

STATE OF WISCONSIN

PERSONNEL COMMISSION

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GARY E. WHITLEY,  
                     Complainant,

v.

Secretary, DEPARTMENT OF  
 CORRECTIONS,  
                     Respondent.

Case No.    92-0080-PC-ER

\* \* \* \* \*

ORDER


After having reviewed the Proposed Decision and Order and the complainant's objections thereto, and after having consulted with the hearing examiner, the Commission adopts the Proposed Decision and Order as its final resolution of this matter with the following modification:

The final paragraph on page 7 is modified to read as follows:


The information available to Mr. Jordan in reviewing the subject incident included not only the police reports, the criminal complaint, and statements made by complainant and Ms. Garner, but also the statement of an apparently impartial third party, Ms. Garner's landlord Brad Glassel. Complainant's contention that respondent had no basis for giving more credence to Ms. Garner's version of the incident than to complainant's denial of Ms. Garner's allegations ignores the fact that Mr. Glassel told investigator Hackbarth that complainant told him how sorry he was for what he had done and that he was totally wrong, and that Mr. Glasser believed that complainant "made a statement about being drunk and belligerent" during the incident.

Dated: September 9, 1994

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM:rcr

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

Gary Whitley  
3249 W. McKinley  
Milwaukee, WI 53208

Michael Sullivan  
Secretary, DOC  
P.O. Box 7925  
Madison, WI 53707

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

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

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in

the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

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

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

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

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

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GARY E. WHITLEY,

Complainant,

v.

Secretary, DEPARTMENT OF  
CORRECTIONS,

Respondent.

Case No. 92-0080-PC-ER

\* \* \* \* \*

PROPOSED  
DECISION  
AND  
ORDER

This matter is before the Commission on a complaint of arrest record, conviction record, race and color discrimination in violation of the Wisconsin Fair Employment Act, Subchapter II, Ch. 111, Wis. Stats. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Complainant Gary Whitley is of African and Native American ancestry. He became a state classified civil service employe July 5, 1982, as an Institutional Aide at the Winnebago Mental Health Institute.

2. After first becoming an Institutional Aide Supervisor and then a Social Worker at the Wisconsin Resource Center in January 1991, complainant transferred to the Department of Corrections, Division of Probation and Parole and was assigned to the Milwaukee Regional Office in Milwaukee, Wisconsin, with the working title of Probation and Parole Agent.

3. Complainant successfully completed his six-month probationary period and became a permanent employe in July 1991.

4. During the early morning hours on October 4, 1991, complainant was involved in an altercation with a neighbor, Ms. Jo Garner. Later that same morning, complainant was arrested by the Milwaukee City police at his home, after being identified by Garner as the person with whom she had the altercation.

5. Ms. Garner filed formal charges against complainant and on October 7, 1991, a criminal complaint alleging disorderly conduct, a misdemeanor, was issued by the district attorney's office.

6. The incident was reported to complainant's supervisor by the police and also the complainant on October 4, 1991. Complainant was suspended with pay that same day.

7. Respondent's Milwaukee Regional Office Field Supervisor Jayne Hackbarth was assigned to investigate the October 4 incident.

8. October 7, 1991, Hackbarth interviewed Garner personally and Garner's landlord, Brad Glassel by telephone. Complainant had talked with Glassel about the incident. When Hackbarth conducted an investigatory interview with complainant on October 9, 1991, he refused to provide any information regarding the October 4, 1991, incident because of the pending criminal charges against him.

9. After reviewing Hackbarth's investigatory reports, police incident reports, and D.A.'s criminal complaint, respondent's Milwaukee Regional Chief Allan Kasprzak obtained permission from the central office to proceed with a pre-disciplinary hearing for complainant.

10. On October 10, 1991, complainant's predisciplinary hearing was held. Complainant again refused to comment on the October 4 incident, but stated he would be willing to address the issue after pending criminal charges were resolved.

11. After receiving a report of the predisciplinary hearing, Kasprzak and Deputy Regional Chief, John Barian, who conducted the hearing, agreed complainant should be terminated.

12. A memorandum of complainant's predisciplinary hearing, dated October 31, 1991, was sent to respondent's Administrator, Division of Probation and Parole, Eurial Jordan.

13. By letter dated January 10, 1992, Jordan informed complainant that he was discharged from employment as a Social Worker I with the Division of Probation and Parole, effective January 15, 1992.

14. The discharge letter stated in part:

This discharge is based on your violation of Department of Corrections Work Rule #5 which states:

"Work Rule #5: Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; or gambling."

The letter included discussions about information provided in police reports, Hackbarth's investigatory reports and Barian's predisciplinary hearing memorandum to Jordan. Further, the letter continued:

Since you declined to make a statement regarding the incident, we have no mitigation to consider. You have been previously counseled earlier this year on more than one occasion regarding your harassing female co-workers.... Behavior that shows lack of respect and leaves citizens in fear for their lives will not be condoned and only reinforces the conclusion that there is no alternative to discharge.

15. Complainant's behavior had not become a matter widely known in the community through the media coverage.

16. Subsequent to discharge, complainant made a request for unemployment compensation. In a decision dated and mailed April 13, 1992, Administrative Law Judge, Charles R. Lund, Department of Industry, Labor and Human Relations, ruled complainant's discharge was not for misconduct connected with his work, within the meaning of §108.04(5), Stats. The decision was predicated upon the fact the employer presented no direct evidence that complainant committed the offense alleged.

16. On April 15, 1992, complainant filed a charge of discrimination with this Commission alleging respondent terminated him because of his arrest record, conviction record, race and color in violation of the Wisconsin Fair Employment Act, Subchapter II, Ch. 111, Wis. Stats.

17. Complainant also filed a timely grievance concerning his discharge, under a collective bargaining contractual agreement with respondent. The hearing was held on December 8, 1992. The record was closed April 19, 1993. On June 17, 1993, the arbitrator found just cause for complainant's discharge under the collective bargaining agreement.

#### CONCLUSIONS OF LAW

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

2. Complainant has the burden to prove that he was discriminated against by respondent on the basis of race, color, arrest record or conviction record when respondent discharged him from employment in January 1992.

3. Complainant has failed to sustain his burden of proof.

4. Complainant has failed to prove respondent discriminated against him as alleged.

#### OPINION

The issue in this case is whether respondent discriminated against complainant on the basis of race, color, arrest record or conviction record, as protected against under the Wisconsin Fair Employment Act, when they discharged him from employment January 15, 1992. The legal framework employed in deciding this controversy is consistent with the analysis in McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

The evidence clearly establishes that complainant is a member of a class protected by the Wisconsin Fair Employment Act (WFEA), that he was qualified for the position, and that he was discharged by respondent shortly after he was arrested and charged with a criminal offense. Also, the plain, unambiguous evidence shows respondent's stated reason for complainant's discharge was complainant's conduct on October 4, 1991, which violated respondent's Work Rule 5. What remains is the question of pretext: Was respondent's stated reason for discharging complainant a pretext for race, color or arrest record discrimination?

By inference, complainant argues that he was discharged by respondent because he was arrested on October 4, 1991, and charged with the crime of disorderly conduct, a Class B misdemeanor, under §947.01, Wis. Stats. In support, complainant argues that respondent's proffered reason for his discharge -- his conduct on October 4, 1991, in violation of Work Rule 5 -- is pretextual because it is based solely on alleged, uncorroborated statements of a Ms. Jo Garner, a female with whom he had an altercation. Further, complainant argues respondent wants the Commission to believe they accepted the unsworn statements of Garner, a person otherwise unknown to them, as the factual accounting of the incident, even though he had been employed with respondent since 1982, without reprimand.

Respondent argues complainant was discharged because of conduct underlying his arrest which violated its Work Rule 5. Respondent states that its decision to terminate complainant was based on its own investigation and belief Garner's story was true.

The evidence shows the Milwaukee Police Department advised complainant's supervisor about complainant's arrest. Later that same morning, October 4, 1991, complainant's work unit obtained a list of the police arrests for the previous evening and complainant was suspended with pay that same day. The head of complainant's work unit, Allan Kasprzak, assigned Jayne Hackbarth, the Intake Supervisor, to investigate the incident. Hackbarth's investigation consisted of obtaining and reviewing the police incident reports and interviewing Jo Garner, Garner's landlord Brad Glassel, and complainant. After Hackbarth completed her investigation on October 9, 1991, she submitted the 2 police reports and 3 interview summaries to Kasprzak. On October 31, 1991, John Barian, respondent's Milwaukee Regional Deputy Chief, conducted a predisciplinary hearing, where Hackbarth's investigatory report was verbally summarized and complainant denied the allegations, stating that he was advised by his legal counsel to not otherwise comment. Respondent's Division of Probation and Parole Administrator Eurial Jordan testified that after reviewing Hackbarth's investigatory report, including the police reports and the criminal complaint, Barian's predisciplinary hearing report, the work rules, recommendations for termination from Kasprzak and Barian, and legal counsel, he decided to discharge complainant because he was satisfied that Garner's story was true and such behavior could not be tolerated. The police reports of the October 4 incident provide the following pertinent information. Officer Dean Schubert, who with Officer Grogan, responded to Garner's call, in his investigative narrative writes:

On 10-04-91 at about 1:57 A.M., (Garner) pulled into her driveway at 3227A W. McKinley, whereupon, a B/M 5'7" about 35 YOA, 210 lbs., wearing a maroon shirt and glasses pulled his auto (Lic # AHU-380 24 Jr Silver Buick) behind her. The subject then exited his auto and approached this victim's auto near the driver's side. The victim was startled and locked her car door. The subject then told the victim "I know you. Your name is Jo. Do you want to go out for a cocktail?" The victim then refused and asked the subject to get lost. The subject became angry and stated "You Bitch, get your ass out of the hood." The victim then told the subject to move his auto, whereupon the subject stated, "I'll move after you see the results of my gun." The subject then walked to his auto and yelled, "I'll get you bitch, my gun is ready!" The auto then left the scene and the victim drove two blocks to call the police.

During this same time frame, Officer Schubert also prepared an arrest report. In it he writes:



We spoke to the complainant who stated she was parking her auto behind her house when the subject's vehicle pulled behind her. The subject then asked the victim to go out for a drink at which time she refused and he made threats to get a gun from his car if she wouldn't comply causing her to fear for her life. The victim fled the scene and was able to obtain a plate number and description of the subject.

Three days later Jayne Hackbarth personally interviewed Ms. Garner regarding the October 4, 1991, incident. In her report of her interview with Garner, Hackbarth writes:

Ms. Garner was returning home from work at about 2:00 A.M. on 10-4-91. She was in the process of parking her car when Mr. Whitley pulled his car behind hers, blocking her in. He asked her if she wanted to go for a cocktail to which she replied, 'are you fucking crazy or stupid?' She stated, 'he went off, he went into a frenzy.' He got out of his car and was yelling at her through the window. He made statements to her such as 'who do you think you are?' and was asking her if she thought she was too good for him. Several times he stressed to her that it was his 'hood' (neighborhood) and that she had no right to be there. Several times he told her he was going to get his gun and kill her. She told him she was going to ram his car if he didn't move it to which he reportedly stated if you ram my car they'll be picking you up in a body bag. During the altercation he was pulling on the handle of her car door and was kicking the door. Several times he ordered her out of the neighborhood and told her if he didn't get her then one of his 'bros' would. He told her he has been watching her for a long time, he knows where she lives, and he knows how to get a hold of her. During the incident he did correctly identify the building she lives in and her apartment. He told her she had 24 hours to get out of the neighborhood and repeated several times that he was going to kill her. Ms. Garner was eventually able to pull her car forward and leave the scene. She had obtained his license plate number so she contacted the police.

Garner told Hackbarth there was no physical contact between them but there were some dents in her car door. Garner was driving a 1977 Chevrolet Impala.

Hackbarth interviewed Garner's landlord Brad Glassel by telephone.

About that interview she writes:

Mr. Glassel indicated Gary came over to his house on Sunday, 10-6-91. Mr. Whitley asked him if he heard about the incident between him and Jo Garner. Mr. Glassel told him he had. Mr. Whitley proceeded to tell him how sorry he was for what he had done and that he was totally wrong. Mr. Glassel believes Mr. Whitley made a statement about being drunk and belligerent and said he felt bad about the whole thing. Mr. Whitley asked Brad if he would go with him to Jo's apartment so he could apologize. He didn't think he should go over there by himself. Brad told him 'no,' saying he doesn't think he should become involved....

The criminal complaint from the Milwaukee County District Attorney's office filed October 7, 1991, gives the following account of the October 4 incident:

Garner, an adult citizen, stated that on October 4, 1991, at approximately 1:57 A.M., she pulled into her driveway at 3227A W. McKinley, in the City and County of Milwaukee, whereupon the abovenamed defendant pulled his automobile behind her, blocking her in. Garner stated that the defendant yelled from his car, "Do you want to go for a drink" and Garner refused. Garner stated that the defendant then exited his car and Garner became very frightened so she locked the doors to her automobile. The defendant proceeded to make numerous threats to Garner including, "I'll get my gun and I'll kill you", "You better get out of my 'hood' or I'll get my bros to take care of you", "You don't know who you are dealing with, I will kill you", "I know where you live and I'll be back", "We've noticed you in the neighborhood and we don't want you here". The defendant also called her names such as, "White trash" and "white honky bitch". Garner stated that she was frightened for her life and at one point the defendant attempted to open the doors on her car. The defendant finally left the scene and Garner drove two blocks to call the police. As she was driving away she wrote down the defendant's license plate number, AHU-380.

When Hackbarth interviewed complainant on October 9, 1991, complainant denied the allegations of Garner, saying that he was willing to be cooperative but on advice of legal counsel he could not say any more about the incident.

About the preceding information provided Jordan, complainant argues respondent did not know Garner's background, it made no attempt to check credibility, yet states it accepted her version of the incident on its face. Complainant believes the reasons given by respondent for his discharge to be pretext.

Based on the information provided Jordan, it is difficult to know what occurred that early morning, October 4, 1991. The police reports of Officer Schubert only recite Garner's allegations. Based on these two reports, it is not clear who left the scene first. Also no mention is made of Garner's self-admitted profanity and threat to ram complainant's auto, and no mention is made of any damage to Garner's auto. The only undeniable facts regarding the October 4, 1991, incident as provided Jordan are that complainant and Garner were involved in an altercation, afterwards the police were called and based on Garner's allegations, complainant was taken into custody, arrested and charged with disorderly conduct, under the criminal statutes.

Respondent argues that prior to October 4, 1991, on September 17, 1991, complainant was counseled about physical contact with female staff, sexual comments and familiarity v. professionalism. This counseling resulted from concerns brought to Phelan's attention by a male staff and subsequent interviews of female staff members in late August and September 1991. This information was identified as confidential and was not a part of complainant's personnel record.

In support of his claim of ethnic discrimination, complainant testified and provided documentation of white DOC employes, who were arrested and in some instances convicted, charged by respondent of violating Work Rule 5, but not discharged. Complainant's testimony and documentation of these employes is summarized as follows:

1. James Zoronski, Probation and Parole Officer, was suspended for 30 days in June, 1990, for fraternizing with a client and providing false information to respondent regarding a stolen boat motor in his possession.

2. Daniel Sonnenberg, employe at Oakhill Correctional Institution, was suspended for 10 days on June 6, 1985, under Work Rule 5, for illegal conduct of soliciting prostitution.

3. Clement Helminak, in March, 1987, was suspended for 10 days after police found him in his automobile inebriated and unconscious with a concealed loaded Browning 380 semi-automatic pistol.

4. Edward G. Meier, Social Worker, in 1990, was not terminated after being arrested for smoking marijuana at U.W.-Milwaukee.

5. Leo Longdin, Correctional Officer, was terminated in November, 1988, after signing a deferred prosecution agreement with the district attorney, but was reinstated by an arbitrator who found Longdin had consistently denied allegations in the criminal complaint and the agreement was not admission of guilt.

6. Todd Nehls, Correctional Officer, in the spring of 1986, was arrested and charged with "Battery, Aggravated Battery," a Class A misdemeanor. Respondent allowed Nehls to return to work and did not terminate him until June 1987 after he was convicted. An arbitrator reinstated Nehls on the basis respondent failed to prove Nehls'

misconduct damaged respondent's reputation or created a problem in the operation of its business, and the termination was inconsistent with previous employes' decisions.

7. Curtis Nowacki, Correctional Officer, was reinstated in August 1989, after initially being terminated for violation of Work Rule 5 relative to his arrest and charge of 6 counts of criminal damage to property, 1 count of carrying a concealed weapon, and 1 count of possession of a switch blade. Nowacki admitted to carrying a butterfly knife and a dagger.

8. Jon Winkowski was rehired by respondent as a Probation and Parole Agent after his arrest and conviction for possession of drugs.

9. Officer John Jenkins, Fox Lake Correctional Institution, was reinstated in February 1990, by respondent after an earlier decision to terminate him for violating Work Rule 5, substantiated by a conviction of misdemeanor theft.

10. Ronald Lumaye, Correctional Officer, was suspended for 45 days for violating Work Rule 5 in connection with being apprehended by police, while he was in possession of money and papers of an owner of a 1979 Buick reported stolen minutes before his arrest.

11. Gerard Socwell, Youth Counselor, was suspended in December, 1987, for 3 days after being arrested for assault and battery of his wife, but was not terminated until after his conviction.

Complainant also cited the case of Patricia Bridges. Bridges, an African-American and a Correctional Officer at Green Bay Correctional Institution in 1983, was terminated after a highly publicized incident in which she was arrested and charged with carrying a concealed weapon. An arbitrator reinstated Bridges noting respondent had employed a Gale Paulson after an altercation in which he pointed a pistol at a couple in a bar and was sentenced during his probationary period and discipline was not meted out to him.

Respondent argues that individuals complainant cited at the hearing and arbitration receiving better treatment than he included Patricia Bridges and Nazarrene Mackey, two African-American females. The record shows that Bridges was not treated better than complainant by respondent, although unlike complainant she was reinstated by an arbitrator. Mackey, a Work Release Coordinator at Ellsworth Correctional Institution, in February or

March 1992, was sent home from work because she was disoriented. Later that day the police found Mackey walking the streets disoriented. The police sent her home, but she got in an altercation with her male house mate, the police were called and she was arrested for disorderly conduct and obstructing an officer. Respondent deferred disposition of her case pending psychological treatment. Subsequently, Mackey returned to work.

Respondent also argues that Eurial Jordan, the person who made the decision to discharge complainant, is African-American.

In considering the issues of arrest record and ethnic discrimination, the Commission is mindful that complainant has the burden of proof and must establish his claim by "the greater weight of evidence or clear preponderance of evidence." See Reinke v. Personnel Board, 53 Wis. 2d 123, 137, 191 N.W. 2d 833 (1971).

With respect to arrest record, respondent is not liable merely because in its investigation into complainant's conduct it relied to some extent on information from the police department that had been developed in connection with complainant's arrest. See 79 OAG 89, 91 (1993) ("the employer is protected if it bases its employment decision on the individual's conduct (as opposed to the individual's status as an arrested person), even if the employer bases its conclusion concerning the individual's conduct upon information which the employer received from others (even including law enforcement agencies)."); City of Onalaska v. LIRC, 120 Wis. 2d 363, 367, 354 N.W. 2d 223 (Ct. App. 1984). Therefore, in the case before this Commission, respondent will not be liable for arrest record discrimination unless the record establishes that respondent's assertion that it discharged complainant for his actions on the night in question is a pretext and that its true motivation was complainant's arrest record. The evidence on the arrest record issue establishes that respondent conducted its own investigation of complainant's conduct and reached its own decision regarding complainant's conduct, underlying his arrest and charge. Subsequently an arbitrator concluded complainant was discharged for just cause. Whether or not the Commission would come to the same conclusions as respondent or the arbitrator, it does not believe the greater weight of evidence supports a finding that respondent's stated rationale for discharge was a pretext for arrest record discrimination.

The evidence relative to the issue of race discrimination presents some troubling questions. Complainant presented evidence establishing that in

several instances respondent treated white employes charged with similar misconduct differently than him. In addition, complainant forcefully argues that, with one exception, everyone involved in respondent's decision to terminate him was white. Again turning to the WFEA, the particular issue in such cases is whether the employer is motivated by discriminatory animus. To that extent, each case must stand on its own facts. Here, in this case, the appointing authority, who made the decision to terminate complainant, was of complainant's ethnic heritage. He testified that his decision was independent, and made after considering the internal investigatory report and discussing the matter with subordinates and legal counsel. The record does not establish in which, if any, of the other disciplinary actions the appointing authority was involved.<sup>1</sup> Under the facts peculiar to this case, the Commission cannot conclude respondent's stated reasons for its action was a pretext for ethnic discrimination.

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<sup>1</sup> Due to his position in the department, it is clear that he could not have been involved in most of the transactions.

ORDER

In accordance with the Findings of Fact, Conclusions of Law and Opinion, the complaint in Case No. 92-0080-PC-ER is dismissed.

Dated: \_\_\_\_\_, 1994      STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

DRM:rcr

\_\_\_\_\_  
DONALD R. MURPHY, Commissioner

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