STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL E. LOGAN, and
LORRAINE SAMSEL,
Complainants,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MILWAUKEE,
Respondent.

Case Nos. 99-0124, 0125-PC-ER

RULING
ON
MOTION FOR
RECONSIDERATION

The Commission issued separate rulings in these two matters dated January 19, 2000. Both rulings addressed discovery disputes between the parties and both held that a complainant in an equal rights proceeding before the Personnel Commission may invoke §PC 4.03, Wis. Adm. Code, to conduct discovery during the investigative stage. On February 11, 2000, respondent filed a motion for reconsideration, asking the Commission to reverse its January 19th rulings.

I. Motion for reconsideration

Respondent contends that the case on which the Commission's rulings were based, *Germain v. DHSS*, 91-0083-PC-ER, 5/14/92, "was dismissed and can not be used as precedent." According to respondent:

> The Personnel Commission never addressed the fact that *Germain* (91-0083-PC-ER) was dismissed, moreover, this means it is *not* precedent. *Germain* does not include a decided case or complete record. It is analogous to the filing of a complaint in circuit court followed by discovery, a successful motion for summary judgment by defendant, the filing of an appeal, and a dismissal of the appeal for lack of prosecution. This is not precedent. Such a case would not be published and could not be relied on as precedent under §809.23(3) (unpublished opinions have no precedential value).

Black's Law Dictionary, 7th Edition, includes the following discussion of the term "precedent."

> "In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts." William M. Lile et al., *Brief Making and the Use of Law Books* 288 (3d ed. 1914).

The role of precedent in the administrative law setting is discussed in *Union State Bank v. Galecki*, 142 Wis.2d 118, 417 N.W.2d 60 (Ct.App. 1987). In that case, the Union State Bank sought to overturn a 1985 decision by the Wisconsin Banking Review Board to grant an application by M&I bank to open a new branch bank. Union argued that the Board's order represented a change in its "established policy," because it had denied another application by M&I to open a branch in the same location 5 years earlier. However, in the interim, the Board had revised its administrative rules that established the criteria for opening a branch. The Court of Appeals held:

> [W]hile the board, in 1980, applied economic criteria in denying M&I's application for a branch bank, that was no more than a ruling in a single case. The agency was not speaking to all applicants, present and future; nor was it adopting a policy or an interpretation of a statute to be used as a guide for future branch bank proceedings. *Frankenthal v. Wisconsin R.E. Brokers' Board*, 3 Wis.2d 249, 88 N.W.2d 352, reh'g denied, 89 N.W.2d 825 (1958) and similar cases do pay deference to an agency's interpretation of an ambiguous statute if that interpretation has been followed by the agency "over a long period" of time - in *Frankenthal*, for nearly twenty-seven years, 3 Wis.2d at 255, 88 N.W.2d at 356. However, we do not have that situation or anything like it here. The 1980 ruling was nothing more than a one-time decision in an individual agency proceeding, and the cases tell us that not only may an agency reopen and reconsider its orders on a particular problem, *Fond du Lac v. Dept. of Natural Resources,* 45 Wis.2d 620, 625-26, 173 N.W.2d 605, 608 (1970), but it may also adopt or entertain a different view of the law in subsequent cases. *Duel v. State Farm Mut. Automobile Ins. Co.*, 240 Wis. 161, 181, 1 N.W.2d 887, 895-96 (1942). We also agree with M&I that administrative decisions on license applications are particularly lacking in precedential value, for each application is a "new and separate proceeding." *State ex rel. Schleck v. Zoning Board of Appeals*, 254 Wis. 42, 45, 35 N.W.2d 312, 313 (1948). 142 Wis.2d 118, 124

The Personnel Commission agrees that precedent does not bind it to blindly follow a previously determined case when deciding a later case involving similar facts or issues.[1] However, the value of the Commission's rulings and decisions is substantially enhanced when the Commission acts consistently, and consistency can only be obtained by comparison to other decisions. Often, factual distinctions between one case and another will limit the value of the comparison. But in other cases, the salient facts may be identical. Agencies and employes alike may make personnel decisions on the basis of previous Commission decisions, with the very reasonable expectation that the Personnel Commission, if called upon to review the transaction, will analyze it in a certain way.

The salient facts in *Germain* are identical to those in the present case. In *Germain*, a party sought to carry out discovery during the investigative phase of an equal rights case. The party receiving the request argued that discovery was not available during the discovery phase. The Commission rejected that argument. The Commission remains persuaded by its reasoning in *Germain*.

In the present case, the respondent contends that it is inappropriate for the Commission to even refer to the discovery ruling in *Germain v. DHSS*, 91-00-83-PC-ER, 5/14/92, because the case was subsequently dismissed for lack of prosecution. Respondent cites *State v. Reitter*, 227 Wis. 2d 213, 595 N.W.2d 646 (1999), for the proposition that the 1992 ruling was somehow invalidated by the 1997 order to dismiss the case. In *Reitter*, the Wisconsin Supreme Court noted:

> Reitter relies on a South Dakota federal district court case . . . to urge expansion of the rule by requiring officers to alert defendants that the right to counsel does not exist. In *Heles v. State of South Dakota*, 530 F. Supp. 646 (D.S.D. 1982), the court found the right to counsel attaches prior to the administration of a chemical test. See id. at 654. . . .

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[1] As noted by Kenneth Culp Davis in his *Administrative Law Treatise*, 2nd Edition, §20.12:

> The main judicial response to agency inconsistency in adjudication is a requirement that an agency which departs from a precedent must acknowledge and explain the departure.

> Reitter's reliance on *Heles* is misplaced. The Eighth Circuit vacated the case as moot upon the death of the appellant, 682 F.2d 201 (8th Cir. 1982); therefore, the decision "is not precedent even in the federal court in which it was decided." *Department of Pub. Safety v. Gates*, 350 N.W.2d 59, 61 (S.D. 1984). The South Dakota Supreme Court later declined to follow the Heles rationale and instead held that the right to counsel does not apply prior to the administration of a blood-alcohol test. 227 Wis. 2d 213, 226-27 (Footnotes omitted.)

The key condition present in the cited case of *Heles* that is not present in *Germain*, is that the Eighth Circuit *vacated* that case on the death of the appellant.[2] *Black's Legal Dictionary*, 7th edition, defines "vacate" as follows: "To nullify or cancel; make void; invalidate <the court vacated the judgment>. Cf. OVERRULE." The Commission's 1992 ruling in *Germain* was never vacated. In fact, it served as part of the foundation for the Commission's 1997 order of dismissal.[3] No appeal was taken from that order. Neither the Commission nor any reviewing court has ever vacated the Commission's May 14, 1992, discovery ruling in *Germain*.

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[2] The Wisconsin Supreme Court took a different approach in *Hall Chevrolet Co., Inc. v. Dept. of Revenue*, 81 Wis.2d 477, 490, 260 N.W.2d 706 (1977):

> We should point out that Alex P. Jordan v. Wisconsin Department of Taxation is perhaps of questionable precedential value when viewed from the aspect of stare decisis. Although that case was decided in 1948 and appears in the volume of Tax Appeals Reports published in 1962 by the Commerce Clearing House, a review of the file now deposited in the archives of the State Historical Society shows that, for inexplicable reasons, the parties on May 18, 1951, entered into a stipulation to reverse the order of the Wisconsin Board of Tax Appeals. A judgment of reversal was entered by the circuit court on that same date, and on June 26, 1951, the Wisconsin Board of Tax Appeals reversed the order embodied in the opinion cited at 4 WBTA 11. We conclude, however, that the language embodied in that opinion is nonetheless persuasive, and we rely upon it for that reason. 81 Wis.2d 477, 490, footnote 2.

[3] Case No. 91-0083-PC-ER was dismissed by order dated April 11, 1997. The order was premised, in part, on the fact that the Commission had issued a ruling in July of 1993 on respondent's request for discovery sanctions. The 1993 ruling barred complainant from offering any evidence at hearing that pertained to matters inquired into by respondent's discovery request. The Commission's April 11, 1997, dismissal order was based on three conclusions: 1) four of the complainant's 5 allegations were untimely filed; 2) complainant had been precluded from presenting any evidence as to the 5th allegation; and 3) complainant had failed to prosecute his case over the previous several years.

Respondent suggests that the Commission's decision in *Friedman v. UW*, 84-0033-PC-ER, 8/1/84, is distinguishable because the discovery sought in that case, also during the investigative phase, related to the question of timeliness and not to the allegations of discrimination. Complainant has failed to identify any basis for drawing such a distinction. Discovery is still discovery, whether it relates to when the cause of action may have accrued or the reason certain actions were taken.

Respondent also contends that no discovery may be had in these matters because they are not "contested cases" pursuant to the APA:

> Section 227.45(7) provides there may be discovery by parties in a contested case. The Administrative Procedure Act provides that a controversy becomes a contested case *only after* a hearing is requested or noticed. §§227.01(3), 227.42, 227.44, and 227.45(7), Wis. Stats.; *Daly v. Natural Resources Board*, 60 Wis. 2d 208, 208 N. W. 2d 839, 844(1973) . . . *Hearings are not requested or noticed during the investigative stage so party discovery is not available.* Respondent's brief in support of reconsideration, p. 4.

There is no support for respondent's contention that a controversy becomes a contested case only after a hearing is noticed or requested. Section 227.01(3), Stats., defines a "contested case" as "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party, and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order." There is nothing in this provision which requires, either explicitly or implicitly, that a hearing must be requested or noticed in order to have a contested case. This provision focuses on whether a hearing is *required* by law. Respondent argues in this regard:

> In *Daly*, the statute *required* a hearing—"upon receipt of an application for a permit the department shall fix a time . . . for a public hearing thereon." *Daly* at 214, 842. In contrast, the Personnel Commission only holds hearings under certain circumstances. For example, a losing party in the initial determination phase must first make a timely request to obtain a hearing and often does not request one. It is presumptuous to assume there may be a hearing in this case. Since a hearing has not been noticed or requested, party discovery is inappropriate. *Id.*

Respondent's position is essentially that a hearing should not be considered to be *required* if it is possible that there might be a set of circumstances where a hearing is not held through waiver or default. However, this is true of almost any administrative proceeding. This is exemplified by § 227.44(5), Stats., which provides:

> Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. In any proceeding in which a hearing is required by law, if there is no such hearing, the agency or hearing examiner shall record in writing the reason why no such hearing was held . . . .

A person who files a WFEA complaint with the Commission does have a right to a hearing if probable cause is found and conciliation is unsuccessful, or if he or she appeals a determination of no probable cause. *See* §§111.39(4)(b), 111.375(2), Stats.; §PC 2.07(3) Wis. Adm. Code. Furthermore, a complainant has a right to waive an investigation and probable cause determination, in which case "the commission shall proceed with a hearing on the complaint." §230.45(1m), Stats.

Finally, the Commission refers the parties to the Commission's ruling in *La Rose v. UW-Milwaukee*, 94-0125-PC-ER, 3/22/96, which was before the Commission on the respondent's (UW-Milwaukee's) motion to compel discovery *during the investigative stage* of that proceeding. In its March 22, 1996, ruling, the Commission effectively granted the respondent's motion requiring the complainant to resubmit various interrogatory responses with a notary verification upon oath or affirmation, §706.07(1)(a), Stats., rather than with merely an acknowledgement by a notary, §706.07(1)(e), Stats. The Commission offered the following observation relating to UW-Milwaukee's right to obtain discovery from the complainant during the investigative phase of the proceeding:

> The administrative rules of the Commission provide authority for the UW to seek discovery in Mr. La Rose's case.

For the reasons set forth above, the Commission denies respondent's motion for reconsideration of the January 19th rulings in the above matters.

II. Complainant Samsel's request to impose sanctions

In his February 21st arguments on respondent's motion for reconsideration, Mr. Samsel asks the Commission to enforce compliance with the January 20th order and/or impose various sanctions, including a finding of discrimination, a finding of probable cause, drawing negative inferences or awarding of fees and costs.

By letters dated January 20, 2000, the parties were notified by a member of the Commission's staff that respondent had until February 11, 2000, to respond to the complainants' discovery requests. Just four days later, the respondent notified the Commission and the complainants that it believed the Commission's January 19th rulings were faulty, that it was requesting a copy of the *Germain* file from the Commission, and that it would, therefore, probably be unable to meet the February 11th due date for providing discovery. The Commission lacks the authority to award costs and attorney fees for discovery motions against a state agency. *Dept. of Transportation v. Pers. Comm.*, 176 Wis. 2d 137, 502 N.W.2d 918 (1993). Given the respondent's prompt notification of its intent to dispute the Commission's January 19th rulings, the Commission declines to impose any sanctions for failing to provide the discovery by February 11th.

ORDER

Respondent's motion for reconsideration of the Commission's January 19th rulings is denied. Complainant Samsel's request for an enforcement order or sanctions is also denied. The schedule for complying with the January 19th rulings will be set forth in a cover letter to this order.

Dated: March 17, 2000 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner