STATE OF WISCONSIN PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

Case No. 96-0016-PC

RULING ON MOTION FOR RECONSIDERATION
RULING ON MOTION FOR ATTORNEY'S FEES
FINAL ORDER

NATURE OF THE CASE

This case is pending before the commission after the entry of an interim decision and order on September 1, 1999, which rejected the respondent's discharge of appellant and addressed issues related to appellant's remedy. The commission retained jurisdiction to resolve any further issues concerning attorney's fees. The appellant filed a motion for attorney's fees. Respondent filed a response to that motion and also a motion to reconsider interim decisions. The Commission now addresses both motions.

MOTION FOR RECONSIDERATION

During the hearing which preceded the September 1, 1999, interim decision and order, respondent sought to question appellant about whether he had purloined documents from the workplace. A relevancy objection was sustained. In the interim decision and order, the commission discussed this ruling as follows:

> During the adverse examination of appellant, respondent asked appellant whether he had a practice of making copies of certain documents and his counsel objected on the basis of relevancy. In response to the objection, respondent stated that it pertained to the issue of mitigation of damages. Respondent further explained that, through this line of questions to appellant and the testimony of another witness, it would show that UWM would have terminated appellant for misconduct in June 1996 if he had still been employed there; and that under the "after acquired evidence" theory, appellant's back pay damages should be cut off

> in June 1996, the date appellant would have been terminated by respondent because of the evidence acquired after the termination in issue.
>
> After a recess, the examiner sustained the objection without explanation. The examiner granted respondent's request to make an offer of proof for the record, which included respondent's exhibit R-22, calculations of respondent's back pay liability based on the after-acquired evidence theory.
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> The Commission concludes that this ruling of the examiner was proper. To have allowed this evidence would have unfairly required appellant to have tried to address a significant new issue in this case—in a nutshell, whether he had violated work rules by having improperly removed documents from the workplace, and whether such conduct would have led to his discharge in June 1996—without any prior notice that it would be raised in this proceeding. P. 8. (footnote omitted)

The Commission also addressed respondent's alternative argument that the hearing should have been continued to facilitate notice to the appellant of the after-acquired evidence issue and time to prepare:

> As appellant points out in his response to respondent's objections to the proposed decision and order, respondent did not request a continuance at the time when the issue of the after acquired evidence was before the examiner. Also, given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated. There is also a question as to whether it would violate the civil service code to sanction what would be in effect the retroactive addition of reasons for the discharge of the appellant. *See, e. g., Liethen v. WGC,* 93-0095-PC, 10/20/93 (once written notice of reasons for discharge are provided and an employe is discharged on that basis, new charges can not be added as an additional basis for discharge); *Alff v. DOR,* 78-0227-PC, 3/8/79 (respondent could not amend discharge letter to add two charges which were not known to the respondent prior to the discharge letter). However, because the commission concludes that lack of notice precludes litigation of the issue of the missing documents at this point in the remedy process, it will not address the question of whether injecting this issue into this case at this time would violate the civil service code. P. 11.

On October 22, 1999, respondent filed a motion to reconsider the interim decisions on back pay and reinstatement, and brief in support. Respondent asserts that on April 8, 1998, it had filed a replevin action in Milwaukee County Circuit Court seeking

the recovery of documents appellant improperly had removed from the workplace. Respondent further asserts that in connection with this proceeding the documents in question were returned to it on September 29, 1999, and were very voluminous (10 file boxes and approximately 24,000 documents). Earlier, appellant had produced only one file box of documents and had asserted privilege with regard to about 30 other documents when he had been asked to produce "all documents which [he] has removed from the UWM Police Department and are now under his possession or control." Furthermore, in his June 24, 1996, deposition when appellant was asked if he had "boxes and boxes of documents at home from things copied at work," he answered "I don't believe that would be an accurate characterization."

Respondent asserts in its motion that it would have fired appellant on the basis of his having removed these documents—i. e., that the removal of these documents was in itself a ground for dismissal independent of the grounds contained in the charges against appellant that were the subject of this appeal. Respondent further asserts that this newly discovered evidence is a basis for the commission to reverse its order requiring appellant's restoration, and to limit its back pay award to the period of February 11, 1996 (the date of the discharge) to June 24, 1996 (the date when appellant allegedly dissembled during his deposition and did not reveal the true extent of the documents he had taken from the workplace).[1]

In support of its motion, respondent cites *McKennon v. Nashville Banner Publishing Co.,* 513 U. S. 352, 361-62, 66 FEP Cases 1192, 1196-97 (1995), and *Hoell v. LIRC,* 186 Wis. 2d 603, 610, 522 N. W. 2d 234 (Ct. App. 1994).

McKennon is an age discrimination case where the employer learned in the course of discovery that the discharged employe had removed confidential documents concerning the employer's finances from the workplace. The Court found that these

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[1] This motion was filed at the same time as respondent's response to appellant's second motion for costs. In light of the multitudinous volume of motions and briefs that have been filed in this case, the extended nature of this proceeding, and the proliferation of attorney's fees, the Commission has determined, after independently having reached the conclusion that this motion for reconsideration should not be granted, not to require appellant to file a brief on the motion.

after-discovered facts were an independent basis for discharge, and that this should affect the issue of remedy:

> We . . . conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.
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> . . . Once an employer learns about employe wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information even if it is discovered during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a back pay remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information was discovered.

Respondent also cites *Hoell v. LIRC,* 186 Wis. 2d 603, 610, 522 N. W. 2d 234 (Ct. App. 1994), where the Court held that in a mixed motive WFEA case, if the discharge would have taken place in the absence of an unlawful motive, the employe's remedy should be limited to a cease and desist order and attorney's fees.

Respondent contends that both cases stand for the proposition that if the employer can show it would have terminated the employe regardless of the improper reason for termination, reinstatement and back pay are inappropriate. However, *Hoell* and *McKennon* are distinguishable on two bases.

First, in the instant case we have a distinct issue relating to lack of notice and waiver not present in those cases. Here, respondent has known since June 1996 that appellant had removed documents from the workplace, and never raised an after-acquired evidence issue in this proceeding until the hearing on remedy on May 18, 1999. In fact, as discussed in the interim decision, respondent has specifically advised during the course of this proceeding that it intended to raise the issue of the purloined documents in a new disciplinary action after appellant's restoration. The only factual difference between now and June 1996 is that now respondent implies it is aware as a result of newly-discovered evidence that appellant took ten boxes of documents rather

than one. However, respondent earlier had asserted (in a July 20, 1998, letter to the Commission in opposition to appellant's motion for reinstatement) that it had an independent basis for terminating appellant on the basis of the one box of documents that then were known. Respondent at that time stated that "[i]f ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him, for unauthorized possession of university property with regard to the records issue." As also was discussed in the Commission's September 1, 1999, interim decision, respondent reiterated this position in a May 14, 1999, memo. This statement provided notice to appellant at that time that respondent was aware that its recourse with regard to the allegedly purloined documents would be to proceed with a new disciplinary action against appellant after he had first been reinstated—i. e., after the entry of the Commission's final order.

Under these circumstances, the "newly-discovered" evidence—the actual physical return of the file boxes of documents—does not constitute a material difference that should permit respondent to raise the issue of the improperly-removed documents at this stage in these proceedings.

Second, this case involves an appeal of a discharge under the civil service code, not a WFEA discrimination claim. The respondent can not take any disciplinary action against appellant without complying with the requirements of the civil service code and the due process clause. The appointing authority can not add additional reasons for discharge after the facts of the initial notice of termination, appellant's *Loudermill* hearing, and the hearings before the Commission. *See Alff v. DOR,* 78-0227-PC, 3/8/79; *Liethen v. WGC,* 93-0095-PC, 10/20/93. *See also State ex rel Tracy v. Henry,* 219 Wis. 53, 262 N. W. 222 (1935). In the latter case, there had been a judicial determination that certain employes had been illegally discharged under the civil service code because the notice of discharge either had not given any reason for the discharge, or a legally insufficient reason. After this judicial decision, the employer conducted an investigation and concluded there had been adequate, independent grounds for discharge at the time of the original, illegal discharges, and took steps to discharge the employes effec-

tive the date of the original discharges. The Court held that the employes were entitled to have been restored with all back pay going back to the point of their original discharges, and the subsequent attempt at retroactive discharges was illegal. This case is consistent with the proposition that respondent would have the right to proceed to discharge appellant on the basis of the purloined documents, but only after first having restored him with back pay from the date of the original termination to the date of restoration. For the Commission to now deny restoration and limit appellant's back pay to the time from the original discharge (February 11, 1996) to the date of the discovery of the missing documents (June 24, 1996) amounts effectively to an unlawful retroactive discharge of the nature involved in *Tracy*.

RULING ON MOTION FOR ATTORNEY'S FEES

In an interim ruling entered on June 23, 1998, the Commission denied appellant's application pursuant to §227.485, Stats., for fees and costs on the ground that respondent had been substantially justified with respect to its decision to suspend and then discharge appellant. On October 1, 1999, appellant filed another motion for costs. In his current motion for costs, appellant seeks costs with regard to all activity in this case performed since the Commission's June 23, 1998, ruling. He also seeks costs for all activity involved in the replevin action mentioned above.

The Commission will first address the question of fees in connection with the replevin action. Any basis for awarding fees in this matter must be found in §227.485, Stats.[2] That statute authorizes fees with regard only to either a "contested case" or a proceeding for judicial review under §227.52, Stats. The term "contested case" encompasses agency proceedings, §227.01(3), Stats. Clearly, the replevin action is neither an agency proceeding nor a §227.52 judicial review proceeding, and thus there is no basis for an award of fees as to the replevin action. While appellant argues that the

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[2] The Commission also has authority to award costs and fees in proceedings in certain kinds of discrimination or retaliation cases. However, the instant case involves an appeal pursuant to §230.44(1)(c), Stats., not a discrimination complaint.

replevin action was undertaken "in connection with the contested case [before the Commission]," the language of §227.485 is explicit and does not cover such ancillary proceedings which may have been undertaken in connection with this contested case before this Commission.[3] *See Duello v. UW-Madison,* 87-0044-PC-ER, 3/9/90; *McCready v. DHSS,* 85-0216-PC, 9/10/87.

In its June 23, 1998, interim ruling on fees and costs, the Commission outlined the standards applicable to an award of fees for proceedings before this agency:

> As the prevailing party, appellant argues that he is entitled to fees and costs pursuant to §§227.485, 814.245, Stats., and PC 5.05, Wis. Adm. Code. Section PC 5.05 (3), Wis. Adm. Code, provides that a motion for fees and costs raised under §227.485, Stats. shall be addressed under the standards and procedures of that statute. Sections 227.485 (3), (5) and (6), Stats., authorize the Commission to determine and award costs using the criteria in §814.245, Stats. Section 814.245 (3) provides:
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> > If an individual . . . is the prevailing party in an action by a state agency or in any proceeding for judicial review under §227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position.
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> The Commission must determine then whether respondent's position was "substantially justified." *Sheely v. DHSS*, 150 Wis. 2d 320, 442 N.W.2d 1 (1989). Under *Sheely*, to satisfy the "substantially justified" burden respondent must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. June 23, 1998, ruling, p. 2.

In his brief in support of his motion for costs incurred in this proceeding before the Commission since its June 23, 1998, interim decision denying appellant's first motion for costs, appellant focuses primarily on respondent's litigation of the replevin action. As has just been discussed, costs are not recoverable in this proceeding before this Commission for appellant's litigation expenses incurred in the replevin action. The

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[3] The Commission notes that §814.245, Stats., provides for recovery of costs in judicial proceedings in a manner analogous to §227.485.

only reference appellant makes to respondent's handling of the Commission proceeding itself since June 23, 1998, is the contention that respondent deviated from and had never sought to be relieved from "its stipulation to let [the Commission] decide the back-pay issue based on the briefs filed in the early fall of 1998." Appellant's brief in support of motion for costs, 2. However, the record on this point ultimately does not support appellant's contention.

The stipulation in question is memorialized in a letter from appellant's attorney dated July 28, 1998. The parties agreed on a schedule for appellant to respond to respondent's discovery requests, for appellant's deposition, for respondent to file a calculation of appellant's back pay, and for the parties to file submissions in connection with that calculation on dates in September. The stipulation further provides:

> Based on the submissions, the Commission shall make a finding as to the remedy. If in the interim there are discovery objections, such objections shall be telephoned to you [Commissioner Murphy] for immediate ruling. If there is no objection to UWM's calculation, then the Commission shall adopt that as the remedy in this matter. If there are objections or further submissions, the Commission shall make finding [sic] on the submissions of the parties. Letter dated July 28, 1999, from appellant's counsel to Commissioner Murphy, p. 1.

This stipulation did not rule out further submissions after the September submissions; rather, it provided that if there were further objections or submissions, they would be resolved on the basis of those submissions. The parties submitted their arguments and materials in September. However, a dispute was engendered as respondent subpoenaed appellant's bank records in connection with the question of mitigation. During discovery, appellant had produced a checkbook which showed one deposit of $2000 during the period in question. However, the subpoenaed bank records reflect over $80,000 in deposits during this period. Appellant objected to this on a number of grounds, including improper rebuttal. The parties then filed further briefs and arguments. Two status conferences were held and on January 11, 1999, the parties reached a stipulation reflected in a January 15, 1999, letter from Commissioner Murphy to the parties:

> After further discussion about the issue of remedy and the necessity of a hearing, the parties agreed to the following:
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> 1) Respondent will provide the Commission and appellant a revised spreadsheet of Brenon's estimated back pay from February 11, 1996 through March 1999.
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> 2) Respondent will file a brief in response to appellant's assertions regarding mitigation of damages and the exclusion of earned wages after his termination by respondent, by February 1, 1999.
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> 3) Respondent will file a copy of the August 28, 1998, deposition of appellant with the Commission.
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> 4) Appellant will file an affidavit as to all earnings in 1998 with appropriate documentation—check stubs—exclusive of the $22,400 reported in his deposition. Also, appellant agreed to provide copies of all tax withholding statements, as they become available to him. Finally, it is anticipated that appellant will supplement this information with documentation of any earnings in 1999 through March 1999. Letter to parties from Commissioner Murphy dated January 15, 1999.

On January 19, 1999, respondent filed a copy of appellant's August 28, 1998, deposition and requested a hearing, arguing that a hearing was necessary to resolve material issues of fact regarding appellant's other income. Respondent contended that appellant had not complied with discovery requirements and that there were major discrepancies between appellant's disclosures in deposition testimony and in document submissions, and the bank records respondent had subpoenaed.

On January 26, 1999, appellant filed a response to this submission, contending, *inter alia,* that respondent had misrepresented the state of discovery, and objecting to a further hearing. After this, further documents and motions were filed and eventually a conference was held on April 28, 1999, at which Commissioner Murphy scheduled a hearing on remedy for May 18, 1999. At that conference, the parties agreed to withdraw all motions and to resolve the outstanding issues at the hearing on remedy.

In the Commission's opinion, respondent had a reasonable basis for its posture in this proceeding. To begin with, as mentioned above, the stipulation reflected in the July 28, 1998, letter from appellant's attorney did not rule out further submissions; it anticipated that possibility. The Commission ultimately agreed with respondent's re-

quest to schedule a hearing after numerous additional submissions raising a number of issues. A party can be relieved from a stipulation on the basis of changed conditions or unforeseen developments. *See 73 Am Jur 2d STIPULATIONS,* §§13-14; *Burmeister v. Vondrachek,* 86 Wis. 2d 650, 664, 273 N. W. 2d 242 (1979). In the instant case, respondent first received appellant's bank records on September 21, 1998.[4] There appear to be discrepancies between the record of deposits thus revealed and what information appellant had provided in discovery up to that point. These discrepancies are relevant to the back pay issue because they relate to respondent's contention that appellant must have hidden sources of income that properly should be considered in the mitigation calculation. Respondent ultimately did not sustain its burden on the issue of mitigation. However, losing a case does not mean that a party was not substantially justified in its position. *See, e. g., Stern v. DHFS,* 212 Wis. 2d 393, 397, 569 N. W. 2d 79 (Ct. App. 1997). Given the apparent discrepancies in appellant's financial records in the amount of about $78,000, respondent had a reasonable basis for proceeding as it did.

AMENDMENT OF SEPTEMBER 1, 1999, DECISION

While neither party raised this point, there is a typographical error in this decision which the Commission herewith corrects. The first page of this decision quotes the stipulated statement of the issues for hearing. This statement of issues is reiterated on page ten. However, the latter entry misstates the second issue. Instead of "What is the sum of respondent's mitigating damages and setoffs," it states "What is the sum of respondent's back pay and other credits?" The Commission will make this correction, insert a revised page in the decision, and send copies to the parties.

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[4] On September 25, 1998, respondent filed, among other things, a request for a hearing before the entire Commission. This was equivalent to a request to be relieved from its stipulation to submit the remedy issue on the basis of written submissions.

FINAL ORDER

1. Respondent's action of discharging appellant is rejected and this matter is remanded to respondent for action in accordance with this decision. Respondent is required to immediately offer appellant reinstatement to his former position or its equivalent with back pay and benefits from the date of his discharge to the date of his restoration, as set forth in this decision, except that the amount of back pay and benefits actually due appellant pursuant to this decision must be recalculated so that it is current as of the date of payment and reflects the appropriate amount of interest.

2. Appellant's motion for costs filed October 1, 1999, is denied.

3. Respondent's motion filed October 22, 1999, to reconsider interim decisions is denied.

4. The Commission's September 1, 1999, decision is amended as set forth above.

Dated: November 19, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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Parties:

Dale Brenon
8250 North 46th Street Apt. 122
Brown Deer, WI 53223

Katharine Lyall, President
UW-System
1720 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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. 2/3/95