interviews of January 26 had taken place, there is no reason to conclude he had a better defense, cf. HEREK V. POLICE & FIRE COMMISSION OF MENOMONEE FALLS, 226 Wis. 2D 504 (1999). The exclusionary rule Complainant seeks lacks a persuasive basis in law or the facts of this case. Respondent's interest in the January 26 interviews was not determining whether a probationary employee had engaged in illegal conduct. Rather, it was a determination whether McCorison exercised the judgment DSP management expected of a probationary employee generally, and of a probationary employee seeking to carry his service weapon off-duty specifically. Nor does the

record establish that at or after the interviews, Respondent pursued its employment-based interest with improperly coercive means.

In sum, there is no basis under SELRA to overturn Respondent's actions regarding Complainant. The Order entered above thus dismisses the complaint.

Dated at Madison, Wisconsin, this 10th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

RBM/gjc
31052-A