STATE OF WISCONSIN PERSONNEL COMMISSION

BERNARD PERRY,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,

Respondent.

Case No. 87-0036-PC-ER

DECISION AND ORDER

A proposed decision and order was issued in this matter on February 22, 1989. Both parties filed objections and requested oral arguments. A copy of the proposed decision and order is attached hereto. After hearing the parties' arguments, reviewing the written arguments filed by the parties and consulting with the hearing examiner, the Commission rejects certain portions of the proposed decision and order as noted below. The remaining portions of the proposed decision and order are adopted.

Conclusion of law #4 is revised to read:

4. The complainant has failed to sustain his burden of proof.

That portion of the Discussion section of the proposed decision and order commencing with the third full paragraph on page 12 and ending before the first full paragraph on page 16 is replaced with the following language.

The complainant also argues that the respondent was required to obtain additional information such as would have been included in a criminal indictment. In support of this argument, the complainant relies on the County of Milwaukee decision:

> The Milwaukee Court, noting the identical statutory terminology in Sec. 111.335, Wis. Stats., for the test to exclude from employment a person facing a pending charge and a person con-

> victed, likened the "general facts" contained in a criminal indictment or information to the type of general facts it deemed appropriate when the elements test is relied upon. Milwaukee, 825-26. It follows that when those types of facts aren't provided in an elements approach, then the elements-only test isn't appropriate.
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> An "indictment," were this a criminal matter, would have provided Mr. Kreul and Mr. Fessenden the following information: that the occurrence was in a grocery store and that cigarettes were involved. Complainant's brief, p. 26.

The Commission cannot agree with the complainant that something more than an understanding of the statutory elements of the conviction is necessarily required by the County of Milwaukee decision in an" elements only" analysis. Those facts found in a criminal indictment or information would usually be required only when the conviction is for an unspecific offense such as that of disorderly conduct.

The complainant correctly notes that in justifying its interpretation of the analysis required in a conviction record case, the Court referred to the analysis required in an arrest record case:

> Under the terms of sec. 111.32(5)(h)2a, Stats., 1979-80, the legislature has set out another exception to the prohibition against arrest record and conviction record discrimination. Under this section, it is not unlawful:
>
> > "a. For an employer or licensing agency to refuse to employ or license, or to suspend from employment or licensing, any person who is subject to a pending criminal charge if the circumstances of the charges substantially relate to the circumstances of the particular job or licensed activity." (Emphasis added.)
>
> We find it significant that the above quoted exception is phrased in terms similar to the exception at issue in this case. An employer faced with an applicant who has a pending criminal charge against him has little to base a "circumstances" inquiry on other than what is contained in a complaint or information. Thus, the employer's inquiry is limited to general facts. It is not unreasonable to assume that the legislature, in choosing the same test for both exceptions 2a and 2b, contemplated a similarity [*sic*] limited inquiry under the 2b exception. This court's definition of the proper "circumstances" inquiry may be employed in situations arising under either 2a or 2b. 139 Wis. 2d 805, 825-26.

On an initial reading, this language would appear to support the complainant's contention that the employer should always consider that which would be found in an information in an arrest record case, or the equivalent in a conviction record case. However, such a reading would clearly be contrary to other language in Milwaukee County which made it clear that the Court was not disturbing its decision in Gibson:

> We note that "circumstance" may mean more than simply "fact." Webster's Ninth New Collegiate Dictionary, p. 242 (1983) provides:
>
> > "CIRCUMSTANCE . . . . 1 a: A condition, factor event accompanying, conditioning, or determining another: an essential or inevitable concomitant. . . ."
>
> Thus, for example, an "essential concomitant" in an armed robbery case is the propensity of the robber to use force or the threat of force to accomplish one's purposes along with thievery. *This is precisely the type of "circumstance" the Gibson court* highlighted when it employed the so-called "elements only" test. Gibson, 106 Wis. 2d at 28. It appears that the "elements only" test is not a test distinct from the statutory test. Rather, focusing on the elements simply helped to elucidate the circumstances of the offense. 139 Wis. 2d at 826.

Complainant's contention is also inconsistent with the Court's focus in Milwaukee County *on the practicality of the test. The Court characterized its in*terpretation of the statutory reference to "circumstances" to permit employers and licensing agencies to make their employment decisions in a "confident, timely and informed way." 139 Wis. 2d at 826. If the employer must in all cases obtain a copy of the criminal information underlying each conviction, many hiring decisions would suffer lengthy delays while the employer contacts the clerk of the appropriate court(s), records are retrieved and copies are made and mailed. The delay would be even more extensive where the conviction record is maintained outside of Wisconsin.

The Commission recognizes that in County of Milwaukee, the Court specifically pointed to various findings made by the hearing examiner in the case. Those findings, set out above, identified Mr. Serebin's former place of employment from which the convictions arose (Glendale Convalescent Center), his capacity (administrator) and duties (the overall business end of the home) at the nursing home as well as his misconduct (failure to provide sufficient staff and adequate diet) and the specific consequences of that conduct (patients had suffered from bed sores and weight losses and one patient had wandered out of the home and died of exposure to cold). But the Court prefaced its recitation of these facts by stating that the Labor Industry Review Commission "could have looked to" these findings of fact which were previously made by the hearing examiner and were before the Commission in that case. The Court did not suggest that these facts, which bear many similarities to a criminal information, had to have been considered when determining whether the circumstances of the offenses and of the job were substantially related.

Based on the above analysis, the Commission concludes that an employer is not required, in all cases, to consider those facts which would be found in a criminal information when considering whether to hire a person with a conviction record. In the present case, the conviction record of retail theft did not require the respondent to go beyond the statutory elements to consider the criminal information. A retail theft conviction is not comparable to a conviction for "disorderly conduct" where the type of offensive circumstances is not explicit. Retail theft falls within the category of convictions listed in County of Milwaukee where the type of offensive circumstances is explicit. That category includes "sexual assault, armed robbery, theft or embezzlement convictions for example." 139 Wis. 2d at 825.

The respondent argues that the elements of the retail theft conviction and the relief security position are substantially related given the responsibility assigned to the position for preventing theft, the extensive access to property and the infrequency of supervision. The Commission agrees that the security nature of the position, as described in finding 3, is determinative given the other facts of this case. The position is unusual in that prevention of theft is a primary goal. The employe effectively has total access to 22 campus buildings, including 19 dormitories. The employe spends less than 10% of his/her work hours in contact with a supervisor. The remaining 90% of the time, the employe is working independently and is either inside or traveling to one of the 22 campus buildings. It should be noted that the complainant does not have a lengthy record of theft-related convictions, in contrast to the multiple convictions of Mr. Serebin in County of Milwaukee and of Mr. Jessen in tions are not necessary to establish a substantial relationship. In all three of these decisions, the Supreme Court found there was a substantial relationship between the conviction record and the duties of the position. The facts of Gibson appear to be most closely analogous to the instant complaint. In Gibson, evidence showed that the school bus driver position required a driver to "maintain discipline without resort to corporal punishment" and to exercise "a great deal of patience and self control." 106 Wis. 2d at 25. The Court went on to hold:

> A conviction of armed robbery under Indiana law requires that the person be found to have participated in the taking of another's property by threatening to harm them with a dangerous weapon. It thus indicates a disregard for both the personal and property rights of other persons. It also indicates a propensity to use force or the threat of force to accomplish one's purposes. The armed robbery conviction indicates personal qualities which are contradictory to the extreme patience, levelheadedness and avoidance of the use of force [testified to as] essential in a school bus driver.

In the instant case, the complainant's conviction for intentionally taking merchandise from a merchant evidences a disregard for the property rights of others. This conviction indicates personal qualities which are contradictory to the security responsibilities assigned to the relief security position.

The Commission also disagrees with the proposed decision's implication that the offense was of less significance because it had occurred approximately a year before the employer's decision against hiring. A time frame of one year does not make this offense "old news." It is noted that in County of Milwaukee the criminal acts occurred about five years before termination, in Gibson the conviction occurred about a year and a half before denial of licensure, and in Law Enforcement Standards Board the convictions occurred about four years before the disqualification.

Finally, the Commission disagrees with the assertion in the proposed decision that:". . . if the complainant is barred from the instant position, he can be barred from employment in essentially every conceivable job which does not provide constant supervision or constant contact with a co-worker." This ignores the fact that the position in question has responsibility for security and has total access to many buildings, including dormitories.

The Order is revised to read:

The respondent's action in not hiring the complainant for a vacant relief security officer position is affirmed and the complaint is dismissed.

Dated: May 18, 1989 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

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PROPOSED DECISION AND ORDER

On April 1, 1987, complainant filed a charge of discrimination alleging that he had been discriminated against based on arrest/conviction record with respect to a hiring decision. On May 23, 1988, an investigator for the Commission issued an initial determination of probable cause to believe that discrimination had occurred. After conciliation proved unsuccessful, the matter was scheduled for hearing. At hearing, the parties agreed to modify the issue for hearing so that it read as follows:

> Whether the complainant was discriminated against on the basis of conviction record in regard to his not being hired for a Security Relief position in March of 1987.

Prior to hearing, the parties completed a stipulation of certain facts. After the close of the hearing, the parties filed post-hearing briefs.

FINDINGS OF FACT

1. On February 27, 1987, the complainant filled out an application for limited term employment (hereafter referred to as LTE) as a relief security officer in the Division of University Housing, University of Wisconsin-Madison. The application noted, inter alia, that the complainant had received a high school diploma from Beloit Memorial High School in 1969 and had earned 105 credits at the University of Wisconsin-Madison between 1973 and 1976. In ad-

dition, the application provided space for listing three prior employers which served to provide qualifying experience. The complainant listed the following experience:

> a. Desk sergeant at the Oakland Army Base for American Mutual Protective Service, from February, 1984 to September, 1985. Duties:
> Responsible for typing up all police reports submitted to [indecipherable] concerning incidents which happened at Oakland Army Base. Dispatch units to silent alarms and areas of trouble. Notify all concerned parties of incidents which occurred, depending on their severity. Typed up police blotter and answered all questions and directed all activities of patrol units.
>
> b. Patrol sergeant at the Oakland Army Base for Stoval Security, from February, 1981 to February, 1984. Duties:
> To make continuous patrols of Oakland Army Base and maintain high visibility. Make money escorts, respond to all incidents, which occurred on the base such as traffic accidents, burglaries, theft, domestic disputes, trespassing, make arrests when necessary, testify in court on some case. Basically to provide all police services required as a patrolman.
>
> c. Patrolman at the Vallicetos Nuclear Plant for Duber Security, from May, 1979 to February, 1981. Duties:
> To provide security at Vallicetos nuclear plant located in Livermore [California]. Job duties were to rotate job stations as security measure, check IDs of all persons entering the plant, make patrol rounds, rattle doors to make sure locked to insure no nuclear materials or other valuables were taken from the plant.

As a condition for his employment at the Army Base, the complainant underwent a thorough background check by the Defense Investigation Services of the United States Defense Department. This background check typically includes F.B.I. and police records, a check regarding bankruptcy filings, and interviews of persons acquainted with the person being investigated. The background check is updated approximately every five years.

2. On the last page of the February 27th application, complainant was asked: "Have you been convicted of an offense other than non-moving traffic violations?" The complainant responded by checking "No".

3. The position summary found in the Position Description for the relief security officer position reads:

> Patrol inside and outside buildings to maintain security of buildings and residents including checking operating equipment, keeping alert for hazardous conditions, responding to emergencies and reporting unusual incidents.

LTE employes in these positions are used to fill in for permanent classified employes who are on vacation or ill or where there is a vacancy in a permanent position and the vacancy cannot be filled immediately.

4. At the time he submitted his application, the complainant was interviewed by a representative of the respondent's Housing Office. During the interview, the complainant mentioned that he had resided in Ogg Hall during his student years at the University of Wisconsin. At the conclusion of the interview, the complainant was referred on for an interview with Robert Kreul, Housekeeping Services Supervisor for Family Housing with the respondent.

5. Mr. Kreul interviewed the complainant on March 4, 1987. During the course of the interview, the complainant discussed his residence at Ogg Hall and provided further information about his work history as summarized on his job application. Complainant also provided Mr. Kreul with information about his more recent work experience, which included 3 months at Qualitemps and 5 to 6 months unloading semi-trailers for Reynolds Van Lines. Complainant provided Mr. Kreul with names of employment references at Qualitemps, Reynolds and the Oakland Army Base and also gave the name of his minister in Beloit to Mr. Kreul as a reference.

6. Mr. Kreul subsequently contacted both Major Lee Stuart at the Oakland Army Base and complainant's minister. Major Stuart gave Mr. Kreul a moderately positive reference for the complainant. The minister's reference was more positive.

7. By telephone call to complainant's home on March 11, 1987, Mr. Kreul left a message for the complainant that the respondent had decided to hire him for the LTE position pending the standard police check of his background. Complainant was told to report to work on March 18, 1987 at 11:00 pm.

8. During the afternoon or early evening of March 18th, Mr. Kreul was informed by someone else in his office that the police report had been received for the complainant and that the report showed that the complainant had been convicted of retail theft within the prior 12 month period. Mr. Kreul, who works the night shift, then called his supervisor, Robert Fessenden, Asso-

ciate Director of UW Housing, at home. Mr. Kreul informed Mr. Fessenden of the situation, noting complainant's work experience and his positive references, but also noting that the references reflected contacts which would have preceded the conviction. Based on this information and his knowledge of the nature of the possible employment, Mr. Fessenden decided that the complainant would not be permitted to work in the position.

9. At approximately 9:30 pm on March 18th, shortly before the complainant was scheduled to begin his employment, Mr. Kreul told the complainant not to come in to work because of his retail theft conviction. During the course of their conversation, the complainant outlined the information set forth in finding 10. Later, Mr. Kreul conveyed that information to Mr. Fessenden, but the decision not to hire the complainant was not altered.

10. In February of 1986, the complainant went into a grocery store in Beloit where he first picked up a pack of cigarettes and then went on to pick up milk, eggs and some lettuce. Complainant placed the cigarettes in his shirt pocket before reaching the check-out area and neglected to pay for them. A police officer arrested the complainant and cited him with violating Beloit's retail theft ordinance. Because complainant's driver's license was from California rather than Wisconsin, the arresting officer informed the complainant that he had to go to the police station. While at the police station, the complainant paid the fine that was imposed for the violation and was released.

11. Approximately 10 days after the 1986 incident, the complainant consulted with an attorney at the Public Defender's Office as well as two attorneys in private practice and asked them whether he had been convicted of theft or anything else. The attorneys informed the complainant that the incident was merely an infraction of a city ordinance rather than a conviction.

12. When on June 24, 1987, the complainant applied for another position with the respondent, as Custodial Assistant - Relief, he again stated on his application form that he had not been "convicted of an offense other than non-moving traffic violations."

13. At all times relevant to these proceedings, respondent's security officers, whether employed as permanent employes or as LTE's, were required to wear a uniform which identified them as a security officer and to carry a two-way radio for direct communication with each other and the police dispatcher when necessary. During the 11:00 pm to 7:00 am work shift of the night secu-

rity officer, there were no other employes of UW Housing present, other than housefellows who lived on the premises and the Security Supervisor who was present five out of seven days of the work week. Even when the Security Supervisor is on duty, s/he was not in a location to provide close supervision to the security officers on duty. During a normal 40 hour work week, there are fewer than 4 hours of contact with a supervisor. At times, dormitory residents are careless and leave their possessions in lounges, main rooms or laundry rooms or leave their room doors unlocked when they are away from their rooms.

14. Had the complainant been employed by the respondent as a LTE security officer, the complainant effectively would have had total access to 22 buildings on respondent's campus, 19 of which are dormitories. The complainant would have been provided keys to all except approximately 3 rooms in each building. Complainant would have had keys to all of the students' rooms in those dormitories. During the course of making his rounds, the complainant would have spent more than 50% of his time on the various floors of the dormitories.

15. While employed as a patrol officer at the Oakland Army Base, the complainant always worked with a partner and they would have to sign out from the desk sergeant any keys providing access to the offices and homes on the base. While employed as a desk sergeant at the Oakland Army Base, the complainant was responsible for the various base keys, but had no duties away from his desk.

CONCLUSIONS OF LAW

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

2. The respondent is an employer within the meaning of §111.32(6), Stats.

3. The burden of proof is on the complainant to establish that the respondents' decision on March 18, 1987, not to hire the complainant for the position of LTE security officer constituted discrimination based on complainant's conviction record.

4. The complainant has sustained his burden of proof.

DISCUSSION

Pursuant to §111.322(1), Stats., it is illegal to "refuse to hire . . . any individual . . . because of [conviction record]" subject to the exceptions and special cases set forth in §111.335, Stats. In the present case, there is no issue that the respondent decided not to hire the complainant because of his conviction record. The only question is whether the respondent's action falls within the conduct permitted by §111.335(1)(c)1, Stats.:

> (c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ . . . any individual who:
> 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job . . . .(emphasis added)

Just as the burden of proving inability to accommodate a handicapped employe rests with the employer[1] , the burden of proof as to the showing substantial relationship should rest with the respondent.

The language in §111.335(1)(c)1, Stats., has been interpreted by the Supreme Court of Wisconsin in a series of three cases, beginning with Law Enforcement Standards Board v. Lyndon Station, 101 Wis. 2d 472, 305 N.W. 2d 89 (1981). In that case, the issue revolved around the authority of the Village of Lyndon Station to employ William Jessen, a convicted felon, as police chief after the Wisconsin Law Enforcement Standards Board (LESB) had deemed him ineligible for appointment to the position and had refused to certify him as being qualified based upon §LES 2.01(1)(d), Wis. Adm. Code,[2] which prohibits the employment of a convicted felon as a law enforcement officer. Mr. Jessen had been convicted of 26 counts of misconduct in public office. The court held:

> Jessen was convicted of misconduct in public office on 26 felony counts of falsifying uniform traffic citation. As a police officer for the village, Jessen would be charged with enforcing the traffic laws . . . . Thus, under the facts of this case, it can hardly be said that the circumstances of the offense for which Jessen was

[1] Giese v. DNR, 83-0100-PC-ER, 1/30/85

[2] The rule became effective in 1970 and was never changed despite the 1977 action of the legislature adopting the prohibition against discrimination based upon conviction record.

> convicted fail to meet the substantial relationship exception to the prohibition against employment and licensing discrimination on the basis of a conviction record set forth in sec. 111.32(5)(h)2b, Stats., as common sense dictates that a conviction of the felony of misconduct in public office for falsifying traffic tickets certainly bears a substantial relationship to the duties of a police officer who is called upon to issue traffic citations. Therefore, when reading sec. 111.32(5)(h), in conjunction with sec. 165.85(4)(c) (empowering the LESB to promulgate minimum competency and reliability qualifications for employment of law enforcement officers) and Wis. Adm. Code LES §2.01(1)(d) when dealing with the certification and employment of a law enforcement officer, we hold that the circumstances of Jessen's convictions for falsifying uniform traffic citations substantially relate to his duties as police chief for the village of Lyndon Station and thus [he] is barred from holding a law enforcement position in Wisconsin. 101 Wis. 2d 472, 492

In a lengthy dissent, Justice Abrahamson concluded that the Supreme Court was in error for determining that there was a substantial relationship where the LESB had not made a determination on the substantial relationship issue. Justice Abrahamson argued that it was inconsistent with the statutory requirement of considering the "circumstances" of both the conviction and the particular job for the court to rely on the mere existence of felony convictions.

The next case in this area was Gibson v. Transportation Commission, 106 Wis. 2d 22, 315 N.W. 2d 346 (1982). The issue in Gibson was whether the Department of Transportation (DOT) had to investigate the detailed circumstances of an armed robbery for which Mr. Gibson was convicted before the department could refuse to grant Mr. Gibson a school bus driver's license. The statutes involved were the Fair Employment Act and §342.12(2)(e), Stats., which provided:

> (2) The department shall issue a school bus operator's license to a persons only if such a person meets all of the following requirements: . . .
>
> (e) Subject to [the Fair Employment Act], has not been convicted of a felony or offense against public morals within the past 5 years.

The court held that DOT was not required to do more than to determine the "elements" of the offense for which Mr. Gibson was convicted. These elements were described as follows:

> A conviction of armed robbery under Indiana law requires that the person be found to have participated in the taking of another's property by threatening to harm them with a dangerous weapon. It thus indicates a disregard for both the personal and property rights of other persons. It also indicates a propensity to use force or the threat of force to accomplish one's purposes. The armed robbery conviction indicates personal qualities which are contradictory to the extreme patience, levelheadedness and avoidance of the use of force [testified to as] essential in a school bus driver.
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> * * *
>
> Our decision in this case does not mean that the particular factual circumstances of the crime upon which a felony conviction was based may never be relevant to a school bus driver licensure decision. If this were the case, the "circumstances of which" language in sec. 111.32(5)(h)2b, Stats., would be superfluous and it is clear from the legislative history of that statute that the legislature specifically intended to include such language in the statute. However, just as a conviction of falsifying traffic citations as a matter of law constitutes circumstances which substantially relate to the job of police chief, so does a conviction of the offense of armed robbery as defined under Indiana law in and of itself constitute circumstances substantially related to school bus driver licensure.
>
> We therefore agree with the trial and appellate courts that the Department's inquiry of the elements of armed robbery under Indiana law satisfies its burden of establishing that the circumstances of the felony for which petitioner was convicted substantially relate to the license for which he applied. 106 Wis 2d 22, 28-29 (footnote omitted)

In her dissent, Justice Abrahamson argued that the court had rewritten the Fair Employment Act by replacing "circumstances" with "elements" and had created a method of analysis based on different categories of felonies, even though there was no agreement on which felonies belonged in the various categories.

The most recent decision of the State's Supreme Court interpreting the substantial relationship standard is County of Milwaukee v. LIRC, 139 Wis. 2d 805, 407 N.W. 2d 908 (1987). The court reversed the decision of the Labor and Industry Review Commission finding that the County of Milwaukee had illegally discharged an employe. At the time of his hire in 1979 to a position as a "crisis intervention specialist," Stephen Serebin faced criminal charges arising from his previous employment as the administrator of a nursing home. In November of 1981, Mr. Serebin was convicted of a felony (homicide by reckless conduct) and twelve misdemeanors relating to patient neglect. The Court analyzed the "substantially related" language as follows:

> This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume risks of repeat conduct by those whose conviction records show them to have the "propensity" to commit similar crimes long recognized by courts, legislatures and social experience.
>
> In balancing the competing interests, and structuring the exception, the legislature has had to determine how to asses when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.
>
> We reject an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job. Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. What is important in this assessment is not the factual details related to such things as the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or a gun was used, whether there was one victim or a dozen or whether the robber wanted money to buy drugs or to raise bail money for a friend. All of these could fit a broad interpretation of "circumstances." However, they are entirely irrelevant to the proper "circumstances" inquiry required under the statute. It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.
>
> The full assessment of what may be termed the "fostering" circumstances may, at times, require some factual exposition. For instance, in "disorderly conduct" cases the type of offensive circumstances is not as explicit as it is in sexual assault, armed robbery, theft or embezzlement convictions for example. However, such factual inquiry would have as its purpose ascertaining relevant, general, character-related circumstances of the offense or job.
>
> * * *
>
> Thus, for example, [a "circumstance"] in an armed robbery case is the propensity of the robber to use force or the threat of force to accomplish one's purposes along with thievery.

* * *

In determining the proper scope of the test, it must be kept in mind that the test must serve not only the judicial system's purposes but the employer's or licensing agency's purposes as well. What test the courts must employ will determine what employers and licensing agencies will do when making employment decisions. Therefore, there must be a semblance of practicality about what the test requires. A full-blown factual hearing is not only unnecessary, it is impractical. Employers and licensing agencies should be able to proceed in their employment decision in a confident, timely and informed way.

* * *

The County argues that the "circumstances" of the offense and the job are similar since in both contexts Serebin was in a position of exercising enormous responsibility for the safety, health, and life of a vulnerable, dependent segment of the population. The twelve misdemeanors indicate a pattern of neglect of duty for the welfare of people unable to protect themselves. The propensities and personal qualities exhibited are manifestly inconsistent with the expectations of responsibility associated with the job. We agree with the County's analysis.

We conclude, as a matter of law, that the circumstances of the offenses for which Serebin was convicted substantially relate to the circumstances of the job of crisis intervention specialist with the County. The Commission could have looked to the findings of fact made by the hearing examiner, which provided, in part:

> "1. As an administrator at Glendale Convalescent Center, Serebin 'handled the overall business end of the home."
>
> "2. Serebin was charged with 58 counts of neglect of nursing home residents; he was convicted of 12 counts. He was also charged and convicted of 1 felony count of homicide by reckless conduct related to the death of a patient who had wandered from this home and died from exposure to cold.;
>
> "3. The trial court found that while Serebin had been administrator 'a number of patients had suffered from bed sores and weight losses which were found to have been caused by [Serebin's] failure , , , to provide sufficient staff and adequate diet, and that one patient had wandered out of the nursing home and died of exposure to cold, as a result of [Serebin's] failure . . . to provide sufficient staff.'

> "4. Serebin's job as a crisis intervention specialist involved his receiving telephone calls on a publicized "hot line" number from members of the public with acute mental health related problems . . . [he] would talk to the caller . . . and would then either counsel the caller over the phone, refer them to appropriate counseling or service agencies, or send out the . . . mobile crisis team.' Following his promotion to Crisis Intervention Specialist KK, Serebin 'did occasionally go out "into the field" to deal directly with persons seeking help, but his primary work involved taking crisis calls over the phone.' In addition, Serebin 'sometimes had occasion . . . to deal with county-wide law enforcement agencies and with assistant district attorneys regarding persons seeking crisis intervention services.'"

> On the basis of the foregoing the Commission should have concluded that the County was justified in discharging Serebin.
>
> * * *
>
> [W]hat is important here is that what has been demonstrated is that Serebin was apparently unwilling to accept his legal and professional responsibility for an extremely vulnerable population. The responsibilities of [the nursing home administrator and crisis intervention specialist] jobs are such that the "circumstances" of the offenses and the job are "substantially related" for purposes of sec. 111.32(5)(h)2b. 139 Wis. 2d 805, 823-30 (footnotes omitted)

In the present case, the parties are in disagreement as to the meaning of <u>County of Milwaukee</u> in terms of what that case required the respondent to consider in deciding whether to hire the complainant for the relief security officer position. That decision clearly requires, at a minimum, some level of analysis based upon an understanding of the statutory or other basis for the conviction and of the duties of the position being considered for employment.

Here, both Mr. Kreul and Mr. Fessenden were quite familiar with the duties of the vacant relief security officer position. Those duties are summarized above in findings 3, 13 and 14. Information about complainant's conviction that was known by Mr. Fessenden at the time of his decision not to hire the complainant is described in finding 8. That information was limited to the knowledge that the complainant had been convicted of retail theft within the prior 12 month period. There was no specific information provided to either Mr. Kreul or Mr. Fessenden as to the statutory or other basis for the conviction. However, Mr. Fessenden testified that he understood retail theft to mean that the complainant had taken something from a retail business without paying for it. Mr. Kreul testified that he understood retail theft to mean the theft of a small or large amount of merchandise or cash from a business.

Neither party placed a copy of Beloit's retail theft ordinance into evidence. However, in his brief, complainant writes: "The Beloit ordinance, Ord. 15.01, incorporates statutory definitions." The brief then goes on to refer to §943.50, Stats., which provides:

> (lm) Whoever intentionally alters indicia of price or value of merchandise or who takes and carries away, transfers, conceals or retains possession of merchandise held for resale by a merchant or property of the merchant without his or her consent and with intent to deprive the merchant permanently of possession, or the full purchase price, of the merchandise may be penalized as provided in sub. (4).

Respondent, in its reply brief, did not dispute this description of the Beloit ordinance. As a consequence, the Commission applies this definition to the present case.

It is undisputed that Mr. Fessenden, who made the decision in this matter, was unfamiliar with the statutory definition of retail theft found in §943.50(lm), Stats. As noted above, Mr. Fessenden understood that retail theft meant the taking of something from a retail business without paying for it. Mr. Fessenden's understanding was consistent with the statutory definition, and his failure to determine the statutory elements of retail theft before making a decision does not make that decision illegal.

The complainant also argues that the respondent was required to obtain additional information such as would have been included in a criminal indictment. In support of this argument, the complainant relies on the County of Milwaukee decision:

> The Milwaukee Court, noting the identical statutory terminology in Sec. 111.335, Wis. Stats., for the test to exclude from employment a person facing a pending charge and a person convicted, likened the "general facts" contained in a criminal indictment or information to the type of general facts it deemed appropriate when the elements test is relied upon. Milwaukee, 825-26. It follows that when those types of facts aren't provided in an elements approach, then the elements-only test isn't appropriate.

> An "indictment," were this a criminal matter, would have provided Mr. Kreul and Mr. Fessenden the following information: that the occurrence was in a grocery store and that cigarettes were involved. Complainant's brief, p. 26.

The Commission agrees with the complainant that something more than merely an understanding of the statutory elements of the conviction is required by the County of Milwaukee decision.

The complainant correctly notes that in justifying its interpretation of the analysis required in a conviction record case, the Court referred to the analysis required in an arrest record case:

> Under the terms of sec. 111.32(5)(h)2a, Stats., 1979-80, the legislature has set out another exception to the prohibition against arrest record and conviction record discrimination. Under this section, it is not unlawful:
>
> > "a. For an employer or licensing agency to refuse to employ or license, or to suspend from employment or licensing, any person who is subject to a pending criminal charge if the circumstances of the charges substantially relate to the circumstances of the particular job or licensed activity." (Emphasis added.)
>
> We find it significant that the above quoted exception is phrased in terms similar to the exception at issue in this case. An employer faced with an applicant who has a pending criminal charge against him has little to base a "circumstances" inquiry on other than what is contained in a complaint or information. Thus, the employer's inquiry is limited to general facts. It is not unreasonable to assume that the legislature, in choosing the same test for both exceptions 2a and 2b, contemplated a similarity [*sic*] limited inquiry under the 2b exception. This court's definition of the proper "circumstances" inquiry may be employed in situations arising under either 2a or 2b. 139 Wis. 2d 805, 825-26.

While the above language is not entirely clear when viewed in light of the other language of the Court's decision, it does suggest that the employer should consider that which would be found in an information in an arrest record case, or the equivalent in a conviction record case. An information would include those facts constituting the offense and the time of the commission of the offense so as to permit the defendant to prepare a defense:

> An information must inform the defendant of the charges against him and all the substantive elements of the crime so as to

> enable the defendant to defend on the specific offense charged and to plead the conviction in bar to future prosecutions on the same offense. State v. Dean, 105 Wis. 2d 390, 398-99, 314 N.W. 2d 151 (Ct App, 1981)

In County of Milwaukee, the Court specifically pointed to various findings made by the hearing examiner in the case. Those findings, set out above, identified Mr. Serebin's former place of employment from which the convictions arose (Glendale Convalescent Center), his capacity (administrator) and duties (the overall business end of the home) at the nursing home as well as his misconduct (failure to provide sufficient staff and adequate diet) and the specific consequences of that conduct (patients had suffered from bed sores and weight losses and one patient had wandered out of the home and died of exposure to cold). While these findings made no specific references to the date of the offenses, it is difficult for the Commission to conceive that the Court would not consider that information in, for example, a case where twenty-five years have passed between the offense and the employment decision.

Based on this analysis, the Commission concludes that, in this case, the item taken by the complainant which resulted in the retail theft conviction, the locale and the date of the offense should all be taken into consideration when making the analysis of substantial relationship.

The complainant points out that the respondent had additional relevant knowledge about the complainant beyond that which might be found in an information. Respondent was aware of complainant's prior record of employment which included six years of security work in California. Complainant also infers that the respondent should have been aware that the complainant had successful passed a Department of Defense security check before he was permitted to work at the Oakland Army Base. While this additional information may be relevant to a determination of the appropriateness of hiring the complainant for the security relief position vacancy, the County of Milwaukee decision makes it clear that this information is not properly part of the substantial relationship analysis. Even though the respondent may have had this information available and may even have considered some of it, the proper scope of the Commission's determination is whether, using the County of Milwaukee analysis, the respondent's action of not hiring the complainant for the vacant position constituted discrimination based on conviction record. As noted above, that analysis requires consideration of the following information:

> 1. The complainant had been convicted of violating Beloit's retail theft ordinance which applies to persons who intentionally alter indicia of price or value of merchandise or who take and carry away, transfer, conceal or retain possession of merchandise held for resale by a merchant or property of the merchant without his or her consent and with intent to deprive the merchant permanently of possession, or the full purchase price, of the merchandise.
>
> 2. This conviction arose from an incident on February 22, 1986, when the complainant took a pack of cigarettes from a Beloit grocery store.
>
> 3. The respondent learned of the complainant's conviction record on March 18, 1987. The complainant was scheduled to commence work later that day as a relief security officer with those duties and responsibilities described in findings of fact 3, 13, and 14.

According to County of Milwaukee, if the respondent is able to establish, based on this information, a substantial relationship between the conviction and the job, illegal discrimination did not occur.

While the Commission is satisfied that some relationship exists between the complainant's conviction record and the job, the respondent has failed to establish a substantial relationship. Complainant had a single conviction, arising from an incident more than one year before the March 18th employment decision. That ordinance violation was for the retail theft of a cigarette pack from a grocery store. The complainant does not have a lengthy record of theft-related convictions, in contrast to the multiple convictions of Mr. Serebin in County of Milwaukee and of Mr. Jessen in Lyndon Station. The complainant's only conviction arose from the theft of an item of relatively nominal value. While the patrol responsibilities assigned to the relief security position will cause the employe to be in contact with a variety of property, both University-owned and student-owned, the complainant has made a valid argument that if the complainant is barred from the instant position, he can be barred from employment in essentially every conceivable job which does not provide constant supervision or constant contact with a co-worker. The Commission concludes that such a result would be inconsistent with the goal of the

Fair Employment Act's prohibition against discrimination based on conviction record.

The complainant also contends that the respondent made its decision based, in part, on considerations that are outside the substantial relation exception. In his brief, complainant quoted testimony by Mr. Fessenden in response to a question regarding his telephone conversation on March 18th with Mr. Kreul:

> [W]e are very sensitive to the security issue. There've been a number of cases across the country where universities have been sued for having employees or not having adequate security to protect the residents and their possessions.

Complainant also quoted testimony by Mr. Kreul in response to a question about what concerns arose on learning of complainant's retail theft conviction:

> Well, the concern was that my responsibility to our residents and to their property as well as to the University's property, that it should be maintained as securely as possible. And I also had a concern for my own potential liability in possibly hiring into this situation.

The complainant then goes on to cite the Commission's decision in Smith v. UW, 79-PC-ER-95, 6/25/82, where the Commission concluded that retaliatory motives need only have played a part in the adverse employment action in order to support a finding of discrimination, and rejected the "but for" test for determining whether retaliation played a legally sufficient part in the decision. The complainant contends that a concern over potential litigation is not included in the exception to conviction record discrimination found in §111.335(1)(c)1, Stats., and, therefore, makes the instant decision illegal using the "in part" test. Complainant's contention fails to take into consideration the policy considerations which underlie the test adopted by the Court in the County of Milwaukee case. There, the Court stated:

> In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related. 139 Wis. 2d 805, 823.

The "risk of recidivism" alludes to the risk of liability resulting from such recidivism. One commentator offered the following view of the Court's reference:

> The court alluded to, but did not discuss, the concerns of employers who fear monetary losses from the activities of their servants and agents. Such fears might include liability for an employee's intentional torts, liability for negligent actions or inactions, and loss of consumer goodwill following further criminal activity. Recent "negligent hiring" cases in other jurisdictions have done little to reduce such fears. Note, County of Milwaukee v. LIRC: Levels of Abstraction and Employment Discrimination Because of Arrest or Conviction Record, 1988 Wis. L. Rev. 891, 911-12.

Mr. Fessenden's concern for the liability potential arising from a decision to hire an individual who has a conviction record is merely a recognition of an aspect of one of the two competing interests found in the Fair Employment Act's prohibition against discrimination based on conviction record.

Complainant also argues that Mr. Kreul expressed to complainant a concern that complainant would be suspected if anything ever turned up missing from the dormitories and complainant were employed as a relief security officer. This contention is based on the complainant's testimony that Mr. Kreul made such a comment during the course of their conversation on March 18th. Mr. Kreul, on the other hand, did not recall making such a statement to the complainant. While the testimony on this point is conflicting, the relevant fact is not what Mr. Kreul told the complainant, but is whether Mr. Fessenden, who was the decision-maker in this matter, actually considered it. There is no evidence that the prospect of suspecting complainant for any dormitory theft was considered by Mr. Fessenden. Mr. Fessenden testified that it was not a factor in his decision and Mr. Kreul testified that he did not believe that he made such a comment to Mr. Fessenden. The Commission concludes that the complainant's arguments on this point are without merit.

Complainant also argues that the respondent should have delayed the decision until a more complete investigation could be carried out by the respondent. Complainant points out that he would have been more closely supervised during his initial period of employment. There is nothing in this record on which to conclude that the respondent's action of making a prompt decision relative to complainant's employment on March 18th was in itself discriminatory. The employer is not required to carry out a more thorough investigation as argued by the complainant.

The respondent suggests that the decision reached by Mr. Fessenden was based not only on the complainant's conviction record, but also on his denial of any such record at the time he completed his application on February 27th. (Finding 2) Mr. Fessenden testified that complainant's failure to list the retail theft conviction on his application was "another thing that made [Mr. Fessenden] concerned." This testimony was at the end of a fairly lengthy response to the following question posed by respondent's counsel: "Did anything else play into the decision not to hire Mr. Perry." At hearing, complainant offered an explanation for his signed statement that he had not been convicted of an offense other than a non-moving traffic violation. This explanation (finding 11) was not made known to either Mr. Kreul or Mr. Fessenden at the time of the March 18th decision. The key question, however, is whether Mr. Fessenden considered the apparent untruthfulness of the statement on the employment application to be an independent basis for not hiring the complainant. The evidence suggests it was not. Mr. Fessenden's sole statement on the subject was that it "concerned" him. The topic came up almost as an afterthought in his testimony. He did not describe the discrepancy as a matter of determinative value.

A final contention, raised by the complainant, is that certain testimony by Mr. Fessenden reflected a decision in conflict with due process requirements:

> Mr. Fessenden stated that a retail theft conviction was evidence of a characteristic of the individual which rendered the individual untrustworthy, and that only an employment history for several years after the occurrence of the theft could overcome the effect of the retail theft conviction. That is to say that over a period of several years, the presumption about the person's character arising from a "retail theft" cannot be overcome by any evidence.
>
> * * *
>
> The actions of the University are state actions, and therefore subject to the due process requirements of the 14th Amend-

> ment. In Vlandis v. Kline, (1973), 4122 U.S. 441, the United States Supreme Court confronted a Connecticut statute which irrebuttably presumed that a student whose address was out-of-state during the year of application to the state university remained a non-resident of the state for tuition purposes for so long as the student remained enrolled in the university. The Vlandis Court held that the state, "...is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when the presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." Vlandis, 452. The Court stated that students must be allowed to present evidence of residency.
>
> Since it is never universally or necessarily true that no individual with one retail theft conviction has a propensity to steal, Vlandis means that the decision made by the University in March 1987 was made by it in a manner inimical to due process. Complainant's brief, pp. 34-35 (Emphasis in original).

The facts of the present case are clearly distinguishable from those in Vlandis. Here, Mr. Fessenden merely testified[3] that if the complainant's retail theft conviction had been several years earlier, and if the complainant had received good references since the time of the conviction, it would have resulted in a different conclusion. The Commission is unaware of any testimony which would would result in a conclusion that Mr. Fessenden had made an irrebuttable presumption which would apply for a period of years. First, there was no specific time period testified to by Mr. Fessenden. Second, in contrast to Vlandis, any such presumption would not be permanent. Finally, implicit in Mr. Fessenden's testimony is that he would view each situation on a case-by-case basis. There is no basis on which to conclude that Mr. Fessenden had formulated a rule which had the effect of a statute, in contrast to Vlandis where the Court was reviewing a Connecticut statute. Mr. Fessenden's testimony merely described a hypothetical situation of a retail theft occurring some years prior to the date of review. Therefore, the ruling in Vlandis does not apply here.

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[3]The relevant testimony is as follows:

> Q: Was there anything you could have learned about Mr. Perry that night besides the fact of the retail theft that would have changed the decision you made on the phone that night?
>
> A: Probably, if the retail theft had been several years before and we had good reference checks since that time.

ORDER

The respondent's action in not hiring the complainant for a vacant relief security officer position is reversed. The parties are directed to confer in an effort to reach a stipulation as to the appropriate remedy in this matter. If, within 30 days of the date this order is signed, the parties have not reached such a stipulation, the Commission will schedule a status conference.

Dated:____________________, 1989 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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