STATE OF WISCONSIN PERSONNEL COMMISSION

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FRANK BLAKE,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 82-208-PC

DECISION AND ORDER

This is an appeal from a discharge decision. The parties agreed to the following issue for hearing:

Whether there was just cause for the discharge.
Subissue: Whether the discipline imposed was excessive.

Prior to the hearing, the appellant filed a Motion to Suppress. Both parties filed briefs in respect to that motion which was denied by the examiner at the commencement of the hearing. The appellant's motion and the ruling are explained below. After the hearing on the merits, both parties submitted briefs.

FINDINGS OF FACT

1. For the period from October 19, 1981 until he was discharged effective October 21, 1982, the appellant was employed as an Administrative Assistant 3 in the Bureau of Correctional Health Services, Division of Health, Department of Health and Social Services. The Bureau is responsible for administering a correctional health care program for the juvenile and adult residents of the State's prisons, correctional camps and metropolitan correctional centers. At all times during this period, the appellant's supervisor was Barbara J. Whitmore, Director of the Bureau.

2. The Bureau has approximately five people on its central office staff in Madison. The appellant worked in the central office. The remainder of the Bureau's employes hold positions in the major institutions.

3. The appellant's responsibilities were summarized in a position description dated October 21, 1981, as follows:

> Under the general direction of the Bureau Director, this position has state-wide responsibility for the organization, maintenance and monitoring of a system of health information and health records for inmates at nine (9) correctional institutions, eight (8) correctional camps and all community-based rehabilitation facilities under contract with the Division of Corrections.

In addition to his responsibility for developing and implementing a medical record system, the appellant, along with the other members of the Bureau's staff, was responsible for responding to complaints regarding the health care provided to individual inmates.

4. Throughout the period in which he was employed by the Bureau, the appellant's residence was in Oshkosh, Wisconsin.

5. Prior to his position at the Bureau, the appellant had been employed by the state for a period of over ten years.

6. The Department of Administration (DOA) operates a fleet of 1250 cars for use by state employes during the course of their employment. There are three different categories of requisitioned cars:

a. Pool cars. These cars are housed at a site in Madison operated by DOA. A person wishing to use a pool car brings in a requisition slip and checks out a car for a period ranging from one day to many months.

b. Functional pool cars. These cars are used in the same manner as a pool car except that they are housed at an agency's own office.

c. Personally assigned cars. These cars are assigned to a specific individual for use. By statute, these cars may be used for personal purposes. However, DOA is to be reimbursed for any personal mileage at a specified rate.

7. An administrative policy adopted by the Department of Administration in 1979 includes the following language.

DEFINITIONS:

* * *

Personal Miles: miles driven in a state vehicle that are not business-related and would not be reimbursable on a travel voucher.

* * *

POLICIES & PROCEDURES

* * *

C. Permitted and Prohibited Uses of State Vehicles

1. Personal Mileage: Pool vehicles may not be used for personal mileage. However, necessary driving incidental to living away from home will be considered business miles. Personally assigned vehicles may be used for a reasonable amount of personal miles. Drivers of assigned vehicles must sign a personal use agreement, form AD-GS-79 or equivalent, which is filed by the agency that owns the vehicle. Personal miles must be reimbursed to the state each month, at a rate established by the Department of Administration, according to procedures established by the agency. Miles driven to and from home are considered personal miles unless they clearly contribute to the efficiency of the trip. Each driver's supervisor is responsible for reviewing mileage records.

8. When an employe picks up a pool car from DOA, they are handed the keys and a Pool Car Trip Ticket. The ticket provides spaces for the driver to fill in departure and return times, the starting and ending odometer readings and any comments regarding the vehicle. The ticket also lists a series of rules for operating the vehicle, including: "All passengers must be on State business -- no hitchhikers." Upon returning the car, the driver is also to sign the ticket and to certify, inter alia, that: "1. Vehicle was used only for State business."

9. The responsibility for making travel arrangements for the Bureau's staff rested with the Bureau's secretary. Until April of 1982, that position was held by Marcia Reierson. In April, Joyce Wall became the new secretary.

10. While secretary, Ms. Wall also prepared a weekly itinerary for the Bureau's staff. The itinerary was based upon information provided to Ms. Wall by each staff member on the Thursday before each week. The weekly itinerary indicated where the person expected to be on a given day so that they could be contacted if necessary. The appellant, along with the rest of the staff, was expected to call in or otherwise advise Ms. Wall when there was a change in his itinerary.

11. The appellant maintained a personal calendar during 1981 and 1982.

12. On September 22, 1982, the Division of Health initiated a new monthly report identifying the mileage and costs incurred by each member of the Bureau's staff in the use of state vehicles. The first report was received by Ms. Whitmore on or about September 22, 1982, and stated that during July of 1982, the appellant had driven 1,976 miles in a state car.

13. Ms. Whitmore sent a memo to the appellant dated September 24, 1982, in which she stated:

> Please review the attached report received from Tom Lucas. Please explain vehicle usage for the month of July 1982. I reviewed the weekly itineraries and car rental requisition slips for July and could not determine your travel activities for that month.

14. The appellant responded by a memo dated October 1, 1982, which stated:

> In reply to your correspondence dated September 24, 1982, the following correctional facilities were visited in July for follow-up on clinical data with reference to inmate complaints, as well as the review of the current (PCMR) medial record change over: Waupun, Kettle Moraine, Dodge, Fox Lake, Winnebago Camp, Correctional Drug and Alcohol Treatment Center (WMHI) and Green Bay.
>
> The mileage incurred was in the interest of the state. Weekly itineraries submitted by me are all tentative and are not corrected to reflect true out of the office work activities.

15. The file maintained by Ms. Wall for car requisition slips did not include any copies of requisitions for the appellant for the period including July, August and September of 1982. On or about October 1st, the Bureau obtained copies of three requisition slips for state cars provided to the appellant for the period from July 6, 1982, through September 30, 1982.

16. By memo dated October 4, 1982, from Ms. Whitmore, the appellant was directed to submit a report for July, August and September, documenting the appellant's travel activities. The report was to indicate the location, arrival time, departure time, means of transportation and mileage and was to be submitted by the end of the working day on October 5, 1982.

17. The appellant submitted a written activity report in the form of a memo dated October 5, 1982. The appellant prepared his report based upon his own recollections and upon his personal calendar.

18. By memo dated October 5th, the appellant was notified that:

> There will be a predisciplinary investigatory meeting concerning your use of a state vehicle. The meeting will be held at 9:00 a.m., October 6 in Room 273 WS SOB. You are entitled to a representative of your choice.

The memo was from Jerry Jensen, Chief of the Management Assistance Section, Office of Operations and Management, Division of Health. Mr. Jensen had been assigned to investigate the appellant's use of state vehicles.

19. A comparison of the car requisition slips, a computer printout prepared by DOA of vehicle usage by the appellant and the activity report prepared by the appellant (dated October 5, 1982) shows that between July 6 and September 30, 1982, the appellant drove 5,063 miles in state vehicles and could account for just 1,712 miles on his activity report. For September, the month closest to the date that the appellant prepared his activity report, the appellant identified 273 miles in his activity report while the requisition slips indicated he had driven 1,559 miles.

20. The predisciplinary investigatory meeting was held as scheduled on October 6th. At that meeting, the appellant admitted that he signed for (state) credit card purchases of gasoline for state vehicles as follows:

Friday, September 3	$11.50	9 gallons	Madison
Monday, September 5	12.25	---------	Oshkosh
Wednesday, September 7	-----	10 gallons	Madison
Friday, September 10	8.50	6.5 gallons	Waupun
Tuesday, September 14	9.40	7.47 gallons	Madison
Thursday, September 16	8.50	6.5 gallons	Waupun
Saturday, September 18	11.50	----------	Oshkosh
Monday, September 20	12.20	9.5 gallons	West Bend
Friday, September 24	12.50	----------	Oshkosh

21. Waupun is the site of the Dodge Correctional Institution and the Waupun Correctional Institution. The Fox Lake Correctional Institution is nearby. The Winnebago Mental Health Institute is located near Oshkosh.

22. At the predisciplinary investigatory meeting on October 6th, the appellant stated that personal miles accounted for the discrepancy between his activity report mileage totals and the requisition slip totals. The appellant also stated that he used the car to go back and forth to his home in Oshkosh and that he thought the State would bill him.

23. At the meeting, Mr. Jensen requested that the appellant also submit an activity report for the period from November 1, 1981 through June 30, 1982, by Friday, October 8th.

24. The appellant's activity report for that period lists travel totalling 6,118 miles, not including side trips for lunch. The activity report includes statements by the appellant that he visited the following institutions on the dates noted.

1.	October 30, 1981	Fox Lake
2.	January 4, 1982	Fox Lake
3.	February 22, 1982	Fox Lake
4.	June 2, 1982	Fox Lake
5.	June 3, 1982	Kettle Moraine
6.	June 4, 1982	Oakhill
7.	June 4, 1982	Taycheedah

Examination of the visitor logs maintained by those institutions indicate that he was not present on those dates. In preparing his activity report, the appellant relied upon his own recollection, documents from (case and/or project) files, and on his personal 1982 calendar.

25. During the same period (November 1, 1981 through June 30, 1982) the appellant drove state vehicles a total of 13,747 miles.

26. The appellant slept overnight in a State car for the night of September 27, 1982. He was discovered at 3:00 a.m. on September 28, 1982, by a Town of Fitchburg police office in the Oregon State Camp area. The appellant was scheduled to attend a meeting at Oakhill at 8:00 or 9:00 a.m. on September 28th.

27. The Department's Work Rules prohibit the following conduct:

> 3. Stealing or unauthorized use, neglect, or destruction of state-owned or leased property, equipment, or supplies.
>
> 7. Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.

28. In a letter dated October 20, 1983, from Kenneth Rentmeester, Administrator of the Division of Health, the appellant was discharged effective 4:30 p.m. on October 21st. The letter stated, in part:

> According to Department of Administration records, you drove a state car 19,395 miles.
>
> Itineraries prepared by you indicate that you traveled only 7,680 miles for business and the remaining 11,715 miles, by your own admission, were incurred for personal use.
>
> This is clearly a Violation of Work Rule Three (3).
>
> In an attempt to verify the itineraries submitted by you on October 5, 1982 and October 8, 1982, it has been learned that on 10 occasions you did not travel to the destinations you indicate on your report.
>
> Filing false reports is a violation of Work Rule Seven (7).

On October 6, and October 13, 1982 predisciplinary investigatory meetings were conducted by Mr. Jerry Jensen. At these meetings, you were unable to explain the gross discrepancies in your reports.

29. The appellant's conduct constituted violations of Work Rules 3 and 7.

30. The appellant's conduct impaired the operations of the Bureau by undermining the appellant's relationship with his superiors and co-workers.

31. As of September 30, 1982, the appellant's supervisor, Ms. Whitmore, planned to recommend that the appellant "be suspended in accordance with personnel rules and ... be required to reimburse the Department for personal use of a State vehicle." That proposed recommendation was made before the extent of the appellant's travel was known to the respondent, and before Mr. Jensen's investigation had commenced. After a second predisciplinary meeting on October 13th, Ms. Whitmore recommended that the appellant's employment be terminated.

32. The only other case known by Mr. Jensen to have involved the misuse of a state vehicle resulted in a 30 day suspension for the employe. That case involved traveling 485 miles on personal business in a state vehicle.

33. Prior to his termination, the appellant had never been formally disciplined by the respondent.

CONCLUSIONS OF LAW

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

2. The respondent was not required to advise the appellant that information he provided could be used in criminal proceedings.

3. The respondent has the burden of proof.

4. The standard of proof to be applied is one of a reasonable certainty, by the greater weight of the credible evidence.

5. There was just cause for the imposition of discipline.

6. The discipline imposed was not excessive.

OPINION

Before discussing the merits of this case, the Commission will address itself to a procedural argument raised by the appellant.

A. Standard of Judgment

The appellant argues that the standard of judgment to be applied in this case is the "middle standard" of "clear; satisfactory and convincing evidence" rather than the ordinary civil standard of a "reasonable certainty, by a greater weight of the credible evidence." This argument is premised upon a line of cases suggesting that the middle standard is to be applied to forfeiture actions when the acts constituting the municipal ordinance violations also constitute a crime under state statutes. Madison v. Geier, 27 Wis. 2d 669, 135 N.W. 2d 761 (1965); Cudahy v. DeLuca, 49 Wis. 2d 90, 181 N.W. 2d 374 (1970); City of Omro v. Brooks, 104 Wis. 2d 351, 311 N.W. 2d 620 (1981).

The Wisconsin Supreme Court specifically addressed the issue of the standard of proof to be applied by the Commission's predecessor, the State Personnel Board, in Reinke v. Personnel Board, 53 Wis. 2d 133, 191 N.W. 2d 833 (1971). In Reinke, the Board had reviewed a discharge decision in which the employe had been found to have slapped an inmate at the Wisconsin School for Girls. The Board had found that there was substantial evidence to support the action of the appointing authority and concluded that the discharge was therefore for just cause. On review, the Supreme Court found that the Board's application of the substantial evidence standard was improper and that the Board should have applied the ordinary standard in civil actions:

> [The] standard to be used by the Personnel Board in making its findings should be that used in ordinary civil actions, to a reasonable certainty, by the greater weight of the credible evidence standard.
>
> The Personnel Board is required by law to find ultimate facts, and there is no authority for the board to determine if there is substantial evidence to support the action of the appointing authority. The function of the board is to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence. Reinke, 53 Wis. 2d 123, 137-38 (citation omitted).

The Court cited both Madison v. Geier and Cudahy v. DeLuca in footnotes to its decision so it cannot be said to have been unaware of the arguments now advanced by the appellant. It is also important to remember that the employe in Reinke was accused of slapping an inmate, which could have been the basis for a criminal charge against the employe. Despite this information, the Court established, without qualification, a single standard of judgment to be used by the Personnel Board in disciplinary cases: "to a reasonable certainty, by the greater weight of the credible evidence." This is the standard to be applied by the Commission in all disciplinary appeals, regardless of whether the conduct underlying the discipline would also support a criminal charge.

B. Merits.

In disciplinary appeals, the Commission is required to apply a two step analysis:

> First, the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. Holt v. DOT, Case No. 79-86-PC (11/8/79).

The Wisconsin Supreme Court has defined "just cause" in the context of employe discipline as follows:

> ... one appropriate 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. State ex rel Gudlin v. Civil Service Commn., 27 Wis. 2d 77, 98, 133 N.W. 2d 799 (1965); Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974).

The respondent's case in support of the discipline imposed is focused upon circumstantial evidence indicating that the appellant used a state vehicle for personal miles.

The Bureau's Secretary maintained a weekly itinerary so she would know when someone in the office would be gone and where they might be reached. The itinerary covers the period from April, 1982, to October, 1982, and was obviously only as good as the information provided by the particular employe. However, the secretary testified that the appellant did, in fact, submit the requested forms. In addition, the appellant testified that he would usually notify the secretary if his plans had changed from his originally submitted itinerary. Based on this information, the weekly itineraries appear to be reasonably reliable indications of the appellant's activities.

The appellant maintained a personal calendar in order to know where he was supposed to be so that he could cancel an appointment if appropriate. However, the appellant described the calendar as a "hit or miss" affair, that was most accurate for visits scheduled well in advance. The appellant stated that he would not mark an "impromptu" trip down in the calendar if he knew that the trip was mandatory. The personal calendar therefore also provided a somewhat incomplete though reasonably accurate description of the appellant's travels.

The third documentary source of evidence regarding the appellant's whereabouts is the visitor logs maintained by the majority of the state's correctional institutions. The respondent failed to submit a complete set

of visitor logs from all of the state institutions covering the entire period of the appellant's employment. The appellant was also able to establish that the logs were not 100% accurate because they might not reflect a visit by someone who merely dropped off documents at the institution's front gate. Despite these limitations, the visitor logs are entitled to some weight in reaching a decision in this matter.

The two activity reports prepared by the appellant comprise the final set of documents that are of major importance in this case. These documents were prepared by the appellant under some time constraints and without access to gasoline receipts or to the Bureau's weekly itinerary. However, the appellant did have access to his working files and had, at least, his 1982 personal calendar available.

The chart below compares the information from these various documents. The notation N/A means not available.

Visit		Confirmation			
Date	Location[1]	a. Activity Report	b. Visitors Logs	c. Personal Calendar	d. Weekly Itinerary
10-30-81	Waupun C.I.	Yes	N/A	Yes	N/A
11-2	"	Yes	N/A	Yes	N/A
12-1	"	Yes	N/A	Yes	N/A
12-2	"	Yes	N/A	Yes	N/A
12-4	"	Yes	N/A	Yes	N/A
2-1-82	"	Yes	N/A[2]	Yes	N/A

[1]The appellant's activity reports state that he visited Oshkosh on 33 different days during the period of his employment at the Bureau. It is impossible to determine from the documents in the file for some of those visits whether the appellant carried on state business in the Oshkosh Correctional Trainings Facility and nearby institutions, as compared to those times he apparently stayed overnight in Oshkosh while en route between Madison and institutions in the Oshkosh area.

[2]This visit is noted in the appellant's personal calendar as being scheduled for 9:30. The Oakhill visitors log shows that the appellant was at Oakhill on February 1st from 9:00 a.m. until 10:00 a.m.

Visit		Confirmation (continued)			
Date	Location[1]	a. Activity Report	b. Visitors Logs	c. Personal Calendar	d. Weekly Itinerary
2-15	Waupun C.I.	Yes	N/A	Yes	N/A
3-25	"	Yes	N/A	No	N/A
4-5	"	No	N/A	No	Yes
4-23	"	No	N/A	No	Yes
5-6	"	No	N/A	No	Yes
5-27	"	Yes	N/A	Yes	Yes
6-11	"	No[3]	N/A	No	Yes
6-14	"	No[3]	N/A	Yes	No
7-8	"	Yes	N/A	Yes	No
7-13	"	Yes	N/A	Yes	No
9-14	"	No	N/A	Yes	Yes
9-24	"	Yes	N/A	Yes	Yes
10-30-81	Fox Lake C.I.	Yes	No	Yes	N/A
11-17	"	Yes	Yes[4]	Yes	N/A
1-4-82	"	Yes	No[4]	No	N/A
2-4	"	Yes	Yes	Yes	N/A
2-22	"	Yes	No	Yes	N/A
3-26	"	Yes	N/A	No	N/A
4-27	"	No	N/A	No	Yes
5-6	"	No	N/A	No	Yes
6-2	"	Yes	No	Yes	No
6-14	"	Yes	Yes	Yes	Yes
8-3	"	Yes	N/A	No	No
10-27-81	Green Bay C.I.	No	N/A	Yes	N/A
11-9	"	Yes	Yes	Yes	N/A
2-5-82	"	Yes	Yes	Yes	N/A
3-22	"	Yes	Yes	Yes	N/A
4-9	"	No	Yes	No	Yes (4-8)
5-7	"	No	Yes	No	Yes
5-28	"	Yes	Yes	No	Yes
7-26	"	Yes	No	Yes	No
11-10-81	Taycheedah C.I.	Yes	Yes (11-9)	Yes	N/A
12-3	"	Yes	Yes	Yes	N/A
3-26	"	Yes	Yes	No	N/A
5-11	"	No	Yes	No	No
5-14	"	No	Yes	No	No
6-4	"	Yes	No	Yes	No
6-10	"	Yes	Yes	Yes	Yes
7-16	"	Yes	No	Yes	No

[3]The appellant's activity report states he was already in Fox Lake on June 16th. That visit was confirmed by all sources.

[4]The visitors log states "SNOW STORM. NO MOVEMENT PERIOD!!!"

Visit		Confirmation (continued)			
Date	Location[1]	a. Activity Report	b. Visitors Logs	c. Personal Calendar	d. Weekly Itinerary
11-18-81	Kettle Moraine C.I.	Yes	N/A	Yes	N/A
3-29	"	Yes	Yes	No	N/A
6-3	"	Yes	No	Yes	No
6-11	"	Yes	Yes	Yes	Yes
11-25-81	Oakhill C.I	Yes	Yes	Yes	N/A
2-3-82	"	Yes	Yes (2-1)	Yes	N/A
3-31	"	Yes	Yes	No	N/A
6-4	"	Yes	No	Yes	No
6-9	"	Yes	Yes	Yes	No
8-11	"	Yes	No	No	No
9-28	"	Yes	No	Yes	Yes
11-16-81	Dodge C.I.	Yes	N/A	Yes	No
4-5-82	"	Yes	N/A	No	Yes
5-6	"	No	N/A	No	Yes
5-27	"	Yes	N/A	Yes	No
11-16-81	Winnebago Mental	Yes	N/A	No	N/A
1-28-82	Health Institute	Yes	N/A	Yes	N/A
2-16	or Winnebago	Yes	N/A	Yes	N/A[5]
4-15	Camp.	No[6]	N/A	Yes	No
8-5	"	Yes	N/A	No	No
9-24	"	Yes	N/A	Yes	No
3-16-82	Ethan Allen School	Yes	N/A	No	N/A
3-3-82	UW-Milwaukee	Yes	N/A	Yes	N/A
3-4	"	Yes	N/A	Yes	N/A
4-19-82	West Bend	Yes	N/A	Yes	Yes
9-20	"	Yes (9-27)	N/A	Yes	Yes
3-22-82	Lincoln Hills	Yes	N/A	No	N/A

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[5]The weekly itinerary shows that the appellant was on vacation.

[6]The appellant's activity report states that he was on vacation when he visited Winnebago. His personal calendar and the weekly itinerary for August 5th indicate he was on vacation and fail to mention any visit to Winnebago.

This listing shows that the vast majority of the travel that is indicated in the institutions' visitor logs, the appellant's personal calendar or the Bureau's weekly itinerary, was in fact claimed by the appellant in his activity reports. This evidence does not support the appellant's theory that there was a significant amount of business travel that was not reflected on his activity reports.

Other evidence is also relevant in determining how the appellant had used the state vehicles which he obtained. Joyce Wall, the Bureau's secretary, estimated that the appellant conducted only about five or six site visits during the period from the middle of June 1982 until October of 1982. She also stated that the appellant was usually gone once or twice a week for such visits during April, May and early June of that year. The appellant himself admitted that for the four week period prior to Labor Day in 1982, he spent virtually every day in his office working and not traveling. The appellant's supervisor stated that during the last months of his employment, the appellant was not given any outside assignments to audit records or to follow up on inmate complaints. The gasoline credit card slips for the month of September, 1982, indicate that the appellant normally purchased gasoline in Madison, Oshkosh or in Waupun (which is en route between Madison and Oshkosh). The appellant purchased gas in Oshkosh on Saturday, September 18th and then on Monday purchased an additional 9.5 gallons in nearby West Bend. According to his own activity report, the appellant arrived in West Bend at 9:30 a.m.[1] from Oshkosh.

The Commission also notes that the appellant admitted that on the evening of September 27th, he slept overnight in a state car in the vicinity of the Oregon State Camp because he had an 8:00 a.m. or 9:00 a.m. meeting at the Oakhill facility. This conduct suggests that the appellant used the state car for purposes other than business travel, i.e. as a home

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[1]The Commission concludes that the report incorrectly set the date for the visit as September 27th instead of September 20th.

away from home. Such use is consistent with the conclusion that the appellant drove the state vehicles for personal, as well as business, purposes.

It is also apparent that the appellant did not follow the standard procedure in respect to submitting vehicle requisition slips (Form AD-44's). The standard practice in the Bureau since at least April of 1982 was for the staff member needing a car to ask the secretary to arrange for a car on a specific date. The secretary (Joyce Wall) would type up the request and call the motor pool to reserve a car. She would also make extra copies of the request and obtain the requisite authorization signature. The completed requisition form was then given to the driver on the day the car was scheduled to be picked up. After the car was returned to the DOA fleet, the driver was to fill in the odometer reading on the requisition form and to return a carbon copy of the form to the Bureau secretary who retained a copy for her records. In contrast, the appellant testified that the DOA fleet office would send a copy of the requisition directly to the Bureau and that all the appellant had to do was to turn in the requisition form when he returned the car. If the appellant's testimony was true, the respondent would have had copies of all of the car requisition forms submitted by, or on behalf of, the appellant. However, the Bureau had no record of at least those three requisitions covering the period from July 6th through September 30th. The appellant admitted that he prepared the requisitions himself and obtained the stamped authorization signature. The Bureau's secretary specifically recalled preparing requisition #830 for the period from April 7th to April 13th. The form shows that the date of April 13th was crossed off and a new return date of May 3rd was inserted. Ms. Wall did not recall making this change. A

similar change is reflected on requisition #734 which initially ran from March 8th to March 16th. The return date was crossed off and April 6th was inserted. The appellant's practice of filling out his own requisition forms, the changes in the dates for returning the vehicles and the absence of any copies of the forms in the Bureau's files all generate a strong implication that the appellant sought to mask the full extent of his use of state vehicles.

The clearest evidence in this matter are the statements made by the appellant at the predisciplinary investigation meeting. The appellant argues that at the October 6th meeting, he admitted to using a state car for personal miles on only one occasion. He argued that his admission was only in reference to one incident in which he became very ill on a Friday afternoon during a business meeting at a Madison motel and traveled directly, by state car, to his home in Oshkosh. In contrast, Mr. Jensen stated that the appellant admitted he used a state vehicle to go back and forth to his home in Oshkosh and that he expected the state would bill him. The appellant testified that he might have said that he thought the state would bill him for those personal miles, but that that was not what he had intended by his statement.

This and other questions of credibility that arose in this proceeding were resolved against the appellant based upon the content of the appellant's responses as well as his demeanor. At the hearing, the appellant specifically denied using a state vehicle for personal miles but moments later admitted to driving a car from Madison to Oshkosh because he was ill. The appellant testified that even though he prepared the second activity report after the October 6th predisciplinary investigatory meeting, he did not know that the report might be used as a basis for

disciplinary proceedings. These and other comments by the appellant act to undermine the reliability of his testimony.

A final point is relevant to the merits of this case. The bulk of the respondent's evidence in this matter was circumstantial and if viewed individually would have been unable to support a finding of just cause for discipline in this matter. However, when viewed together, the evidence establishes, to at least a reasonable certainty, that the bulk of the 18,000 miles driven by the appellant in a state vehicle were for personal rather than business purposes. The appellant has, at all times, been in a position to offer contrary evidence. It is not unreasonable to expect someone whose profession is to insure the adequacy of medical records to maintain a reasonably accurate record of his own travels. The first time he was asked to account for his mileage during September of 1982 was on October 4, 1982. Yet at that time, the appellant was only able to recall business travel totalling 273 miles during the previous month. His activity report lists nothing for the days of September 3, 5, 14, 15, 16 and 18. Yet four and one-half months later, when confronted with gasoline credit card slips for that period, the appellant recalled that he drove from Madison to Green Bay on Friday, September 3rd, returned as far as Oshkosh, spent the weekend in Oshkosh, filled the car with gas and returned to Madison on Tuesday, September 7th because Monday had been a holiday. Later in his February, 1983 testimony, the appellant recalled that on both September 14th and 15th, he drove to Waupun and returned to Madison and that on the 16th he drove to the Winnebago camp near Oshkosh and managed to be in Oshkosh at the proper time to go to an appointment with his eye doctor on that date, all supposedly without any personal miles. Two days later on Saturday, the appellant was in Oshkosh again, charging gas so that

he could return to Madison on Monday. Other than notes in his calendar that he had an eye appointment on the 16th and Waupun on September 14th, these travels are completely uncorroborated in terms of whether they were made for business purposes.

The appellant had adequate time before the respondent imposed discipline (October 20, 1982) and before the administrative hearing began (January 20, 1983) to document his allegations that there were business trips beyond those noted on his activity reports. He could have offered notes from his files or testimony from persons he visited as to the dates or the frequency of his visits. He failed to do that. Based upon the record before it, the preponderance of the evidence clearly supports the conclusion that the appellant often used state vehicles for personal reasons. For that reason, the Commission finds that the appellant did, in fact, violate Work Rule #3 and that there is just cause for imposing discipline for that violation. By violating the work rule, the appellant had to have undermined his relationship with his supervisors and his fellow employes, thereby impairing his own effectiveness as well as the effectiveness of the Bureau.

The Commission also finds that the appellant's activity reports are inaccurate for those dates noted in Findings of Fact #24, thereby constituting a violation of Work Rule #7. However, in light of the fact that these entries were, with just one exception, found on the appellant's personal calendar, and because of the lengthy period between the date the activity log was completed and the alleged visits occurred, the Commission finds that the violation of Work Rule #7 does not justify the imposition of any discipline.

In determining the amount or level of discipline to be imposed for the violation of Work Rule #3, the Commission has considered the magnitude of the violation and the only other instance (Finding of Fact #32) involving a violation of the same work rule and concludes that dismissal of the appellant was not excessive.

C. Motion to Suppress

Prior to the commencement of the hearing in this matter, the appellant filed a motion to suppress, arguing that because he was not granted immunity from prosecution for any criminal charges arising from his alleged conduct, any evidence obtained from him should be excluded from the record. The hearing examiner denied the appellant's motion, but advised the parties that it was possible for the Commission to overturn the examiner's ruling and that the parties should proceed accordingly. In his post-hearing brief, the appellant reiterated his arguments.

The appellant's motion to suppress is based upon the recent case of Oddsen v. Board of Fire and Police Commissioners, 108 Wis. 2d 143, 321 N.W. 2d 161 (1982). In Oddsen, two Milwaukee police officers were discharged for allegedly engaging in sexual intercourse with each other while off duty. They were interrogated separately by more senior officers for extended periods of time. The Wisconsin Supreme Court found that the course of questioning was coercive as a matter of fact and resulted in involuntary statements. The Court's conclusion was based on the circumstances of the interrogation. The interrogation was described as follows:

> Shortly thereafter, at approximately 8 o'clock, Oddsen and Gail Quade were taken to the headquarters of the Fifth District, and each was separately interrogated by more senior officers. About the time the police arrived at the Quade home, Gail Quade became ill and vomited blood. She called her doctor and told him of her condition and made an appointment for that morning at 10 a.m.

Upon arrival at District Station 5, she was questioned about her off-duty conduct. Although she told the sergeants who were interrogating her that she had made an appointment with her own doctor, and although they knew that she was complaining about vomiting blood, she was not allowed to leave in order to keep the appointment with her own physician. She was instructed to submit to the investigation or be subject to further charges. It is undisputed that she knew that her failure to answer questions could result in her discharge.

At about 10 a.m. she gave a statement in which she admitted no wrongdoing. Under the scrutiny of her interrogators, she called her doctor again, telling him that she could not leave the police station, and a new appointment was made for 2:15 p.m.

There is evidence in the record adduced at the hearing before the Board of Fire and Police Commissioners that indicates that, following her first statement, one of the interrogating officers tore up some of the sheets of Gail Quade's statement which he thought were false and kept those he considered useful. He indicated to her that she would stay there until she gave the information which the interrogators thought to be truthful.

At around 10:00 a.m., Quade again vomited blood, and she reported this to Sergeant Parys. At about 2 p.m., Quade was taken to the First District Central Police Headquarters; and there, apparently, Lieutenant Starke took charge of the interrogation. He was told by either Sgt. Parys or Sgt. Eccher that Quade was spitting up blood. Quade told Starke that she had an appointment with her physician at 2:15 p.m., but when she asked Lt. Starke for permission to see her own physician, he said, "We're not through with you yet. When we're done, you can go." Lt. Starke, however, allowed Quade to call her doctor. Her conversations with her physician were always made in the presence of one or more of the interrogating police officers. She told her physician that she had continued to vomit blood, had very severe stomach pains, and was very nervous and upset. Her doctor then said he would see her later in the afternoon if she at that time would be able to leave the police headquarters. At or about the time of this phone call, Lt. Starke told Quade that, if she wanted to go to a hospital or see a doctor, he would stop the interrogation. He said at the hearing before the Board of Fire and Police Commissioners that he was very conscious of her physical condition. Quade told Starke that she wished to see her own doctor. It was very clear from the testimony that, at no time, did Lt. Starke acquiesce in Quade's request to see her personal physician, who was familiar with her condition. He merely said that she could go to a hospital or see a doctor. He stated that she could see her own doctor when the police were finished with her.

Quade testified that she vomited during the afternoon, and she said that she had severe stomach pain during the entire period of questioning.

At 5:45 p.m., after approximately ten hours of questioning, Quade gave a statement in which she admitted to having intercourse with Police Officer Oddsen while off duty. During the course of the taking of a verbatim statement at about 5:45 or 6 o'clock, Quade denied having intercourse with Oddsen that morning. She did admit, however, to having intercourse on three earlier dates. Lt. Starke asked such

"narrow" job-related questions during the course of this interview as, "During any of these affairs, did Oddsen use protection," "Did you have any contraceptives or a pill," and "Could there have been a possibility of your becoming pregnant."

After being questioned for twelve hours, Quade was allowed to leave shortly after 7 p.m. While she was on her way home, being driven by police sergeants, they were ordered to return her to the central police administration offices. She was returned for a purpose that is not made clear in the record nor was it made clear to her. She was finally permitted to return home after fourteen hours of custody and confinement.

Accordingly, the statements which the police officers extracted from Quade were the result of approximately fourteen hours of interrogation, during which time Quade complained of severe stomach pains and the vomiting of blood. During the interrogation she was permitted to call her doctor four times to make appointments to see him; but each time, when the time for the appointment came, she was told by the interrogators that she could not see her doctor until they were finished with her. Officer Quade knew that her failure to respond to the questions could result in her discharge; and when she wrote her initial statement, she was told she would have to write another report--a report which would conform to what the police officers believed to be the truth--unless she wished to be subjected to additional discipline.

At the time Oddsen and Quade were brought to police headquarters, Oddsen asked for a lawyer or a representative of the policemen's union to be present during the interrogation. In Quade's hearing before the Board of Fire and Police Commissioners, Oddsen stated this request was made not only for himself but also for Officer Quade. Officer Quade did not ask for a lawyer or a representative of the policemen's union until late in the afternoon, and that request was denied. Although it was made clear to Office Quade that their interrogation focused upon adultery, at no time was she told of her fifth amendment rights against self-incrimination nor was she told that any statements she might give during an interrogation under the duress of possible job loss for failure to answer could not be used in a criminal proceeding.

Oddsen was brought to the police headquarters at the same time as Gail Quade. He immediately asked, as recounted above, for a lawyer or representative of the union. This request was denied.

Oddsen told the interrogating officers that he was extremely tired, that he had not slept for two nights, and it was his assertion near the end of the interrogation that he had not slept for forty-seven hours. Nevertheless, he was directed to write a report of the morning incident. At 9 a.m., Oddsen wrote a report which his interrogators believed to be untruthful, and he was told that he would be punished for filing an untruthful report. In the first statement given, he denied that he had ever had sexual intercourse with Officer Quade. After writing this initial report, Oddsen again requested representation, which was again denied. He was told that, if he left without satisfying his interrogators, he would face additional disciplinary action. Early in the afternoon, Oddsen was taken to the downtown police headquarters, where he was told by Lt. Starke he would have to give a statement. Again his request for counsel or representation was denied. Oddsen stated that he was physically and

> mentally exhausted and unable to answer any more questions. Nevertheless, he was directed to write additional statements.
>
> At the hearing before the Board of Fire and Police Commissioners, Lt. Starke was asked about the conditions surrounding Oddsen's interrogation at central headquarters. He stated that Oddsen alleged that he had been without sleep for forty-seven hours, but he said he examined Oddsen closely and felt that he was coherent in his answers. He acknowledged that Oddsen, despite the request, was not allowed counsel, and he asserted that his purpose for interrogation was merely an employee investigatory matter and that, had a felony charge for adultery been contemplated, the interrogation would have been by the vice squad. He did say, however, that he was aware that a felony charge for adultery could result. He acknowledged that Oddsen was told that he would not be allowed to leave until he satisfactorily responded in a stenographically reported verbatim statement.
>
> Oddsen contended that, during the period of time he was at the police headquarters, from approximately 8 in the morning to 8:45 at night, he was not offered any food, and the only thing he had to drink was a cup of coffee at about 10 a.m. During this period, during a respite in his interrogation, he said he saw Gail Quade go into a washroom and heard her vomit. He stated that, before each statement was requested of him, he asked for counsel. He was denied the right to make any phone calls.
>
> Lt. Starke testified before the board that, in fact, Oddsen was offered food. Oddsen told the commissioners, however, that he was offered food so late in the day that at that point he was not interested in food and could not have eaten.
>
> The verbatim stenographically reported statement of Oddsen was given in response to Lt. Starke's questions about 6 p.m. Officer Oddsen was asked about what happened that morning at the residence of Police Officer Gail Quade. Officer Oddsen responded by saying that he had not had any sleep for forty-eight hours and he would like someone present from the union to represent him, either one of the officers of the union or Attorney Kenneth Murray, the legal representative of the police officers union. He was told that the rules did not allow representation. Officer Oddsen stated that he knew that he was bound by the rules of his employment to answer questions put to him.
>
> He denied having intercourse that morning with Officer Quade, but finally he did admit to having intercourse with her on three occasions, the first being on Christmas Eve of 1977. Two other instances of intercourse were acknowledged. With the same assiduity for probing into facts that narrowly and directly are within the scope of official duties of subordinate officers that he displayed in interrogation of Officer Quade, Lt. Starke asked Oddsen, "Any sodomy?"
>
> Oddsen was released about about 8:45 p.m., after being questioned in excess of thirteen hours.
>
> 108 Wis. 2d 143, 148-53 (footnote omitted)

After finding the circumstances of the interrogations to be coercive as a matter of fact, the Court went on to find that the statements "were coerced and involuntary as a matter of law" because Oddsen and Quade were

not advised that any information which they gave could not be used against them in criminal proceedings:

> In the instant case, it is clear that both Oddsen and Quade knew that they could be fired if they refused to answer the questions. It is equally clear that they were not told that, were they to speak, the statements they gave could not be used against them in a prosecution for adultery. Accordingly, the statements they gave were barred as a matter of law. Absent the advice that they could not be prosecuted on the basis of the statement given, their statement was the product of a coercive choice. They were truly between Scylla and Charybdis. If they did not speak, they knew that they would be fired. If they spoke, what they said could lead to prosecution, and most likely, in any event, to conviction and dismissal from their jobs. Absent the warning spelled out in Conlisk, these coerced statements cannot be used. There is no necessity for the police department or anyone else to be given authority to grant immunity from criminal prosecution. Immunity is conferred by operation of law as determined by the United States Supreme Court in Garity. If a statement is taken under these conditions, i.e., a threat of job forfeiture, a defendant is given immunity from prosecution, at least to the extent that the statement could be the basis for the prosecution. Accordingly, in the instant case, in order to prevent the statement being excluded as a matter of law, where its purpose is discipline, it was incumbent upon the interrogating police officers to advise:
>
> > "... the employee of the consequences of his choice, i.e., that failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings."
>
> 108 Wis. 2d 143, 164-65 (Citation omitted).

The appellant in the instant case acknowledged that neither the duration nor circumstances of the Oddsen case are present in his appeal. However, he argues that the failure of the respondent to advise him that his responses to investigatory questions could not be used against him in criminal proceedings acted to exclude his statements as a matter of law. Specifically, the appellant seeks exclusion of the activity reports (Respondent's Exhibits 5 and 7), the appellant's personal calendar for 1981 and 1982 (Respondent's Exhibits 21 and 22) and all testimony regarding statements made by the appellant during the predisciplinary investigatory meeting and the subsequent predisciplinary hearing.

The Commission concludes that given the circumstances of this case, the respondent was not required to expressly provide the warning described in the Oddsen case and that the appellant's motion to suppress was properly denied.

There is nothing on the record in the instant proceeding to suggest that criminal prosecution was ever contemplated by the respondent in regard to the appellant's conduct. There is also nothing on the record to indicate that the appellant was ever aware that criminal prosecution could have been initiated. At all times, the respondent's investigation focused on an alleged violation of a work rule involving the use of a state vehicle for something other than business purposes. There were no apparent attempts to contact the district attorney or to otherwise commence an investigation for supporting the filing of criminal charges. There was never any citation of a state criminal statute in any correspondence directed to the appellant. There is no indication that, by its language, the work rule in question ("Stealing or unauthorized use, neglect, or destruction of state-owned or leased property, equipment, or supplies) acts to incorporate the provisions of the State's Criminal Code.

The only testimony regarding the possibility of seeking criminal sanctions against Mr. Blake is testimony of his supervisor, Ms. Whitmore:

> Q. At any time during the course of the investigation in this matter, did you consider recommending the institution of formal criminal proceedings?
>
> A. No, I don't think I ... I'm not sure. I guess what I would have wanted to do was get all the documentation and hear everything that I possibly could, you know, hear every side, and try to be as objective as possible.
>
> Q. Was there any discussion, as far as you are concerned, in which you were directly involved, relating to the institution of formal criminal proceedings?

A. I did have discussion with Mr. Jensen relating to how Mr. Franke [Blake] may have violated the work rules.

Q. Was there ever any discussion of the state criminal statutes?

A. I don't recall.[1]

Nothing in the record suggests that Mr. Jensen, who conducted the investigation, or Mr. Rentmeester, the appointing authority, ever considered initiating a criminal complaint, nor does anything in the record suggest that the appellant knew such a complaint was even possible.

In contrast, the relevant facts in Oddsen are as follows:

1. In the notice to the Board of Fire and Police Commissioners, the Police Chief "specifially stated that Gail Quade and Timothy J. Oddsen had failed to conform to the adultery statute, sec. 944.16, Stats." 108 Wis. 2d 143, 145.

2. It was undisputed that Officer Quade "knew that her failure to answer questions could result in her discharge." 108 Wis. 2d 143, 149[2]

3. The lieutenant conducting the interrogation was aware that a felony charge for adultery could result. 108 Wis. 2d 143, 152.

4. "During the entire interrogation of Oddsen, it was clear that the investigation centered on whether Oddsen and Quade had committed adultery." 108 Wis. 2d 143, 154.

5. "Oddsen, like Quade, knew, and in fact was told, that the failure to answer questions truthfully could result in being discharged from the police force." 108 Wis. 2d 143, 154.

6. "Oddsen, like Quade, knew that the commission of the sexual acts could result in criminal prosecution." 108 Wis. 2d 143, 154.

7. "[T]he police department attempted to have the district attorney's office commence prosecution for adultery against both Quade and Oddsen." 108 Wis. 2d 143, 154.

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[1]No official transcript of the hearing in this matter had been prepared as of the date the proposed decision and order was issued. This excerpt of the proceeding was prepared directly from the tape recording made pursuant to §227.07(8), Stats.

[2]In contrast, when Mr. Blake was asked what his understanding was as to what would have occurred had he refused to provide information at the predisciplinary meetings, he stated, "I had no idea." This question and answer had been proceeded by appellant's statement that he was not free not to answer questions asked about his activities.

8. The complaint against Oddsen alleged that he had "violated department rules which require that:

> 'Members of the police force ... shall conform to, abide by and enforce all the criminal laws of the State of Wisconsin and the ordinances of the City of Milwaukee of which the Department must take cognizance....'

108 Wis. 2d 143, 155.

With the exception of the ambiguous statements made by Ms. Whitmore, nothing in the record suggests that the appellant was between Scylla and Charybdis. Because criminal prosecution was apparently never considered by the respondents, it was not a hazard to the appellant. Certainly it was never perceived by the appellant as constituting a hazard. The other hazard, discipline for failure to respond to directives to provide information, was clearly available to the respondents if the appellant had declined to submit his activity reports. But the appellant's testimony suggests that he was not aware of this hazard either.

The Commission concludes that the absence of either of the two hazards acts to eliminate the coercive element and means that the respondent was not required to advise the appellant that the information he provided could not be used again him in criminal proceedings. The appellant's motion to suppress was therefore properly denied.

ORDER

The action of the respondent discharging the appellant is affirmed and this matter is dismissed.

Dated: January 4, 1984

STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

KMS:jmf
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