STATE OF WISCONSIN PERSONNEL COMMISSION

DENNIS J. SHESKEY,
Complainant,

v.

Chairperson, PERSONNEL COMMISSION,
Respondent.

RULING ON JURISDICTION AND RULING ON DISQUALIFICATION MOTION

Case No. 99-0085-PC-ER

This case is before the Commission to consider complainant's disqualification motion and a jurisdictional issue. The facts recited below include a summary of all cases filed by complainant with the Commission as background information. The facts recited appear to be undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. *Sheskey v. DER*, 98-0045-PC, is a pending appeal filed by complainant as a "4th step grievance." In August 1995, respondent agreed to complainant's request to be laid off. The alleged harm here was that complainant "was not recalled when Ms. Zimmerman transferred into my position on 7/6/97." The Commission stayed this case pending the outcome of the circuit court decision described in the next paragraph. The Commission's decision to place this case on hold pending the outcome of the circuit court litigation is one of the alleged discriminatory acts against the Commission in *Sheskey v. PC*, 99-0085-PC-ER. The stay has been lifted as of this writing due to issuance of the court decision

2. *Sheskey v. DER*, 98-0054-PC-ER, involved allegations that DER violated the Family and Medical Leave Act (FMLA) in regard to the allegations noted below.

a. 1995 performance reviews;
b. In 1994, DER held complainant to 5 FMLA days and required him to use other leave for an additional 5 days;
c. In August 1995, respondent agreed to complainant's request to be laid off;

d. June 1997, denial of recall rights when Elaine Zimmerman transferred into complainant's position.
e. July 1997, denial of recall rights when a MIT2 and an IS professional entry positions were filled.

The complaint as initially filed included alleged violations under the FMLA and under the whistleblower law. The Commission, for administrative convenience, assigned the FMLA claims as case number 98-0054-PC-ER and the whistleblower claims as 98-0063-PC-ER. The Commission's decision to create a separate file for the FMLA allegations and for the whistleblower allegations is one of the alleged discriminatory acts against the Commission in *Sheskey v. PC*, 99-0085-PC-ER. On June 3, 1998, the Commission dismissed this complaint as untimely filed in *Sheskey v. DER*, 98-0054-PC-ER, 6/3/98, rehrg. denied 7/22/98. The Commissions' decision was affirmed by the Dane County Circuit Court (in a decision by Judge Higginbotham) in *Sheskey v. Wis. Pers. Comm.*, 98-CV-2196, 4/27/99. The Commission's dismissal of this case is one of the alleged discriminatory acts against the Commission in *Sheskey v. PC*, 99-0085-PC-ER.

3. *Sheskey v. DER*, 98-0063-PC-ER, started out as the whistleblower half of the case described in the prior paragraph. The alleged adverse actions are shown below.

a. July 1995 performance evaluation
b. July 1995 alleged hostile work environment, which form the (alleged) reason for complainant volunteering for layoff. The claim of hostile work environment includes the following allegations:
   - Within 6 days of volunteering for a layoff, respondent had complainant escorted off the work premises which effectively denied him access to the workplace and co-workers;
   - Complainant believes he was treated differently than others such as Dennis Carol (laid off on 7/14/95) and Kathryn Moore (laid off on 2/16/96) because those individuals were not escorted off the work premises and, accordingly, had access to the workplace to research job information. Mr. Carol and Ms. Moore also were offered a lay-off plan six months in advance of their respective layoff dates while complaiannt was not and this difference, complainant alleges, denied him an opportunity to provide information and documentation as to his qualifications for other positions "as specified in MRS-163 (6/5/95)."

- Complainant believes he was denied "mandatory recall rights" to the following positions:
  - 6/9/97, Peggy Gulan-Parker was hired as an original appointment in an Information Specialist Professional-Entry-Confidential position.
  - 6/30/97. Ellen Lybert was hired as an intra-agency transfer to a Management Information (MI) Technician 2-Confidential position.
  - 10/9/95, Elaine Zimmerman was hired as a transfer to complainant's position held prior to the layoffs.
  - 10/13/95, Bill Lorenz was hired for a MI Technician 4 position.

Respondent moved for dismissal of all whistleblower claims on the alternative grounds that there was no protected disclosure or the claims were untimely filed. Complainant then amended this complaint to add disability as an alleged basis of discrimination in regard to complainant's "recall rights" to the hiring transactions noted above. Respondent also moved for dismissal of the disability claim on the grounds that the person who made the Zimmerman and Lorenz hiring decisions was unaware of complainant's disability. Respondent also claimed an "absolute defense" to the disability claim due to complainant's receipt of money for total disability. The Commission dismissed the whistleblower claims but not the disability claims, *Sheskey v. DER*, 98-0063, 8/26/98. Currently, the disability claim is pending investigation by a Commission Equal Rights Officer. Some of the alleged discriminatory acts against the Commission in *Sheskey v. PC*, 99-0085-PC-ER, are that the Commission dismissed the whistleblower claims on the grounds that no protected disclosure appeared and without a discussion of the timeliness issue raised.

4. *Sheskey v. DETF & DER*, 98-0106-PC-ER, was filed by complainant on May 28, 1998. This complaint (including amendments filed) asked the Commission to investigate why complainant's DETF case worker was changed and whether discrimination occurred by DER and/or DETF when DETF found (on May 15, 1998) that he was ineligible for disability benefits related to the application he filed on June 19, 1997. The alleged bases of discrimination included disability and FEA retaliation. Respondents filed several motions including a motion for dismissal contending that the Commission lacked subject matter jurisdiction. The pending motions were on the Commission's May 5, 1999 agenda for

resolution on May 12, 1999, but were deferred due to receipt on May 10, 1999, of complainant's disqualification motion. One of the alleged discriminatory acts against the Commission in *Sheskey v. PC*, 99-0085-PC-ER, involves complainant's perception that the Commission is delaying resolution of this case due to the Commission's need to consider all pending motions.

5. *Sheskey v. DER*, 98-0225-PC-ER, was filed on December 21, 1998, and alleged sex discrimination in regard to the following allegations:

- Complainant's layoff effective 8/19/95,
- Elaine Zimmerman transferring to complainant's former position on or about 10/9/95,
- Failure to recall complainant for appointment to an IS Professional Entry position filled by Ms. Gulan-Parker on or around 6/23/97,
- Failure to recall complainant for appointment to a MIT 2 position filled by Ms. Lybert on or around 7/6/97, and
- The second transfer of Elaine Zimmerman to complainant's former position, then classified at the IS Professional Intermediate level, on or around 6/7/97.

The Commission dismissed all claims as untimely filed in *Sheskey v. DER*, 98-0225-PC-ER, 5/5/99. One of the alleged discriminatory acts alleged against the Commission in *Sheskey v. PC*, 99-0085-PC-ER, is the Commission's decision to dismiss this case.

6. *Sheskey v. PC*, 99-0075-PC-ER was filed on April 5, 1999, alleging as shown below:

> I allege that the Personnel Commission dismissal, based on untimely filing of 98-0054-PC-ER (6/3/98) was not based on the facts of the case and ignored established precedent. I further allege the Commission knew its decision was undefendable (sic) but dismissed the complaint. While I tried to wait for a decision to my appeal, I am confident it will be upheld. I alleged that the Commission was retaliating against me because of the number of complaints and the number of different allegations, including claims of FEA discrimination. I also alleged that 98-0045-PC was wrongly postponed until after a decision of my appeal. I allege that the Commission knew their decision in 98-0054-PC-ER would be overturn (sic) and therefore should not have postponed 98-0045-PC waiting for a decision that was known in advance.

The Commission dismissed this case for lack of jurisdiction in *Sheskey v. PC*, 99-0075-PC-ER, 5/19/99.

7. *Sheskey v. DER & DETF*, 99-0076-PC-ER was filed on April 20, 1999, alleging that DER and DETF discriminated against complainant on the bases of disability, FEA Retaliation and harassment in regard to the following actions:

- DETF's denial of ICI (disability) benefits after 10/28/96, and all associated actions including (but not limited to) collection of an alleged overpayment.
- DETF's and DER's opposition to Wis. Retirement Bd. Appeal #98-129-WR and #98-137-WR, and their conspiracy to deny complainant a "DRA."
- Many additional allegations of wrongdoing by DETF.

This case currently is pending investigation by a Commission Equal Rights Officer.

8. *Sheskey v. PC*, 99-0085-PC-ER, was filed on May 10, 1999 and alleged that the Commission discriminated against complainant on the bases of disability and FEA Retaliation. In this complainant, complainant alleged discrimination in regard to the Commission's processing of his cases and the decisions/rulings made to date. He also made the following allegations:

- I further allege the Commission, thru (sic) secret and unofficial communication with DER and ETF, knew my allegations were true before rendering any decisions. I also allege that the Commission, ETF and DER are cooperating (sic) their efforts to discriminate against me. Because of this knowledge, the Commission knowingly and willingly discriminated against me. I also allege that the Commission has engaged in secret unofficial communication concerning my complaints with the EEOC, and Judge Higginbotham to further their discriminatory conduct.
- Sometime between when I file (sic) complaint 99-0075-PC-ER (4/5/99) against the Commission and 4/8/98, I allege the Commission persuade (sic) Judge Higginbotham to delay his ruling in case 98CV2196 which was due to be rendered on 4/5/99 . . . Judge Higginbotham, who had requested an additional 90 days, upheld the Commission decision on 4/27/99. As the Commission decision contradicts its own precedents and that is one reason for a reversal of a Commission decision, I allege the Commission persuaded Judge Higginbotham to upheld (sic) their decision . . . The Commission (sic) obvious motive is to use Judge Higginbotham's ruling to defend against 99-0075-PC-ER as there is no doubt that the Commission has jurisdiction for 99-0075-PC-ER.

On May 12, 1999, the Commission sent complainant a letter noting that an issue existed as to whether the Commission had jurisdiction to consider the claims raised in this complaint. Complainant was asked whether he wished to rely on arguments already filed in *Sheskey v. PC*, 99-0075-PC-ER, or whether he wished to file additional arguments. He filed additional arguments by letter dated May 21, 1999.

9. Complainant, by letter dated May 10, 1999, raised a "Disqualification motion PC 5.01(4)," stating as shown below:

> As I filed a discrimination complaint against the Personnel Commission concerning their decisions, I request that the Personnel Commission be disqualified from any proceedings concerning my complaint.

CONCLUSIONS OF LAW

1. It is complainant's burden to establish sufficient facts to support a disqualification request under §PC 5.01(3) and (4), Wis. Adm. Code.

2. He has failed to meet his burden under #1 above.

3. It is complainant's burden to establish that the Commission has jurisdiction over the allegations raised.

4. He has failed to meet his burden under #3 above.

OPINION

I. Disqualification Motion

Complainant filed a disqualification motion under §PC 5.01(4), Wis. Adm. Code. The code provisions pertinent to this motion are noted below:

> **PC 5.01** HEARING EXAMINERS. . . .
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> **PC 5.01 (3):** DISQUALIFICATION. If a presiding authority is unqualified to preside for reasons of conflict of interest or personal bias, the presiding authority shall withdraw and notify the commission and the parties of the disqualification.
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> **PC 5.01 (4):** MOTIONS FOR SUBSTITUTION OR DISQUALIFICATION OF PERSONS CONDUCTING HEARINGS. If any party deems the presiding authority to be unqualified for reasons of conflict of interest or bias, the party may move in a

> timely manner for substitution of a different examiner or disqualification of the commissioner. The motion shall be accompanied by a written statement setting forth the basis for the motion. If a hearing examiner does not grant a motion for substitution, it shall be referred to the commission, which shall determine the sufficiency of the ground alleged.

The basis for complainant's request is that he has filed two cases (99-0075-PC-ER and 99-0085-PC-ER) against the Personnel Commission. The more recent case alleges discrimination in the Commission's processing of his cases and decisions issued in his cases.

The legal principles regarding the jurisdictional issue posed here (as discussed later in this ruling) are clear-cut and of long standing. Complainant's arguments on the jurisdictional issue could be viewed as a sham or as frivolous if filed by an attorney on complainant's behalf.[1] The complainant is not represented by counsel which may explain why the complaint was filed in the first instance, but does not change the fact that the suit is without merit. All Commissioners feel they are able to preside over complainant's cases in a neutral manner. There is no room for bias to enter the legal analysis under these circumstances. Furthermore, complainant's right to a decision based on correct legal principles and not on bias is protected due to the fact that he may request review of the Commission's decision to the court system. Accordingly, complainant's disqualification motion is denied.

II. Jurisdiction

Complainant contends the Commission has jurisdiction over the present case. His supporting argument was contained in his letter dated April 19, 1999, and is shown below in relevant part.

> My complaint is directly and solely against the Commission and involves personnel transactions. Even if the Personnel Commission feels it lacks jurisdiction for my complaint, the Commission should still render a decision . . . I will explain why the Commission does have authority to hear this complaint.

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[1] The Commission as an administrative body is not held to the same standard as exists for disqualification of a judge under 757.19, Stats It is instructive to note, however, that under §757.19(2)(b), Stats., a judge who is a party to a case need not disqualify himself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

> The Commission is already considering 98-0106-PC-ER which includes ETF and there is no direct employment relationship between ETF and myself. Furthermore, I have found nothing in the state statutes or the administrative code which limits discrimination charges to only an employee's employing agency. WI stats. (sic) 111.32(6)(a) clearly indicates a state employee's employer is the state and each agency of the state;
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> > "'Employer' means the state and each agency of the state and, except as provided for in par. (B), any other person engaging in any activity, enterprise or business employing at least one individual."
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> Clearly the legislative intent was to provide state employees redress for discrimination against any state agency regardless of their employing agency. If the legislature wanted to limit complaints to an employee's employing agency they would have done so. Clearly the legislature recognized the need to include complaints like 98-0106-PC-ER where ETF is alleged to be discriminating in the terms and conditions of employment by their selective and unequal administration of employee benefits. The complaint against the Commission is no different; The (sic) Commission is discriminating in the terms and conditions of employment by making personnel decisions which completely contradicts established court precedent.

The Commission is an "agency of the state" within the meaning of s. 111.32(6)(a), Stats. However, the inquiry does not end there. Additional statutory provisions must be considered as noted below in relevant part (emphasis added).

> **Section 111.321, Stats.**: PROHIBITED BASES OF DISCRIMINATION. Subject to ss. 111.33 to 111.36, no employer . . . or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed . . .
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> **Section 111.322, Stats.**: DISCRIMINATORY ACTIONS PROHIBITED. Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
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> (1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms conditions or privileges or employment or labor organization membership because of any basis enumerated in s. 111.321.
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> * * *
>
> (3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter

> or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

Thus, §111.321 prohibits "any act of employment discrimination as specified in §111.322," and §111.322 states "it is an act of employment discrimination" to take any of the enumerated adverse employment actions on a prohibited basis. The prohibition on retaliation, §111.322(3), uses the language "[t]o discharge or otherwise discriminate against any individual because he or she . . . has made a complaint." (Emphasis added.) The FEA at §111.322(1) enumerates "act[s] of employment discrimination" as, *inter alia*:

> To refuse to hire, employ . . to bar or terminate from employment . . . any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment.

The Commission has not refused to hire or employ complainant. The complainant has never been a Commission employe and, accordingly, the Commission *as an employer* has never barred complainant from employment; nor has the Commission *as an employer* made decisions regarding complainant's entitlement to promotions or to compensation. The complainant's sole contact with the Commission has been in its role as an impartial decision-maker in the context of litigation filed by complainant with the Commission.

The remaining question is whether the Commission's role in complainant's cases constitutes an adverse term, condition or privilege of employment, within the meaning of s. 111.322(1), Stats. The Commission answers this question in the negative for reasons discussed in the following paragraphs.

The Commission consistently has held that litigation is not a term, condition or privilege of employment protected under the FEA.[2] In *Larsen v. DOC*, 91-0063-PC-ER, 7/11/91, Ms. Larsen was employed by the Department of Corrections (DOC). The DOC moved to dismiss Ms. Larsen's requested amendment to add an allegation that DOC violated the FEA by asking her irrelevant personal questions at a deposition. The Commission granted DOC's motion stating as shown below (emphasis added):

> In the Commission's opinion, once the employer and employe become opposing litigants in a statutorily-provided proceeding before a third party agency, this context basically is not that of an employment relationship, and the employer's actions as a litigant in that litigation normally would not implicate any "terms, conditions, or privileges of employment." The proceeding may arise out of the employment, but the relationship between the parties in the conduct of the litigation is not that of employer and employe.

The present case is further removed from any employment relationship than the situation presented in *Larsen*. Specifically, the *Larsen* case involved the agency of the state that employed Ms. Larsen. In the present case, complainant has never been employed by the Commission and his only interaction with the Commission has been in the Commission's role as the adjudicative body for litigation which he filed with the Commission. Accordingly, there is no viable rationale for deviating from the Commission's prior ruling in *Larsen*.

Also see *Poole v. DILHR*, 83-0064-PC-ER, 12/6/85, where the complainant alleged discrimination against the Commission based on his perception that the Commission delayed investigation of his discrimination complaint. The Commission stated in *Poole*, as shown below in relevant part:

> The Commission's relationship to the complainant was clearly not an employment relationship. Complainant's contentions therefore are beyond the Commission's authority to consider.

The Commission also wishes to address complainant's argument, which is repeated below:

> Clearly the legislative intent was to provide state employees redress for discrimination against any state agency regardless of their employing agency. If the legislature wanted to limit complaints to an employee's employing agency they would have done so. Clearly the legislature recognized the need to include complainants like 98-0106-PC-ER where ETF is alleged to be discriminating in the terms and conditions of employment by their selective and unequal administration of employee benefits. The complaint against the Commission is

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[2] *In accord, Balele v. DOA, DHFS & DOJ*, 96-0156-PC-ER, 6/4/97; *Marfilius v. UW-Madison*, 96-0047-PC-ER, 5/14/96 and *Huff v. UW-System*, 96-0013-PC-ER, 5/2/96.

> no different; The (sic) Commission is discriminating in the terms and conditions of employment by making personnel decisions which completely contradicts established court precedent.

Along with this discussion is a consideration of the additional arguments filed by complainant on May 21, 1999, as shown below in relevant part:

> The Commission has decided many complaints against state agencies which do not have direct employment relationship (sic) with the complainant. The vast majority of these complaints involved DER as a party even though there is no direct employment relationship between DER and the complainant. Some recent examples are; *Murphy v. DHSS & DER*, 98-0013-PC; *Oriedo v. DPI, DER & DMRS*, 98-0042-PC-ER and *Olmanson v. UWGB & DHFS*, 98-0057-PC-ER.
>
> From *Phillips v. DHSS & DETF*, 87-0128-PC-ER; "The various agencies of the state are but arms of the state, and when an agency exercises its authority in a way that affects the conditions of employment of a state employe, that agency is acting as the employing agency of that employe, and its action is cognizable under the FEA.

The Commission's role in the present case is materially different from the role played by the Department of Employee Trust Funds (DETF) in *Sheskey v. DETF and DER*, 98-0106-PC-ER. DETF is an administrative agency, which determines entitlement to disability benefits for all state employees. The entitlement to disability benefits could be considered as a term or condition of employment akin to compensation and, in this regard, DETF may be acting as complainant's employer in reaching an employment-related decision.[3]

A similar distinction exists in a case cited by complainant in his letter of May 21st. In *Murphy v. DHFS & DER*, 98-0013-PC, the employe worked for the Department of Health and Family Services (DHFS). The Department of Employment Relations (DER) also was a party because the case involved an appeal of a decision to deny Ms. Murphy's request to have her position reclassified. DER is the state agency responsible for all classification decisions for all classified positions regardless of the state agency where the position is held and has the statutory authority to delegate this responsibility (i.e., to DHFS in *Murphy*). (See

[3] The issue of whether DETF is a proper party in *Sheskey v. DETF and DER*, 98-0106-PC-ER, is pending resolution.

§230.44(1)(b), Stats.). The decision whether to upgrade the classification of a position is akin to compensation and, in this regard, DER was acting as Ms. Murphy's employer in reaching an employment-related decision.

Another case cited in complainant's May 21st letter is *Oriedo v. DPI, DER and DMRS*, 98-0042-PC-ER. Mr. Oriedo applied for a position at the Department of Public Instruction (DPI). DPI did not hire him and he filed a discrimination complaint in which he named DPI, DER and the Division of Merit Recruitment and Selection (DMRS) as respondents. The Commission opened the file with all named respondents but a question existed as to whether DER and DMRS were proper parties. At a conference held on February 9, 1999, Mr. Oriedo agreed to release DER and DMRS as parties.

In *Olmanson v. UW-Green Bay & DHFS*, 98-0057-PC-ER, the Commission opened the file with all respondents identified by Ms. Olmanson. The case involved a decision by the UW to hire someone other than Ms. Olmanson for a vacant position. Ms. Olmanson had previously worked for DHFS and alleged that negative comments made by DHFS managers were a reason why the UW did not hire her. The case is pending investigation. The Commission has not been asked to resolve whether DHFS is a proper party.

ORDER

Complainant's disqualification motion is denied and this case is dismissed for lack of jurisdiction.

Dated: May 24, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner

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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