

STATE OF WISCONSIN

PERSONNEL COMMISSION

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NANCY SHEW, \*

Appellant, \*

v. \*

Secretary, DEPARTMENT OF \*

HEALTH AND SOCIAL SERVICES, \*

Respondent. \*

Case No. 95-0091-PC \*

\* \* \* \* \*

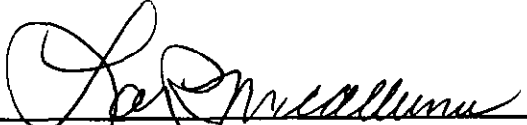
INTERIM ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. The Commission has considered the parties' written submissions with respect to the proposed decision and order.

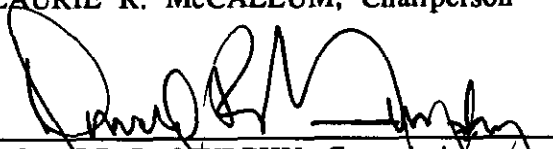
The parties disagree as to the extent of the remedy to which appellant is entitled. This involves issues which the proposed decision does not address, but which the Commission apparently will have to address before this matter is finalized.

At this time, the Commission adopts and incorporates by reference the proposed decision and order, a copy of which is attached, except to the extent that for the time being it will neither adopt nor reject Conclusion of Law #5 ("Appellant is entitled to reinstatement to her former position, and to the restoration of all lost pay and benefits."), but will reserve a ruling on the extent of appellant's remedy. The parties are directed to consult about the possibility of reaching agreement on remedy, and to advise the Commission within 20 days of the date of this interim order whether these efforts have been successful. In the event the parties do not reach agreement within this period, a conference will be scheduled to discuss how the Commission should proceed with this case.

Dated: April 16, 1996 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:pf

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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NANCY SHEW,  
 Appellant,

v.

Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
 Respondent.

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PROPOSED  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of an involuntary demotion.

FINDINGS OF FACT

1. Appellant has been at all relevant times an employe in the classified service at Northern Wisconsin Center (NWC).
2. By a letter dated April 6, 1995 (Exhibit 6), respondent demoted appellant from Word Processing Supervisor 2 to Program Assistant 1, effective April 24, 1995. This transaction resulted in a reduction in pay of \$1.697 per hour.
3. The aforesaid letter imposing the demotion charged appellant with the following misconduct:

This action is for violation of Work Rule #7 which occurred on or about March 28, 1995, when you accessed the computer personnel records of Barbara Hedrington, Personnel Assistant, and shared recruitment and screening process information with a candidate for the Security Officer 3 position.

Our investigation reveals that you did access Ms. Hedrington's computer personnel files and did go through her "personnel" directory to view information in those records. You were clearly overheard and observed accessing the personnel files and discussing the material in those files with the Security Officer 3 candidate, Lynnann Smith. You also admitted having a phone discussion with Ms. Smith on the date and time of the incident.

4. Prior to this demotion, appellant had been employed at NWC for approximately 20 years. Her record of performance was good, and she had had no prior discipline.

5. On March 28, 1995, appellant did have a conversation on her office phone with Lynnann Smith, a personal friend, and an LPN at NWC who had been employed there continuously since 1972 except for the period of 1975-1977, with a good performance record and no discipline. This conversation concerned a resume appellant had typed for her and given to Ms. Smith's husband with various parts marked for Ms. Smith's information, as well as an interview for a Security Officer 3 (SO 3) position which was being filled by transfer, and for which Ms. Smith had an interview the next day. In the course of this discussion, appellant and Ms. Smith discussed the qualifications of several candidates, of whom they were aware from unofficial, non-confidential sources, and rumors that someone had a "lock" on the appointment. They also discussed Ms. Smith's qualifications in comparison both with these known candidates, and with the publicly announced criteria for the position (valid driver's license, etc.) (Exhibit 58). Appellant also gave Ms. Smith some general advice on how to interview -- e.g., maintain eye contact. Mention also was made at Ms. Smith's understanding that three people besides herself were to be interviewed. Appellant did not access Ms. Hedrington's personnel files, nor did she discuss information contained therein with Ms. Smith, as respondent alleged.

6. Prior to and during the course of the aforesaid conversation, appellant scrolled through Ms. Hedrington's non-confidential forms files in an attempt to find some forms which would have helped her to have fulfilled a request from some other employes (Don March and Keith Hughes) for the production of some consent forms. Appellant was aware that Ms. Hedrington had been involved with forms as the NWC forms officer prior to having become the personnel manager, and thought she might have some forms that would be useful in responding to the request.

7. Two of appellant's subordinate employes, Carol Roth and Pamela Steinmetz, saw parts of Ms. Hedrington's records on appellant's computer screen, overheard parts of appellant's conversation with Ms. Smith, and discussed this with each other. It could be inferred from what they saw and heard that appellant improperly accessed Ms. Hedrington's confidential personnel files which contained confidential information about the SO 3

selection process, and that appellant improperly shared that information with Ms. Smith. Later that day, Ms. Steinmetz informed Ms. Hedrington that this is what had occurred.

8. Ms. Hedrington reported what Ms. Steinmetz had told her to higher level management. After conducting an investigation and hearing procedure, respondent imposed the aforesaid demotion.

9. Several months prior to the March 28th incident, Ms. Steinmetz had observed appellant accessing some attendance committee records that were part of Ms. Hedrington's forms files. Ms. Steinmetz did not report this observation to anyone until after the March 28th occurrence, and it was not part of the misconduct charged against appellant.

10. About a week prior to the March 28th incident, Ms. Steinmetz made a call to Ms. Hedrington and told her she thought appellant was in her (Hedrington's) files with respect to the SO 3 position.<sup>1</sup> As a result of this call, Ms. Hedrington placed a password on the SO 3 interview questions file. This matter was not part of the misconduct charged against appellant.

11. Over a period of time prior to March 28, 1995, Ms. Roth and Ms. Steinmetz made a number of complaints to appellant about a coworker. Appellant investigated these complaints and determined they were unfounded. These complaints included an allegation that another employe had complained about the coemploye's work, but he denied this and said her work was excellent. It also was alleged that the coworker made a statement to Darrell Arndt (Director of Management Services) which Mr. Arndt denied had been made.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats.
2. Respondent has the burden of proof.
3. Respondent did not sustain its burden of proof.
4. Appellant was not guilty of the misconduct alleged in Exhibit 6.
5. Appellant is entitled to reinstatement to her former position, and to the restoration of all lost pay and benefits.

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<sup>1</sup> Ms. Steinmetz testified at hearing that she did not recall so doing.

OPINION

In §230.44(1)(c), Stats., appeals of disciplinary actions, the employing agency has the burden of proof, which is that "the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence." Reinke v. Personnel Board, 53 Wis. 2d 123, 137, 191 N.W. 2d 833 (1971) (citation omitted).

The decision of the instant case rests on the resolution of what is to some extent conflicting evidence as to what occurred during a relatively short period of time during one day. Ms. Steinmetz and Ms. Roth testified that they saw and heard certain things, from which it can be inferred that appellant committed a serious work rule violation by accessing confidential information concerning the selection process for the SO 3 position, and sharing it with Ms. Smith, a candidate for the position. Appellant acknowledges having discussed certain aspects of this process with Ms. Smith, but asserts they were discussing publicly available information, and appellant denies either having accessed or shared confidential information. There is evidence in support of each party's version of what occurred, and each party's position was weakened to some extent by credibility problems. In the final analysis, respondent's case was undermined significantly enough by credibility problems and competing evidence that respondent did not carry its burden.

The testimony of appellant and Ms. Smith established that they were aware of a good deal of information about the SO 3 staffing process from non-confidential sources, either officially or through the institutional grapevine, and that this information entered into their discussions. For example, the institution had promulgated the basic criteria for the position, and the appellant and Ms. Smith knew from various sources the identity of a number of candidates, and something about their qualifications. Ms. Roth and Ms. Steinmetz each heard various parts of one (appellant's) side of the conversation between appellant and Ms. Smith, and each got a look at appellant's computer screen at various times. During the day they to some extent shared their observations with each other. The next day, they were interviewed by management in each other's presence. These factors, while by no means dispositive, provide at least a fertile field for a possible misunderstanding about what actually occurred.

Respondent cites in support of its case a number of statements attributed to appellant, most of which are consistent with appellant's own account and

her insistence that she neither accessed nor divulged confidential information. Ms. Roth attributed four statements by appellant to Ms. Smith (these are taken from Ms. Roth's written statement, Exhibit 33):

1. "Call me back, I've got news but I don't want to be on the phone too long."
2. "[S]omething like 'I can't get in the file, it has a password on it.'"
3. "[T]alking about the SO 3 position."
4. "[M]ention[ed] Lynn Decker and Andrea Watton."

Of these statements, the first and third are consistent with appellant's account of what happened, but also could have been at least part of an improper conversation about the SO 3 staffing.

Ms. Steinmetz also attributed four statements to appellant (these are taken from Ms. Steinmetz's written statement, Exhibit 34):

1. [To Ms. Smith's husband] "Everything is marked."
2. "Listen, this is the criteria they're looking for."
3. [Appellant read] "a list of names [including] specifically Lynn Decker, Perry Pelekoudas, and Andrea Watton."
4. "There must be you and three others."

The first two statements are consistent with appellant's account of what happened. This is also true of the fourth, which is consistent with testimony that Ms. Smith had heard there were four people to be interviewed the next day. Furthermore, there is nothing in Ms. Hedrington's personnel files which are in the record that would have provided appellant with this piece of information. Thus three of these four statements are consistent with appellant's story, but also could have been at least part of an improper conversation about the SO 3 staffing.

The remaining statements about which Ms. Roth and Ms. Steinmetz testified are difficult to reconcile with appellant's story. This leads to the question of whether they are accurate accounts of what appellant said. There are a number of factors which undermine respondent's case in this regard.

Ms. Hedrington's more or less contemporaneous record of her conversation with Ms. Steinmetz (Exhibit 32) states: "Pam said she heard Nancy place a call to Lynnann." This is inconsistent with Ms. Steinmetz's testimony that Ms. Roth had heard this and reported it to her (Steinmetz).<sup>2</sup> This inconsistency can be attributed to a number of factors, but under the particular circumstances of this case (witnesses hearing various parts of one side of a conversation and then hearing the other person's account of what she witnessed), it is of more significance than might otherwise be the case.

Another troubling inconsistency involves Ms. Hedrington's testimony that she had been prompted to put a password on the interview questions by a call she had received from Ms. Steinmetz about a week before the March 28th call:

She [Steinmetz] had called me. I think it was a week before that and told me that Nancy [Shew] was in the directory, and -- I guess it was similar to that, if I wanted, if I was -- if I had some information in there regarding the Security Officer 3 position. At that time I did put a lock on one file that I thought would be most helpful to an applicant, and that was the interview questions.

However, Ms. Steinmetz testified she could not recall this conversation:

Q. When Barb Hedrington, in response to your, or during your conversation with her at this time said that, yes, one of her documents had a password security lock on it, do you have any knowledge as to why that document had a password security lock on it?

A. No, I don't.

Q. Had you ever talked to Barb Hedrington prior to this day on the 28th about securing her, or concern about access to Barb's personnel computer?

A. I don't recall.

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<sup>2</sup> Ms. Hedrington was adamant on redirect about this point:

Q. Could it be that Pam Steinmetz told you on the 28th of March that Carol Roth or someone else in that office overheard Nancy Shew place this call to Lynnann Smith?

[objection sustained]

Q. You testified earlier that Pam told you that she overheard Nancy place the call to Lynnann Smith -- is that correct?

A. Yes.

Q. Are you certain that that's what Pam told you?

A. Yes, I am....



Q. Do you have any knowledge about Nancy Shew having access to Barb Hedrington's personnel file prior to this day on the 28th of March? That you recall.

A. There was one other incident that I remember. As I had walked by her screen it appeared she was in screens of attendance committee memos ... I don't recall when this was ... I would say it was a few months earlier....

Q. Did you talk with anyone about that?

A. ... I did talk to someone about it after this [3/28] incident ... I talked to Barb Hedrington at that time about it [the earlier incident]. (emphasis added)

It seems highly unlikely that Ms. Hedrington would be mistaken about the reason for having placed a password on the file with the interview questions. Ms. Steinmetz's testimony that she did not recall this incident, which had occurred about a week before March 28th, raises serious credibility questions.

Another credibility factor concerns appellant's uncontradicted testimony that Ms. Roth and/or Ms. Steinmetz had come to her several times with complaints about a coworker, which appellant had determined upon investigation to have been unfounded. This factor is particularly significant because two of the incidents involved accounts of communications involving two other staff members. They (Ms. Roth and Ms. Steinmetz) reported that a certain QMRP (qualified mental retardation professional) had complained about the coworker's work. The appellant testified that she had talked to this person and he had no complaints about the coworker, but thought she did excellent work. The second matter involved an alleged statement by the coworker to Mr. Arndt (assistant NWC director) that their unit did not have enough work to keep them busy. Appellant testified that the coworker had said she had merely told Arndt she was caught up with her work and had asked if she could take one and one-half hours of vacation,<sup>3</sup> and that Arndt confirmed this version of the conversation. This evidence came in without objection and was not rebutted, notwithstanding that, at least with respect to the latter two incidents, the two individuals mentioned by appellant were staff

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<sup>3</sup> This was on an occasion when appellant was not at the institution.

members and presumably readily available.<sup>4</sup> Again, this kind of evidence undermines the credibility of respondent's case.

Another consideration is that it is clear from this record that the relationship between Ms. Roth and Ms. Steinmetz and appellant was not good. It may or may not have been the case that this situation was caused by appellant's supervisory or personal style.<sup>5</sup> However, this does provide a context where it is more likely that the two subordinates would perceive a negative or improper connotation to something they saw or overheard than would otherwise be the case. Again, this is of particular significance in a case like this where Ms. Roth and Ms. Steinmetz heard parts of a discussion and looked in passing at appellant's computer screen, while appellant was discussing the SO 3 staffing process while accessing Ms. Hedrington's forms file.

Another factor that weighs against respondent's case in general is that it is undisputed that appellant made no attempt to conceal her conversation with Ms. Smith. It is by no means impossible that appellant would have been either foolhardy or careless enough to have engaged in the alleged misconduct in such an open manner. However, in the Commission's opinion it is more likely than not that if an employe of appellant's demeanor and experience were going to access confidential personnel files and to share this information with a friend in order to help her do well in a competitive interview, she would do so in a less open manner.

Finally, appellant testified that one of the screens that Ms. Steinmetz testified she saw on appellant's computer could not possibly have appeared on that screen. Ms. Steinmetz had testified that she had seen a screen on appellant's computer entitled HP Laser Jet Personnel, and that this would have accessed a printer in personnel rather than in their unit. She said appellant then pushed a key to select another printer within the word processing unit. Appellant testified in detail about how, because of the way she had set up the computer system in the word processing unit, it was impossible that this could have occurred. It appears that this specific evidence would have been susceptible to rebuttal if it were incorrect. However, it was not specifically

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<sup>4</sup> Mr. Arndt testified at the hearing, but he did not refer to this incident, and he was not recalled in rebuttal.

<sup>5</sup> Whatever relevance, if any, the cause of, or blame for, the rift may have, the answers to these questions are outside the scope of this record.

rebutted, albeit that it was contradicted generally by Ms. Steinmetz's earlier testimony. In the Commission's opinion, respondent did not sustain its burden of proof on this factual issue, and this further undermines respondent's case.

There is one fairly significant credibility issue that works against appellant. She did not come forward with her account<sup>6</sup> of having been in Ms. Hedrington's forms directory until after two investigative meetings. While appellant testified that she was more or less in a state of shock after having been confronted with these unexpected accusations, it is hard to believe that this information would not have occurred to appellant at an earlier point. On the other hand, her story is corroborated to some extent by her testimony that two other staff members (March and Hughes) had come to her with a request for the forms in question, and that because of Ms. Hedrington's work in this area before she became the personnel manager, her forms directory was a logical source to have checked out.

Another factor weighing against appellant's account is Ms. Steinmetz's testimony, quoted above, that several months before the incident in question, she had observed appellant apparently accessing screens of attendance committee memos. This incident, although it was not part of the charged misconduct, is probative of respondent's case -- i.e., that appellant had accessed this group of files on one occasion makes it somewhat more likely that she had accessed other personnel files on another occasion.<sup>7</sup> However, there was very little information about this incident -- essentially Ms. Steinmetz's testimony that "as I had walked by her screens it appeared she was in screens of attendance committee memos." Based on this record, accessing these attendance committee records appears to be far less significant than accessing information concerning a staffing process in an attempt to help a friend secure an appointment, and the weight of this evidence is limited.

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<sup>6</sup> See Exhibit 43, appellant's statement of her phone call to Mr. Arndt after the March 31, 1995, meeting.

<sup>7</sup> Appellant's objection to this testimony was overruled. This evidence probably would have been inadmissible in a judicial proceeding, see e.g., 7 BLINKA WISCONSIN PRACTICE (EVIDENCE) §608.1 (1991). However, "an agency or hearing examiner shall not be bound by common law or statutory rules of evidence." §227.45(1), Stats., and the receipt of this evidence concerning this relevant yet relatively discrete occurrence was not erroneous.

Finally, appellant, like any disciplined employe, has an incentive to distort or misstate the facts, because of the consequences of the disciplinary action.

Returning to the specific statements attributed to appellant that are inconsistent with appellant's account of what occurred, Ms. Hedrington's written statement of her March 28th conversation with Ms. Steinmetz (Exhibit 32) is somewhat inconsistent with Ms. Roth's assertion in her written statement (Exhibit 33) that appellant said "something like 'I can't get in the file, it has a password on it.'" (emphasis added) Ms. Hedrington's notes of her conversation with Ms. Steinmetz on the day of the incident (March 28th) contain the following: "Nancy [Shew] also said she [appellant] was unable to read one document because it was locked or had a lock on it." (Exhibit 32) (emphasis added). While the terminology "lock" and "password" have the same functional significance, the use of the term "lock" by appellant would have been consistent with her testimony at hearing that one of the things she discussed with Ms. Smith was the rumor in the institutional grapevine that someone had a "lock" on the SO 3 position. In light of the more contemporaneous nature of Ms. Hedrington's written statement, the relevant general credibility problems with respondent's case, and the evidence that supports appellant's version of this statement, the Commission concludes that respondent did not sustain its burden of proof that appellant made a statement about a file having a password on it, as set forth in Ms. Roth's statement.

The last specific statement attributed to appellant that cannot be reconciled with her account of what occurred is her mention of the names of the three candidates. On this record, appellant would have had no basis to have known the three candidates' names (Decker, Pelekoudas, and Watton) mentioned by respondent's witnesses if she had not accessed Ms. Hedrington's personnel files. However, it is possible that Ms. Roth and Ms. Steinmetz were mistaken about the names they heard and/or obtained the names from another source. Again, there are some things that raise questions about respondent's theory of the case.

As discussed above in Ms. Hedrington's statement of her conversation with Ms. Steinmetz on March 28th (the day of the incident) (Exhibit 32), she states that Ms. Steinmetz said the list of names appellant read included Lynn Decker and Perry Pelekoudas. In her written statement prepared on March 29th, Ms. Steinmetz says she "heard specifically Lynn Decker, Perry

Pelekoudas, and Andrea Watton." (Exhibit 34). Furthermore, while she had indicated to Ms. Hedrington the day before she prepared her (Steinmetz's) written statement that she had trouble with the pronunciation of Ms. Pelekoudas's name, but knew it started with a "P," she (Steinmetz) spelled the name correctly in her written statement. She testified that she did not recall whether she had consulted a source for the spellings of these names prior to having prepared her statement. All these factors weaken the evidence in support of respondent's case, because they increase the possibility that she was mistaken about the names she heard and/or was influenced by exposure to a list of names of candidates. In light of these factors, as well as the credibility problems discussed above, and the unlikelihood that appellant would have recited openly a list of names she could not legitimately have accessed, the Commission concludes that respondent did not sustain its burden of proof that appellant mentioned the names of these three candidates (Decker, Pelekoudas, and Watton).

In conclusion, evaluating the entire record in the context of the Reinke v. Personnel Board, 53 Wis. 2d 123, 137, 191 N.W. 2d 833 (1971), preponderance of the evidence standard, the Commission concludes that while this is a close case, respondent did not succeed in discharging its burden. While the evidence supporting respondent's case is not insubstantial, the many credibility problems afflicting its case tip the balance against respondent.

To avoid possible confusion, there has been some mention in the course of this proceeding about appellant having used work time and property in connection with preparing Ms. Smith's resume and discussing it with her. To the extent that this may be construed as misconduct supporting the demotion (and the Commission does not believe respondent has been attempting to do so), it is outside the misconduct charged by respondent, and cannot be considered for that purpose, *see, e.g., Powers v. UW*, 88-0029-PC (5/10/90); affirmed by Dane Co. Circuit Court, Powers v. WPC, 90CV3023 (2/12/91).

ORDER

Respondent's action of demoting appellant to PA 1 is rejected, and this matter is remanded for action in accordance with this decision.

Dated: \_\_\_\_\_, 1996      STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

AJT:rcr

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DONALD R. MURPHY, Commissioner

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