



Mr. Armbrrecht or appellant could be of assistance to him in this area. More importantly, however, appellant's position was not assigned significant duties in the microcomputer service and repair area either in terms of the scope of such duties or the percentage of time appellant spent performing such duties. In the context of a layoff, it is not the education or training or experience of an employee that governs whether he or she should be targeted for layoff but the duties and responsibilities of the position they occupy and the relative value of such duties and responsibilities to the operation of the employing unit. Although appellant may very well have had the ability to learn to perform the entire scope of LSS microcomputer repair and maintenance services, this is not what he was assigned to do. Appellant appears to imply that he was not assigned these duties because respondent wanted to get rid of him. This is not sustained by the record. There is no indication in the record that, when these duties were first assigned to the Hytry or Dugan positions, respondent had any plan to reduce the number of technician positions or to terminate appellant.

Appellant further argues in his objections that, because a need still existed at LSS for repair of tape recording and other equipment that he worked on and such need was increasing due to the age of the Sony equipment, just cause for his layoff could not exist. This ignores, however, the record's clear showing that the need for the repair and maintenance of such equipment had actually decreased dramatically upon the installation of the Sony equipment. Although the record also shows that there had been some increase since then as the Sony equipment aged, this increase was not at all comparable to the increases in the repair and maintenance needs of LSS's microcomputer and video equipment or the increase in bookkeeping, record-keeping, and other clerical needs as the result of expanding LSS services and the addition of billing responsibilities.

Appellant in his objections also confuses the delivery of audio-visual services by LSS with the performance of equipment repair and maintenance services by LSS technicians. Appellant questions why LSS didn't use the vacant A-V Services Coordinator position for a clerical position since Mr. Gilgen had stated the "services in the AV area have lessened." The record clearly and consistently shows, however, that, although LSS's need for repair and maintenance of the type of equipment appellant's position was assigned to work on showed an overall decrease, the need for repair and maintenance of

video and microcomputer equipment as well as the volume of and scope of services provided by LSS, other than repair and maintenance services, had showed a dramatic increase. Since the A-V Coordinator position was responsible for overseeing the development, coordination, and delivery of such expanded and expanding services, it would have made no sense from management's perspective to eliminate the A-V Coordinator position rather than appellant's position in order to create the clerical position. Although it would always be preferable, from the human and personal perspective, to eliminate a vacant position rather than one filled by a valued 20-year employee, once again it must be emphasized that, in the context of a layoff, the employer must look to the duties and responsibilities of the positions in question rather than the characteristics of the employees filling such positions.

Appellant further argues that, since his supervisory duties were actually increasing, just cause for his layoff could not exist. The record confirms that appellant's supervisory duties were increasing but continued to consume only a small percentage of his time. The record also shows that, in balancing the needs that LSS was required to meet, Mr. Gilgen felt that it would be more efficacious for him to assume the supervisory duties of appellant's position and for the other technicians to assume the repair and maintenance duties of appellant's position than it would be to continue without additional permanent clerical help. This is the sort of choice that management is required to make and the record does not show that respondent's rationale for this choice was fabricated or did not comport with the realities of the workload or staffing situation which existed at LSS at the time of the layoff.

Appellant further argues that the subject clerical duties could have been done by student hourlies and that Mr. Gilgen's request for additional student hourly funding would not have been denied. This argument ignores the evidence in the record that student hourly monies were strictly rationed and that devoting student hourly monies to one function took them away from another. This argument also ignores the showing in the record that some of the higher level clerical activities were not suited for performance by student hourly help because they required day-to-day continuity. Even though some student hourlies may stay on for a period of years, they are still only part-time employees who work a few hours a week, i.e., they are not present throughout the work day or the work week to provide consistency or continuity to an administrative process. Appellant also argues that respondent's failure to hire

a permanent clerical employee to fill the clerical position created as a result of appellant's layoff demonstrates a lack of just cause for the layoff. However, it is clear from the record that the purpose for which appellant's position was eliminated, i.e., the creation of an additional clerical position, has been effected and the duties and responsibilities of this position have been performed on an ongoing basis since it was created.

Appellant also argues that Mr. Gilgen was not familiar enough with the equipment repair and maintenance needs of LSS or with the workloads of the technicians to judge what the priorities of the unit should be. Appellant bases this argument on Mr. Gilgen's lack of technical training in the electronics area as well as his failure to perform more than a general review of the repair and maintenance log or to consult with the technicians about their workload. However, Mr. Gilgen had been the second-line supervisor of this unit for many years and, as a result, was familiar with the type of equipment utilized in the unit, the repair needs of this equipment, the repair records of this equipment, and the responsibilities of the repair and maintenance technicians. This familiarity would give a supervisor a good idea of what the workload of a repair and maintenance unit was regardless of whether a close examination or analysis of the repair and maintenance log had been completed or whether the technicians had been consulted about such workload.

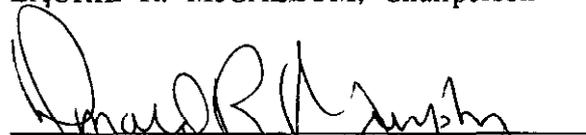
Appellant further indicates that the language of the layoff plan that there was "no longer sufficient work of an appropriate level to justify continuing the Electronics Supervisor III position" is inconsistent with the record's showing that there were sufficient technical and supervisory duties within the unit to keep appellant's position busy on a full-time basis, and was not "understandable" as required by the law governing layoffs. However, appellant is ignoring the context within which the language appears in the plan, i.e., that "due to a reorganization and redistribution of duties within the department of Learning Support Services, we find that we no longer have sufficient work of an appropriate level to justify continuing the Electronics Supervisor III position." This language clearly provides that a reorganization and redistribution of duties pursuant to the reorganization had already occurred. The record makes it clear that the result of such reorganization and redistribution of duties was that the supervisory duties of appellant's position were assigned to Mr. Gilgen's position and the technical duties to the other technicians' positions. As a result, appellant's position no longer had any as-

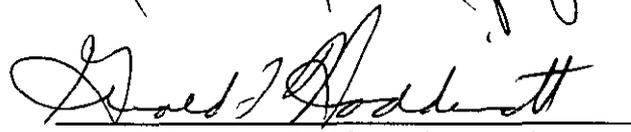
signed duties and, therefore, no longer had "sufficient work of an appropriate level." Appellant argues that this explanation was not provided by the respondent but manufactured by the hearing examiner. However, the explanation is apparent from a reading of the plain language of the plan and didn't need to be manufactured by the hearing examiner. Appellant also points to the difficulty that respondent's witnesses had explaining what such language meant to them. However, this language was lifted from previous layoff plans and was boilerplate language not originally composed in relation to appellant's layoff. Appellant is correct in stating that the "layoff procedure" must be fair and understandable by all employees." However, the layoff plan which contained the language under consideration here was not the document sent to the appellant to explain to him the layoff procedure. This procedure was explained to appellant in a separate letter sent to him after the layoff plan had been approved and appellant does not argue that the explanation provided to him in this letter was not understandable.

Dated: August 16, 1991 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

  
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GERALD F. HODDINOTT, Commissioner

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\* \* \* \* \*

RUSSELL D. ATTOE, \*

Appellant, \*

v. \*

President, UNIVERSITY OF \*

WISCONSIN SYSTEM (Madison), \*

Respondent. \*

Case No. 90-0388-PC \*

\* \* \* \* \*

PROPOSED  
DECISION  
AND  
ORDER

Nature of the Case

This is an appeal of a layoff decision. A hearing was held before Laurie R. McCallum, Chairperson, on February 27 and March 13, 1991, and the briefing schedule was completed on May 20, 1991.

Findings of Fact

1. Appellant began his employment with respondent University of Wisconsin (UW) in 1970 as an Electronics Technician 1 (ET 1) in the Language Laboratories within the College of Letters and Science. Prior to this, appellant had received a degree in electronics technology from Oshkosh Technical Institute and had been employed by a business where he was responsible for analyzing defective television tuners and repairing, calibrating, and constructing test equipment.

2. From 1970 through 1981, the equipment used by the Language Laboratories primarily consisted of reel-to-reel tape recorders, overhead projectors, film projectors, and slide projectors. The repair and maintenance unit of the Language Laboratory included two positions, both classified as Electronics Technicians. These ET positions, one held by appellant and one held by James Armbrecht, were primarily responsible for the repair and maintenance of this equipment. In 1973, the Language Laboratory was granted department status within the College of Letters and Science and was renamed the Laboratories for Recorded Instruction (LRI).

3. In 1981, LRI began to provide microcomputer training and support for faculty and staff of the College of Letters and Science. Another ET position was added to carry out the repair and maintenance of microcomputers. David Hytry was appointed to this new ET position. Prior to Mr. Hytry's appointment, appellant was responsible for removing and installing microcomputer circuit boards and cables. Subsequent to Mr. Hytry's appointment, appellant was responsible for cleaning microcomputer keyboards, cleaning microcomputer diskettes, and repairing microcomputer screens. These responsibilities consumed a small percentage of appellant's position's time. At the time of the subject layoff, appellant did not have the skills or knowledge to perform more complex microcomputer repair or maintenance and would have required additional education and/or training to acquire such skills and knowledge.

4. In 1983, LRI acquired the Video Resource Center from the School of Social Work within the College of Letters and Science. Mr. Armbricht was assigned primary responsibility for the repair and maintenance of the newly acquired video equipment.

5. In 1984, the College of Letters and Science purchased microcomputers for use by department chairs and in 1987 and 1988, for use by faculty. LRI became responsible for the repair and maintenance of these microcomputers. This function was primarily assigned to Mr. Hytry's position.

6. In an evaluation of appellant's work performance, signed by his supervisor, Read Gilgen, on May 17, 1984, Mr. Gilgen stated that ". . . He often finds creative and innovative solutions to technical problems. . . . While continued training in new areas of technology would be useful, Mr. Attoe has a firm grasp of the technologies required for his job." Appellant's position was classified at the Electronics Technician 3 - Supervisor level at that time.

7. In 1986, LRI was renamed the L&S Learning Support Services (LSS) department.

8. In 1986, LSS's learning and language labs were modernized by replacing the remote access reel-to-reel tape recorders with Sony solid-state self-contained cassette decks. This resulted in a dramatic decrease in repair and maintenance needs of the labs.

9. In 1986, LSS agreed to provide audio-visual equipment repair and maintenance services to the Communicative Disorders Department within the College of Letters and Science on a fee-for-service basis. This equipment

consisted primarily of projectors, tape players, and monitors. The agreement provided that the amount of technician time devoted to this service would not exceed 8 hours per week. Appellant was the technician primarily assigned to carry out this service.

10. In 1986, LSS began charging departments within the College of Letters and Science for certain repair and maintenance services. This resulted in additional record-keeping and bookkeeping responsibilities for the Department Secretary (Program Assistant) position within LSS. These responsibilities increased substantially with the acquisition by the College of Letters and Science of a large number of microcomputers in 1988 and 1989. The warranties on most of this equipment expired after one year.

11. In March of 1986, appellant's position was reclassified from Electronics Supervisor 2 (ES 2) to ES 3. In the memo accompanying the request for reclassification, Mr. Gilgen stated that appellant "is required to supervise all aspects of the electronics repair and maintenance in our facility. While his specific duties do not require as much actual "hands-on" ability, in light of the added knowledge required to supervise these new areas, particularly in the area of microcomputer technology, I suspect that a position upgrade may be in order." The revised position description for appellant's position which accompanied the request indicated that the positions' supervisory duties had decreased from 35% to 10% and that 85% of the position's time was devoted to work similar to that performed by the position's subordinates. The positions supervised by appellant's position at the time included 2 ET 3 positions, one held by Mr. Hytry and one by Mr. Armbrrecht; and a vacant ET 1 position. As a supervisor, appellant was responsible for making sure job assignments were made and carried out, for overseeing the job tracking system, and for overseeing the billing system.

12. Some time during 1988, LSS added a student microcomputer lab to its existing facilities and services.

13. In a memo dated March 11, 1988, Mr. Gilgen discussed the changes that had occurred at LSS since 1978 and the current needs of the department. In this memo, Mr. Gilgen stated that the recent lab modernization "has drastically reduced service, maintenance, and operating expenses. This has freed up technical staff to work with microcomputer repairs (1.0 FTE) or to service A-V and electronic equipment from other L&S departments (.5 FTE).

14. On or around April 4, 1988, Mr. Gilgen designated certain supervisory positions within LSS as "group leaders." Mr. Gilgen did this in order to delegate more decision-making and problem-solving to his subordinates and to facilitate a team approach to decision-making and problem-solving. Mr. Gilgen's intent was not to create a supervisor/subordinate relationship between a group leader and the members of his/her group. Appellant was designated as the group leader for the equipment repair/maintenance unit.

15. In an April 20, 1988, memo and a May 10, 1988, memo to College of Letters and Science Dean E. David Cronon, Mr. Gilgen presented certain specific staffing requests related to microcomputer services. One of these was a request for permission to fill the vacant ET position due to an increased need for microcomputer repairs and maintenance. Mr. Gilgen explained that this need was brought about by the acquisition by the College of 400 microcomputers and that in-house repair and maintenance of these microcomputers would save the College \$120,000.

16. In a letter to Dean Cronon dated September 26, 1988, Mr. Gilgen stated that ". . . the third priority we listed in our memos of last fiscal year was for a second full-time classified (Electronics Technician) to help Dave Hytry with repair work. The backlog of repairs is so serious, and Dave is so frustrated, that he has announced his intention to resign several times this past week. We need qualified help in this area, not student help. Please, we need relief now if we are to continue providing service for the some 800 micros throughout the College. (Remember, we are saving over \$120,000 a year by not purchasing Telex service contracts.)"

17. This September 26 letter also requested an increase in LSS's student hourly budget; explained that student hourly help is used not just for clerical tasks but for tape duplicating, tape cataloguing and processing, picking up computers, installing security cables, delivering new computers, installing memory boards or hard disks, and proctoring all the labs; and stated that student hourly needs of LSS had increased 90% as a result of increased services and demands on existing services.

18. Mr. Gilgen met with Dean Cronon on October 6, 1988. Mr. Gilgen's notes relating to the meeting indicate that approval to fill the vacant ET position had not been granted yet and that a need for additional student help for receptionist and administrative tasks was anticipated.

19. On or around November 1, 1988, the General Library System of the University of Wisconsin-Madison requested that LSS provide electronics equipment assessment and maintenance services to them for a fee. The College of Letters and Science denied the request on the basis of their policy that LSS services should generally be provided only to departments within the College.

20. In a memo to Phil Hellmuth, Assistant Dean of the College of Letters and Science, and Barb Hornick, personnel manager for the College of Letters and Science, dated February 20, 1989, Mr. Gilgen stated as follows:

In our meeting of last October, I indicated that our projections showed that we would run out of student hourly funds by the middle of February. We were right on target, since we had only enough money to cover about half of the current pay period. The Dean and you indicated at that time you would cover us for the remainder of the year. This memo is simply a reminder.

We are doing all we can to keep student hourly costs down and will continue to do so. In addition, we hope to have a proposal to you in the near future for adding a clerical permanent classified staff person for several duties now handled by students. In spite of our rapid growth over the past seven years, we have had no increase in permanent clerical support.

21. Mr. Gilgen did receive authorization to fill the vacant ET position at the ET 2 level and Ms. Colleen Dugan was selected for this ET 2 position in March 1989. Mr. Gilgen had earlier considered assigning appellant and Mr. Armbrecht to assist Mr. Hytry with microcomputer repairs but Mr. Hytry told him that he didn't feel that either of them could help.

22. In a memo to Dean Cronon dated March 31, 1989, Mr. Gilgen stated as follows, in pertinent part:

When I met with you last October to discuss our staffing concerns, Phil Hellmuth suggested that in light of our rapidly growing student hourly costs, we consider converting part of that into permanent help. Over the past several weeks we have been studying our situation, and we are now ready to make a recommendation/request.

\* \* \* \* \*

In all of this time, and in spite of tremendous support from the College for micro related responsibilities, we have had no corresponding increase in clerical help. As a result, although some of us handle certain clerical tasks on our own (with word process-

ing, etc.), there are many things that are now being done by students or not being done at all.

\* \* \* \* \*

We should like to request a full-time classified position to work under the supervision of the Departmental Secretary. This person would assume many duties now being done by permanent and student help in the administrative, lab, and acquisitions areas. . . . Some of the duties of the new person would off-load tasks from another permanent staff which would then free that person to handle tasks now done by students (such as media mastering and production, cataloguing, etc.). And in many cases (such as inventory control, billing and collections, tracking of service requests, etc.), it would simply allow us to accomplish tasks that now go undone (or get only partial attention).

We estimate that approximately 20 hours per week of student hourly help would be eliminated by this position, while another 20 hours would be to meet needs which are relatively new (billing) or which have been neglected due to lack of staff (inventory, reports).

I would like to meet with you and Phil to discuss this proposal at your earliest convenience. . . .

23. In an evaluation of appellant's work performance signed by Mr. Gilgen on June 28, 1989, he stated that "Rus feels the need for additional training in order to keep up with technical skills required. He will determine courses at MATC or Wisconsin School of Electronics, or elsewhere, that would help him in this and recommend such to the Director. The Director agreed that he feels Rus is not keeping up technically and needs to concentrate on this aspect." Appellant was classified as an Electronics Supervisor 3 at this time.

24. In a June 29, 1989, memo to Dean Crawford, the new Dean of the College of Letters and Science, Mr. Gilgen makes reference to their meeting of the week before, discusses student hourly funding needs, and states that, "To date, there has been no response to our requests for additional clerical help."

25. In a memo to Dean Crawford dated July 24, 1989, Mr. Gilgen asks for a response from the Dean to the staffing and funding requests he has presented to him and reiterates what he feels are the three "items we need to have answers on." These three items were listed in this memo as the request for additional clerical help, an adjustment/commitment for increased student hourly budget, and capital/lab modernization needs.

26. Increasing student hourly funding for LSS would have required decreasing such funding for other departments within the College of Letters and Science. Creating a permanent clerical position freed up some student hourly funding for other functions since some of the duties of this permanent position would include duties previously performed by student hourly employees.

27. In a memo from Ms. Hornick dated September 26, 1989, Mr. Gilgen was advised that \$12,000 in additional student hourly funding had been approved to cover the cost of student proctors for the student microcomputer lab but that the other part of his request for additional staffing was still under advisement.

28. Some time after September 26, 1989, Dean Crawford advised Mr. Gilgen that his request for an additional clerical position was denied. The primary mission of the College of Letters and Science is that of instruction. LSS is a support unit which does not provide instruction directly but does provide services that support the College's instructional effort. The College of Letters and Science has not received increased funding for operations and the number of authorized full-time positions (FTE) has decreased over the last ten years. The UW-System, including UW-Madison, has a limited number of FTE positions and this number is determined by the Legislature. In turn, the College of Letters and Science is allocated a limited number of FTE. If Mr. Gilgen's request for an additional clerical position for LSS had been granted, it would have required a reduction in the number of positions in some other department of the College of Letters and Science. Dean Crawford's denial of Mr. Gilgen's request for an additional clerical position for LSS was based on the conclusion that the staffing needs of the instructional departments had a higher relative priority than the staffing needs of LSS.

29. In a document he prepared which was dated April 3, 1990, Mr. Gilgen outlined the staffing situation he felt he was encountering at that time in LSS as follows:

- I. Need for additional clerical help has been established
  - A. Additional needs have been growing, especially since LSS is much more involved in tracking charges to departments for service repairs, videotapings, etc.
  - B. Funding from current department budget resources would cover only about .5 FTE (from student hourly savings)
  - C. Additional funding apparently not available

- D. Currently handling some of these needs by hiring grad student 20 hours/week at \$6.00

II. Technical services needs

A. Micro repair

- 1. Grew rapidly, but has stabilized at this point
- 2. Additional person hired (Colleen Dugan) has helped tremendously

B. Charge-backs

- 1. Departments are required to pay for parts
- 2. We order, bill, and follow-up
- 3. This has become a clerical mess

C. Video repair/service

- 1. VRC continues to grow and needs for adequate service remain
- 2. Video use generally is up, and new video equipment is being acquired constantly

D. Learning Labs

- 1. Switch to new Sony units, all solid-state, has virtually eliminated service needs in that area
- 2. High speed duplicators need calibration three times a year

III. Proposed program needs change

A. Program needs vs. Performance approaches

B. Decrease in tech services needs means we need one technician less

- 1. Two micro persons still needed
- 2. Video still needed
- 3. Technician supervisor not needed (does not currently serve any useful function)

C. Increase in clerical needs means we need to add a clerical person

- 1. Increased billing, ordering, tracking, etc.
- 2. Help to make office more like a "business" office for all of the department

IV. Where do we go from here?

30. In a May, 1990, meeting with Mr. Hellmuth and Ms. Hornick, Mr. Gilgen discussed the LSS staffing situation outlined in his April 3 document with them. The discussion centered around how to effect the elimination of appellant's position and how to find another position for appellant. All of the available alternatives, including terminating appellant for cause, were discussed. However, terminating appellant for cause was summarily concluded not to be a viable alternative.

31. In a memo to Dean Crawford dated May 24, 1990, Mr. Gilgen stated as follows, in pertinent part:

As you may recall, the last time we met I brought up a proposal that I felt might help our staffing situation here: eliminate a technician position and use that FTE for a clerical person which we so desperately need. The demands on the technicians (the non-computer ones) has decreased since the installation of our new language labs and I felt this was an area in which we could make some changes based on changing program needs.

I have been meeting with Phil and Barb on this, and all the "legal" and technical details are in place so that we can proceed. However, I have two major concerns before I set the wheels in motion to lay off our technician supervisor:

1. During my meeting yesterday with Phil and Barb, Phil seemed to hedge rather strongly on whether we would be able to use the position for clerical purposes. That is, just because we are eliminating a position doesn't mean we can use that same position elsewhere in our department. Well, the whole point of this exercise is to get the help we need in the clerical area. We have documented our needs and made requests for some three years now, and knowing that new positions are nearly impossible to find, we have been driven to this measure which I find distasteful (laying off a 20 year employee) but necessary. If we can't be assured that it will produce the desired result (clerical help), then I'm not sure I want to go through with it.

(Note: the following is the text of an electronic mail message from Read Gilgen to Dean Crawford, sent on May 24, 1990.)

2. I am convinced that the current amount of work being handled by our technicians does not justify keeping our technician supervisor. The expertise and quantity of the three remaining technicians is indeed justified (video, microcomputers). The supervisor's main skills seem to be in the A-V equipment area, and definitely is not in the digital electronics area. My only concern is that we don't create problems for ourselves in the long run. In particular, we have talked over the years about providing stronger coordination and servicing of A-V equipment throughout the College. Departments often buy equipment that gets little use (hence the need for coordinated "pools" similar to our Van Hise pool), and much of that equipment gathers dust once problems develop because department don't have the money for repairs. LSS could provide a strong role in both cases: coordination and repair. If we do move in such a direction, then the position we are now proposing to eliminate would be needed once again.

As you can see, I am uncomfortable at this point in moving forward. I think I need some assurances and indications of directions before I can make a fully informed decision in this matter.

32. Dean Crawford subsequently gave verbal approval to Mr. Gilgen to create and fill the clerical position at LSS as requested.

33. In a memo to appellant dated June 26, 1990, Mr. Gilgen stated that "This note is simply a brief follow-up to our conversation of this afternoon, to let you know in writing that due to changes in our department staffing needs, we intend to eliminate the position of Electronics Technician Supervisor some time early this fall."

34. In a memo dated August 22, 1990, James Stratton, Director of the UW-Madison Classified Personnel Office, requested approval of the plan for appellant's layoff from the Administrator, Division of Merit Recruitment and Selection (DMRS). This memo provided the following rationale for the layoff: "Due to a reorganization and redistribution of duties within the department of Learning Support Services, we find that we no longer have sufficient work of an appropriate level to justify continuing the Electronics Supervisor 3 position." This plan was approved by DMRS on August 23, 1990.

35. In a letter dated September 4, 1990, appellant was officially notified of his layoff. The letter stated in part as follows:

This is to advise you that the Electronics Supervisor 3 position that you occupy is being abolished effective September 28, 1990. The reason for this action is reorganization and redistribution of duties within the department of Learning Support Services. Since you occupy the only Electronics Supervisor 3 position in the employing unit, you will be laid off. This letter is your official notification of layoff from Learning Support Services at the end of the working day on September 28, 1990.

36. Prior to the layoff, Mr. Gilgen had observed one of the technicians doing personal repair/maintenance work during work hours on more than one occasion. Mr. Gilgen concluded from this that there was not always enough repair/maintenance work to keep four technicians busy during work hours. Prior to the decision to select appellant's position for layoff, Mr. Gilgen had reviewed the repair/maintenance log and concluded from his review of the workload of each technician that appellant's position was the one that should be eliminated.

37. In Mr. Gilgen's opinion, prior to the layoff, there had not been significant backlogs in repair/maintenance of non-microcomputer equipment

(repair/maintenance not completed within one week). Subsequent to the lay-off, there were backlogs in repair/maintenance of this type of equipment.

38. Subsequent to the layoff, Mr. Gilgen assumed the non-technical administrative and supervisory duties previously performed by appellant's position.

39. As a result of the layoff of appellant, LSS discontinued the repair/maintenance services it had been rendering for the Communicative Disorders Department.

40. As of March 13, 1991, the new authorized clerical position at LSS had not been filled on a permanent basis.

41. Appellant filed a timely appeal of the subject layoff with the Commission.

#### Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.44(1)(c), Stats.
2. The respondent has the burden to show just cause for the subject lay-off.
3. Respondent has sustained this burden.
4. The layoff of appellant was for just cause.

#### Opinion

Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183 (1976), provides a framework for decision of this type of appeal. In that case the Supreme Court held:

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

\* \* \* \* \*

Arbitrary and capricious action on the part of an administrative agency occurs when it can be said that said action is unreasonable or does not have a rational basis . . . and [is] not the result of the "sifting and winnowing" process.

Appellant argues that the subject layoff did not satisfy the requirements of §230.34(2), Stats., which states as follows, in pertinent part:

Employees with permanent status in class in permanent . . . positions in the classified service . . . may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization . . .

Appellant cites the Commission's decision in Givens v. DILHR, Case No. 87-0039-PC (3/10/88), aff'd, DILHR v. Wis. Pers. Comm., Case No. 88-CV-2029, Dane Co. Circ. Ct. (1989), in support of this argument. However, first of all, the elimination of a position and the layoff of the position incumbent as the result of a reorganization falls squarely within the scope of those actions authorized by §230.34(2), Stats. [Roblee v. UW, Case No. 86-0032-PC (4/15/87)] . What appellant actually appears to be challenging here are the management decisions which form the basis for the subject reorganization and which are more appropriately addressed, as they are below, in the context of whether the layoff was "arbitrary and capricious" within the meaning of the Weaver decision. Second, appellant's reliance on Givens is misplaced. In Givens, the appointing authority had a vacant, authorized position to which the appellant had attempted to exercise a mandatory restoration right and the appointing authority had taken no action to eliminate the position. The Commission concluded that a "reduction in force" was not necessary under these facts. In the instant case, however, a reorganization plan had been approved which actually eliminated appellant's position i.e., there was no longer an authorized ES 3 position to which appellant had a right. Obviously, this situation necessitates a reduction in force in the ES 3 classification and satisfies the requirements of §230.34(2), Stats.

Was the process followed by respondent in allocating finite resources the result of "sifting and winnowing" and did it have a "rational basis" within the meaning of the Weaver decision? The Commission is of the opinion that this question should be answered in the affirmative.

In Newberry & Eft v. DHSS, Case Nos. 82-98,100-PC ((8/17/83), the Commission found that:

. . . the Commission's inquiry in appeals of this nature is relatively limited. If the employer can show that it had a rational basis for its decision, it has satisfied its burden of proof. It is not required to prove that its decision was performed the best personnel decision that could have been made under the circumstances.

This principle was also articulated by the Commission in Oakley v. Ofc. of Comm. of Securities, Case No. 78-66-PC (4/19/79) as follows:

Both a decision regarding office reorganization and the assignment of duties and responsibilities, and a decision regarding appropriate staffing levels in light of economic conditions are management decisions which are not properly reviewable by the Commission in appeals of this nature.

The record shows that the reorganization and redeployment of staff resources within LSS, as the focus of the department changed, resulted from the ongoing examination by several management employees of a substantial volume of information regarding a variety of alternatives over a considerable length of time. Findings of Fact 3-5, 8-10, 12-18, 20-22, 24-25, 27-32 outline and describe this examination. The Commission is of the opinion that this examination satisfies the "sifting and winnowing" requirement of the Weaver decision. Appellant argues that respondent should have consulted with the technicians within LSS before deciding how to reallocate LSS staff resources. There is, of course, an array of sources which an employer could tap for input before making a decision such as the one under consideration here. Not only is there no requirement that each of these sources be consulted but it would be impractical and, in many cases, impossible, to do so. Appellant has failed to cite any authority which would require the technicians to have been consulted in order for the "sifting and winnowing" requirement to have been met.

The next inquiry is whether the decision reorganizing and redeploying staffing resources within LSS, which led to the subject layoff, had a rational basis. Appellant argues that it did not and was a pretext for terminating appellant.

Appellant argues in this regard that the clerical needs of LSS, other than those being met by the Department Secretary, "could have been met" by student hourly employees as they had been for a considerable length of time. This ignore, however, Mr. Gilgen's representations that certain of these clerical needs would benefit by the continuity provided by a permanent employee; that certain of these needs had been left undone because of limited student hourly resources; and that increasing student hourly funding for clerical support would interfere with other functions in LSS and other departments within the College of Letters and Science being performed by student hourly

employees. These representations provide a rational basis for respondent's decision that LSS's clerical needs, other than those being met by the Department Secretary, could best be satisfied by a full-time permanent clerical position. Appellant has failed to show that these representations did not actually reflect Mr. Gilgen's opinion; or that they misrepresented, or failed to take into account, or were in conflict with the factual information available to Mr. Gilgen or to the other management employees participating in the layoff decision at the time such decision was made.

Appellant argues further in this regard that respondent did not have a rational basis for assigning video and microcomputer repair/maintenance duties to technician positions other than appellant's and for selecting appellant's position for elimination. The record shows that appellant, although he had technical school and on-the-job training relating to electronics in general, had acquired no special expertise relating to video or microcomputer repair/maintenance equivalent to that acquired by the other technicians despite respondent's suggestion over a period of time that he do so. Appellant asserts that the same skills and knowledge is required to fix tape recorders as to fix microcomputers and video equipment. The record shows, however, that, although the same circuitry and electrical current principles may apply to both, it takes more than the knowledge of such basic principles to do hands-on repair and maintenance of microcomputers and video equipment. Appellant cites as the basis for his assertion the knowledge of circuitry and electrical currents he acquired in technical school. However, this knowledge was acquired over 20 years ago and the field of electronics has undergone a revolutionary change since then. Appellant argues that he volunteered to assume microcomputer repair/maintenance duties before Ms. Dugan was hired. The record shows that he did volunteer to do this but that respondent, on the basis of appellant's lack of expertise in this area and on the basis of Mr. Hytry's opinion that appellant could not help out in this area, decided to hire someone who did have such expertise. Finally, the record shows that appellant did have special skills, knowledge, and abilities relating to the repair and maintenance of language lab equipment which formed the basis for respondent's decision to continue this as his primary assignment. The Commission finds that respondent's rationale for assigning video and microcomputer

repair/maintenance responsibilities to LSS technician positions other than appellant's had a rational basis.

The record shows that, at the time of layoff and at the time that it was targeted for elimination, the repair/maintenance responsibilities of appellant's position primarily related to LSS equipment for which there was a decreasing need for repair and maintenance and a decreasing relative emphasis. Although Mr. Gilgen may have exaggerated when he wrote in his April 3, 1990, outline (See Finding of Fact 29, above), that service needs for the learning lab tape recorders had been "virtually eliminated", the record is consistent in showing that the repair/maintenance needs in this area had decreased significantly, particularly when viewed in relation to the repair/maintenance needs in the video and microcomputer areas. The record also shows that respondent cited this decreasing need and decreasing relative emphasis in appellant's assigned repair/maintenance area as the basis for the selection of appellant's position for elimination and the Commission agrees with respondent that this basis is a rational one.

Appellant argues that respondent's use of a vacant LSS position to hire an additional technician in March of 1989 rather than to hire a permanent full-time clerical employee shows that the decision to eliminate appellant's position lacks a rational basis. However, the record shows that Mr. Gilgen did not identify a need for an additional full-time permanent clerical support position until March 31, 1989, and that, until late 1989 or early 1990, Mr. Gilgen was still pursuing his request for an additional position to provide this increased clerical support. His request to use the vacant LSS position to hire a technician was, however, first made in April of 1988. Since many of the tasks which the clerical position was created to fulfill relate to functions augmented or created as the result of the acquisition of microcomputers by LSS and by other departments within the College of Letters and Science in 1988 and 1989, it is reasonable to infer from the record that, in April of 1988, Mr. Gilgen could not have known how these acquisitions would affect the clerical needs of LSS. In addition, in April of 1988, Mr. Gilgen could not have known that a future request for an additional clerical position would be denied. The Commission concludes that there was a rational basis for respondent's decision to use the vacant LSS position to hire a technician, rather than a clerical employee, in March of 1989.

Appellant alleges that respondent gave conflicting reasons for the lay-off and this reinforces appellant's position that respondent did not have a rational basis for the layoff decision. Specifically, appellant contends that the language in respondent's August 22, 1990, memo to DMRS (See Finding of Fact 34, above) that ". . . we find that we no longer have sufficient work of an appropriate level to justify continuing the Electronics Supervisor 3 position." is in conflict with the rationale offered by respondent in other correspondence and at hearing that the layoff resulted from changes in staffing needs of LSS. However, the sentence in the August 22 memo which contains the quoted language states in its entirety:

Due to a reorganization and redistribution of duties within the department of Learning Support Services, we find that we no longer have sufficient work of an appropriate level to justify continuing the Electronics Supervisor 3 position.

The record shows that the reorganization and redistribution of duties resulted from changes in LSS staffing needs, i.e., LSS and College of Letters and Science management decided that LSS should be reorganized to create a second full-time clerical support position, to eliminate a technician position based on an increasing need for clerical support services and a decreasing need for repair/maintenance services for language lab equipment, and to redistribute the eliminated position's technical duties to the remaining technician positions. Once this reorganization and redistribution of duties was approved, there was obviously no longer sufficient work for appellant's position since the primary duties and responsibilities of his position were, pursuant to the reorganization, assigned to other technician positions. It is important to note that respondent was not asking DMRS's approval for this reorganization and redistribution of duties within LSS. This had already been approved and was being implemented by management of LSS and the College of Letters and Science. What respondent was asking DMRS to approve was the layoff plan for appellant's position now that the reorganization and redistribution of duties had been approved and was being implemented. The Commission does not agree with appellant that the record shows an inconsistency between the rationale offered by respondent in the August 22 memo and that offered at other times.

Appellant alleges that the discussion by Mr. Gilgen and the others at the May, 1990, meeting (See Finding of Fact 30, above) of the possibility of terminating appellant demonstrates that the layoff did not have a rational basis and was a pretext for terminating appellant. However, the record shows that, although the matter was discussed, it was simply presented as one of several alternatives to freeing up a position for use as a clerical support position and was dismissed by those in attendance out of hand. The Commission does not agree with appellant that this demonstrates the lack of a rational basis for the layoff decision.

Appellant alleges that Mr. Gilgen was not familiar with the repair/maintenance workload of the technicians at the time the layoff decision was made and this demonstrates that the layoff did not have a rational basis. Mr. Gilgen did testify at hearing, however, that he had reviewed the repair/maintenance log book and based his workload conclusions at least in part on such review. In addition, the record shows that Mr. Gilgen had also observed the technicians at work and on more than one occasion had observed one of the technicians working on personal repairs/maintenance during work hours. Finally, the record shows that Mr. Gilgen, as the Director of LSS, had a general familiarity with the workloads and functioning of the various areas within the department. The Commission does not agree with appellant that the record shows that Mr. Gilgen was not familiar, in a general or specific sense, with the workload of the repair/maintenance technicians or with the workload of other areas within the department.

Appellant argues further in this regard that the fact that the repair/maintenance area, subsequent to the layoff, has experienced backlogs, whereas there were no significant backlogs prior to the layoff; and that LSS has had to discontinue doing equipment repair/maintenance for the Communicative Disorders Department, demonstrates the lack of a rational basis for the layoff decision. However, the record shows that respondent anticipated that there could be backlogs in the repair/maintenance area and reduced services to other departments as the result of the layoff. It would be a reasonable, if not necessary, anticipation whenever three positions are assigned to do the work previously done by four positions. However, LSS and College of Letters and Science management decided that this anticipated backlog was more tolerable from an administrative and management standpoint than the

deficiencies in the clerical area. This is the sort of choice reserved to management and the Commission does not agree with appellant that the existence of a post-layoff backlog in the repair/maintenance area demonstrates the lack of a rational basis for the layoff decision.

Appellant also argues that the fact that respondent has not yet filled the clerical position created in the subject reorganization on a permanent basis demonstrates the lack of a rational basis for the layoff decision. Two factors are important to note here. First of all, under the civil service system, there are many reasons for permanent positions not to be filled promptly which have nothing to do with a lack of intent or commitment on the part of the appointing authority. As a result, without more, the Commission is hesitant to ascribe any significant weight to this fact. This is reinforced by the second factor which is that the record shows a clear and consistent intent and commitment by respondent to fill the newly created clerical position on a permanent basis. This is well illustrated by the following language in Mr. Gilgen's May 24, 1990, memo to Dean Crawford (See Finding of Fact 31, above):

During my meeting yesterday with Phil and Barb, Phil seemed to hedge rather strongly on whether we would be able to use the position for clerical purposes. That is, just because we are eliminating a position doesn't mean we can use that same position elsewhere in our department. Well, the whole point of this exercise is to get the help we need in the clerical area. We have documented our needs and made requests for some three years now, and knowing that new positions are nearly impossible to find, we have been driven to this measure which I find distasteful (laying off a 20 year employee) but necessary. If we can't be assured that it will produce the desired result (clerical help), then I'm not sure I want to go through with it.

The Commission, on this basis, does not agree with appellant that the fact that respondent had not, as of the date of hearing, filled the newly created clerical position on a permanent basis, demonstrates the lack of a rational basis for the layoff decision.

Appellant's basic disagreement in regard to the layoff is with the management decisions respondent made in order to meet increasing and changing demands with finite resources. It is not the Commission's role to determine what the "best" decisions would have been but to determine whether the decisions respondent did make had a rational basis and were the result of a "sifting

and winnowing" process. As discussed above, respondent has demonstrated a rational basis for these decisions and that they were reached as the result of a "sifting and winnowing" process. When confronted with increasing and changing demands on finite resources, an employer has not just the prerogative, but the obligation, to make choices among competing priorities and to make changes based upon these choices. Appellant argues that there is enough repair/maintenance work to keep four technicians busy. Respondent does not dispute that it would be optimal to have four technicians. In fact, respondent tried to keep the four technician positions within LSS and get an additional position to which to assign clerical duties. However, when it became apparent that this was not possible, some difficult choices had to be made by management. These are the sorts of choices reserved to management. The need for four technicians had to be balanced with the need for more clerical support, i.e., these needs became relative. Management decided that, in relative terms, it was more important to meet certain clerical needs that were not being met at all or that were not being met adequately than it was to have four technicians. Respondent has shown that there was a rational basis for this decision which was the result of a "sifting and winnowing" process and appellant has failed to successfully rebut this showing.

Order

The action of respondent is affirmed and this appeal dismissed.

Dated: \_\_\_\_\_, 1991      STATE PERSONNEL COMMISSION

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LRM/lrm/gdt

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