Wisconsin Personnel Commission

Introduction
Appeals
Complaints
Helpful Information
Statutes
Administrative Rules
Digest of Decisions
Full Decisions
Links
Search

Important Notice: Pursuant to the provisions of the State budget that was recently enacted into law, the Personnel Commission has been abolished and its authority has been distributed between two other state agencies: 1) the Wisconsin Employment Relations Commission (WERC) is now responsible for processing Appeals, and 2) the Equal Rights Division (ERD) of the Department of Workforce Development is responsible for processing Complaints. The terms "appeals" and "complaints" are described on the Introduction page of this website.

Correspondence and questions relating to Appeals should now be directed to: WERC, 18 South Thornton Avenue, PO Box 7870, Madison, WI 53707-7870. Phone: (608)266-1381 http://badger.state.wi.us/agencies/werc/index.htm

Correspondence and questions relating to Complaints should now be directed to: ERD, 201 East Washington Avenue, GEF 1, Room A-300, PO Box 8928, Madison, WI 53708. Phone: (608)266-6860 http://www.dwd.state.wi.us/er/

Methods for accessing the Commission's Digest of Decisions:

[Alphabetical topic list]
[Subject matter index (by levels)] [Expanded subject matter index]
[Entry to case summaries]
[Table of cases]

Digest Introduction

This Digest summarizes significant decisions issued by the Commission during the period from February 16, 1978, through March 1, 1999, as well as decisions issued by reviewing courts during the same period. The summaries have been organized according to subject matter. Individual topics have been assigned separate classification numbers. For example, summaries of rulings relating to amending a notice of discipline are found in section 201.05 of the digest. In the body of the digest, the classification numbers are arranged in numerical order followed by all of the case summaries relating to that particular topic.

You are using one of the first versions of the Commission's Digest made available electronically. As time permits, the Commission will make changes so that it becomes easier to navigate within the Digest materials.

In the interim, you may use the following methods to gain access to the Digest's numbering system and to the individual case summaries:

Researching by subject

1. Review the alphabetical list of topics covered by the Digest. Make a note of the classification numbers associated with the topics in which you are interested. Then open the segment(s) of the digest that includes those classification numbers by first going to the entry to case summaries page.

OR

2. Check one of the subject matter indexes in order to figure out which classification numbers are most closely related to your research:

a. The subject matter index, by levels, breaks the classification numbering system into three levels of specificity. The initial level lists only 7 very broad subjects. These subjects are bookmarked to the second index level which includes about 100 major headings. The major headings are then linked to the expanded index, described below.

b. The expanded subject matter index includes the entire list of topics (nearly 750) addressed in the digest. Every topic number is linked to the collected summaries under that heading. If no link is indicated, then there are no entries for that particular topic number.

Researching by case name

If you already know the name of one or more cases that deal with a particular topic you wish to research, you can open the table of cases to obtain the classification numbers assigned to the summaries that are associated with that case. Make a note of the classification numbers. You can then either a) open the expanded subject matter index and use the links there to access the case summaries or b) open the entry to case summaries page and then the individual segment(s) of the digest that contain those numbers. Review all of the case summaries that are listed under the classification number(s) you wish to review.

Persons using this digest to locate decisions to be cited to a court as authority should take note of §809.23(3), Stats., which provides that an unpublished decision of the Court of Appeals is of no precedential value and for that reason may not be cited in any court in this state as precedent or authority. Such decisions are reported in this digest as an informational service only, and their use contrary to §809.23(3) is not encouraged.

Hard copies of the Commission's Digest may be reviewed in the offices of the Commission, at the State Law Library and at the library of the University of Wisconsin Law School UW Law School . Copies of the Digest may also be purchased from Document Sales, 202 South Thornton Avenue, PO Box 7840, Madison, WI 53707-7840. (Telephone: (608)264-9419 or (800)362-7253).

If you discover errors in the digest or have comments or suggestions, please notify the Commission via e-mail addressed to kurt.stege@pcm.state.wi.us.

Home • Appeals • Complaints • Relevant Statutes • Administrative Rules

Digest of Decisions • Decisions • Other Information • Links

Alphabetical Listing of Topics

Once you have determined the classifications numbers that are of interest to you, make a note of them and open the Entry to case summaries page

[A] [B] [C] [D] [E] [F] [G] [H] [I] [J] [K] [L] [M]
[N] [O] [P] [Q] [R] [S] [T] [U] [V] [W] [X] [Y] [Z]

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

X

(no entries)

Y

(no entries)

Z

(no entries)

[Personnel Commission homepage] [PC Digest Introduction]

Subject matter index, levels 1 & 2

Highlighted numbers are linked to the next level of the subject matter index.

NOTE: Matters filed with the Wisconsin Personnel Commission are designated as either appeals or complaints. The Commission's statutory bases for review of appeals do not provide for an investigation by the Commission. In contrast, the statutory bases for review of complaints provide for an investigation. In this digest, decisions relating to complaints are found in chapters 701 through 796, while decisions relating to appeals are located in chapters 101 through 690. Especially for anyone researching a procedural issue, it is adviasable to look under the appropriate headings for both appeals and complaints.

Base Outline

Mid-level Outline

796 Employment action involved in the claim

While this digest has been prepared by Personnel Commission staff for the convenience of interested persons, it should be remembered that the decisions themselves are the ultimate source of Commission precedent.

[Personnel Commission homepage] [PC Digest Introduction]

Subject Matter Index (Expanded)

Once you have determined the classifications numbers that are of interest to you, follow the link(s) directly to the case summaries. If a classification is not highlighted, it means there are no cases on that particular topic.

[100] [200] [300] [400] [500] [600] [700]

NOTE: Matters filed with the Wisconsin Personnel Commission are designated as either appeals or complaints. The Commission's statutory bases for review of appeals do not provide for an investigation by the Commission. In contrast, the statutory bases for review of complaints provide for an investigation. In this digest, decisions relating to complaints are found in chapters 701 through 796, while decisions relating to appeals are located in chapters 101 through 690. Especially for anyone researching a procedural issue, it is adviasable to look under the appropriate headings for both appeals and complaints.

100 JURISDICTION [APPEALS]

101 General

102 Timeliness of an appeal

- **102.01 General application of time restrictions**
- **102.02 Receipt by the Commission**
  - **102.02(1) Receipt of letter**
  - **102.02(2) Time stamp**
  - **102.02(3) Mailing date**
  - **102.02(4) Personal delivery**
  - **102.02(5) Mistaken appeal to the Administrator/Secretary (see also 102.10)**
- **102.04 No notice, generally**
- **102.05 Computation of timeliness according to subject matter being appealed**
  - **102.05(1) Discharge/termination**
  - **102.05(3) Layoff**

200 DISCIPLINARY ACTIONS: Discharges, Suspensions, Reductions in Base Pay and Demotions

201.50 Standard of judgment (see 501)

202 Was some discipline warranted?

- **202.02 Tardiness and/or absence**
- **202.03 Insubordination; failure to follow orders**
- **202.04 Poor work record**
- **202.10 Other misconduct**
  - **202.10(1) Off-duty**
  - **202.10(2) On-duty**
- **202.50 Weighing testimony**

205 Specific defenses

- **205.1 Constitutional Rights**
- **205.3 Absence of standards of performance**
- **205.5 Failure of management to train and supervise**
- **205.7 Multiple punishment**
- **205.8 Inadequacy of pre-disciplinary procedures**
  - **205.8 (1) Pre-disciplinary procedural requirements, generally**
  - **205.8 (2) Notice of imminent danger of termination**
- **205.9 Other**

210 Was discipline imposed excessive?

- **210.2 Excessiveness, generally**
- **210.5 Past work record**
  - **210.5(1) Generally**
  - **210.5(5) Progressive discipline**

240 Demotion

- **240.1 Definition**

250 Suspension

- **250.1 Definition**
- **250.3 Statutory limit on duration**

270 Relief awarded

300 LAYOFFS/JOB ABANDONMENTS

301 Standard of judgment (see 501)

- **301.03 Scope of the Commission's inquiry**

302 Particular issues

- **302.005 Definition**

400 DECISIONS OF THE ADMINISTRATOR/SECRETARY

403.04(7) Extra time to supplement application
403.04(8) Exam administration and scoring
403.04(9) Secrecy -- materials pertinent to appeal
403.04(10) Certification (including veterans points)
403.04(11) Withdrawal of acceptance
403.05 Hearings
403.06 Leave
403.07 List of eligibles (registers), including removal of names
403.08 Make-up work (bad weather)
403.09 Merit pay
403.10 Overtime
403.102 Performance evaluation
403.104 Project positions
403.107 Promotional potential rating
403.11 Probation
403.12 Reclassification/reallocation
403.12(1) Existence of request for reclassification/reallocation [see also 403.12(13)]
403.12(2) Listing of cases by classifications involved [see also 403.12(15), (16), (17)]
403.12(4) Particular issues in determining correctness of classification
403.12(4)(a) Main issue (see also 501.03 and 502.75)
403.12(4)(b) Method of determining correctness
403.12(4)(c) Position description signed by appellant
403.12(4)(d) Majority of duties, significance of time allocated to particular functions
403.12(4)(e) Prohibited duties
403.12(4)(f) Classification of other specific positions
403.12(4)(g) Size of unit
403.12(4)(h) Duties changed
403.12(4)(i) Outside witnesses
403.12(4)(j) New specifications applied
403.12(4)(k) Promise of advancement
403.12(4)(l) Teacher credits
403.12(4)(m) Time served in lower class
403.12(4)(n) Employe retention
403.12(4)(o) Other quantitative factor
403.12(4)(r) Field audit
403.12(4)(s) Temporary duties/responsibilities and continuing responsibilities
403.12(4)(t) Job sharing
403.12(4)(u) Professional and paraprofessional duties
403.12(4)(v) Volunteer/committee responsibilities
403.12(4)(w) Leadwork/supervisory/management responsibilities

500 PROCEDURE AND RELATED TOPICS [APPEALS]

502 Burden of proof/proceeding
- **502.01 Generally**
  - **502.01(1) Burden of persuasion**
  - **502.01(2) Applicability of burden**
- **502.02 Jurisdiction**
- **502.03 Discharge**
- **502.04 Suspension/demotion**
- **502.05 Layoff**
- **502.06 Actions of the administrator**
- **502.07 Reclassifications/reallocations**
- **502.08 Examinations**
  - **502.08(1) Exam process**
  - **502.08(2) Exam content**
- **502.09 Burden of proceeding**
- **502.15 Affirmative defenses**

502.75 Issue for hearing

503 Mootness (see also 522.02)
- **503.01 Resignation**
- **503.02 Examination appeal**
- **503.03 Future abuses**
- **503.04 Arbitration award**
- **503.05 Moot appeal treated as investigation**
- **503.06 Other matters**

503.50 Standing

504 Amendment (see also 712.5)

504.50 Bifurcated hearing

505 Consolidation of appeals
- **505.01 Same appellant**
- **505.02 Separate appellants**
  - **505.02(1) Prehearing conference**
  - **505.02(2) Hearing**

505.50 Open records law

506 Discovery (see also 724)
- **506.01 Necessity of discovery**
- **506.02 Availability of state witnesses**
- **506.03 Particular issues**
- **506.04 Sanctions**

506.50 Proper parties

507 Prior notice of witnesses and exhibits

508 Witnesses and exhibits (see also 510)

- 508.2 Exchange of witness and exhibit lists
- 508.4 Subpoenas
- 508.6 Protective orders
- 508.7 Rebuttal
- 508.8 Witness fees/reimbursement

510 Evidence

- 510.01 Foundation
- 510.02 Examination -- limitation of
- 510.03 Redirect -- scope of
- 510.04 Objection -- timeliness of
- 510.05 Exhibits
- 510.06 Hearsay
- 510.07 Polygraph exam
- 510.08 Relevance
- 510.09 Motion to suppress/ motion in limine
- 510.10 Expert testimony
- 510.11 Materiality
- 510.15 Official notice
- 510.20 Attorney-client privilege
- 510.50 Res judicata/collateral estoppel (see also 717.3)
- 510.90 Other

511 Motions

- 511.01 Jurisdiction
- 511.02 No factual hearing necessary -- issues of law
- 511.03 Factual hearing necessary -- questions of fact
- 511.04 Motion for reinstatement
- 511.08 Motion for summary judgment
- 511.20 Motion to dismiss for lack of prosecution (see also 515.2)
- 511.50 Motion to sequester

511.80 Timing

- 511.90 Withdrawal of motion

512 Procedural rules

- 512.01 Adoption
  - 512.01(1) Power to adopt
  - 512.01(2) Notice and hearing
- 512.02 Change during hearing

600 NON-DISCIPLINARY ACTIONS OF THE APPOINTING AUTHORITY

700 FAIR EMPLOYMENT ACT AND RELATED STATUTORY BASES FOR FILING COMPLAINTS

713.9 Relief denied

714 Investigation
714.1 Generally
714.4 Request for copy of investigative file
714.9 Waiver

715 Initial determination
715.1 Effect of finding of probable cause
715.2 Request for second investigation
715.5 Respondent's objections to the initial determination of probable cause
715.9 Other issues

717 Relationship with other proceedings/matters
717.1 Consolidation with appeals/other complaints
717.2 Existence of parallel federal proceeding
717.3 Collateral estoppel/res judicata (see also 510.50)
717.5 Effect of prior settlement agreement reached in another proceeding (see also 738.4)
717.7 Exclusivity of or preemption by other laws/proceedings

719 Mootness

720 Standing

721 Standard of judgment and analysis
721.01 Generally
721.10 Age
721.12 Arrest record/conviction record
721.14 Color
721.16 Creed
721.17 Family leave/medical leave
721.18 Disability [Handicap]
721.20 Honesty testing device
721.22 Marital status
721.24 National origin/ancestry
721.26 Occupational safety and health
721.28 Race
721.30 Retaliation
721.32 Sex
721.34 Sexual orientation
721.50 Whistleblower (subch. III, ch. 230, Stats.)

722 Burden of proof

724 Discovery (also see 506)

726 Issue for hearing

728 Hearing procedure
- 728.3 Role of hearing examiner/substitution
- 728.8 Transcript
- 728.9 Other

730 Evidence

732 Motions

734 Postponement/delays

735 Settlement efforts and agreements (also see 717.5 and 738.4)

736 Dismissal (includes failure to respond to 20 day letter)
- 736.5 Withdrawal of claim

738 Reopen/Rehearing
- 738.1 Generally
- 738.4 Reopen where allegation of failure to fulfill settlement agreement

740 Findings, Conclusions, Order

742 Remedy

760 Specific applications of principles
- 760.2 Mixed motive
- 760.4 Voluntary resignation/constructive discharge
- 760.6 Proof of general atmosphere of discrimination
- 760.9 Other

766 Age
- 766.01 Generally
- 766.02 Probable cause
  - 766.02(1) Finding of probable cause
  - 766.02(2) Finding of no probable cause
- 766.03 Merits
  - 766.03(1) Finding of discrimination
  - 766.03(2) Finding of no discrimination
- 766.04 Prima facie case
- 766.06 Statistical analysis

768 Arrest record/conviction record
- 768.01 Generally
- 768.02 Probable cause
  - 768.02(1) Finding of probable cause

768.02(2) Finding of no probable cause
768.03 Merits
768.02(1) Finding of discrimination
768.02(2) Finding of no discrimination
768.04 Prima facie case

770 Color
770.01 Generally
770.02 Probable cause
770.02(1) Finding of probable cause
770.02(2) Finding of no probable cause
770.03 Merits
770.03(1) Finding of discrimination
770.03(2) Finding of no discrimination
770.04 Prima facie case

772 Creed
772.01 Generally
772.02 Probable cause
772.02(1) Finding of probable cause
772.02(2) Finding of no probable cause
772.03 Merits
772.03(1) Finding of discrimination
772.03(2) Finding of no discrimination
772.04 Prima facie case

773 Family leave/medical leave
773.01 Generally
773.02 Probable cause
773.02(1) Finding of probable cause
773.02(2) Finding of no probable cause
773.03 Merits
773.03(1) Finding of discrimination
773.03(2) Finding of no discrimination
773.04 Prima facie case

774 Disability [formerly identified as handicap]
774.01 Generally
774.02 Probable cause
774.02(1) Finding of probable cause
774.02(2) Finding of no probable cause
774.03 Merits
774.03(1) Finding of discrimination
774.03(2) Finding of no discrimination

774.04 Prima facie case (see 702.18)
774.05 Duty of accommodation

776 Honesty testing device
776.01 Generally

778 Marital status
778.01 Generally
778.02 Probable cause
778.02(1) Finding of probable cause
778.02(2) Finding of no probable cause
778.03 Merits
778.03(1) Finding of discrimination
778.03(2) Finding of no discrimination
778.04 Prima facie case

780 National origin/ancestry
780.01 Generally
780.02 Probable cause
780.02(1) Finding of probable cause
780.02(2) Finding of no probable cause
780.03 Merits
780.03(1) Finding of discrimination
780.03(2) Finding of no discrimination
780.04 Prima facie case
780.06 Statistical analysis
780.10 Disparate impact

782 Occupational safety and health
782.01 Generally
782.02 Probable cause
782.02(1) Finding of probable cause
782.02(2) Finding of no probable cause
782.03 Merits
782.03(1) Finding of retaliation
782.03(2) Finding of no retaliation
782.04 Prima facie case

784 Race
784.01 Generally
784.02 Probable cause
784.02(1) Finding of probable cause
784.02(2) Finding of no probable cause
784.03 Merits
784.03(1) Finding of discrimination

[Personnel Commission homepage] [PC Digest Introduction]

Wisconsin Personnel Commission's **Digest of Decisions** March, 1999 Version

Entry to case summaries

With links to digest segments

Case summaries organized by classification numbering system:

100's

1.1 Sections 101 through 102.02(13)
1.2 Sections 102.08 through 102.16
1.3 Sections 103.01 through 103.07
1.4 Sections 103.08 (1) through (10)
1.5 Sections 103.09 thorough 103.20
1.6 Sections 103.21 through 130.7(10)

200's

2.1 Sections 201.01 through 202.50
2.2 Sections 205.1 through 270

300's

3.1 Sections 301 through 310

400's

4.1 Sections 401.01 through 403.11
4.2 Sections 403.12(1) through 403.12(2)
4.3 Sections 403.12(4)(a) through 403.12(4)(f)
4.4 Sections 403.12(4)(g) through 403.12(4)(x)
4.5 Sections 403.12(6) through 403.12(13)
4.6 Sections 403.12(14) through 403.12(17)(m)
4.7 Sections 403.125 through 420

500's

5.1 Sections 500.50 through 503.06
5.2 Sections 503.50 through 505.50
5.3 Sections 506.01 through 508.8
5.4 Sections 510.01 through 510.90
5.5 Sections 511 through 516
5.6 Sections 517 through 521.7(8)
5.7 Sections 522.01(1) through 523

600's

6.1 Sections 605.5(1) through 615.5(9)
6.2 Sections 622 through 690

700's

7.1 Sections 702.005 through 702.18(2)
7.2 Sections 702.20 through 702.90
7.3 Sections 704 through 706.01
7.4 Sections 706.03 through 710
7.5 Sections 712.2 through 715.9
7.6 Sections 717.1 through 717.7
7.7 Sections 719 through 722
7.8 Section 724
7.9 Sections 726 through 730
7.10 Section 732
7.11 Sections 734 through 738.4
7.12 Sections 740 through 760.9
7.13 Sections 766.01 through 766.06
7.14 Sections 768.01 through 768.04
7.15 Sections 770.01 through 770.04
7.16 Sections 772.01 through 772.04
7.17 Sections 773.01 through 773.04
7.18 Sections 774.01 through 774.05
7.19 Section 776.01
7.20 Sections 778.01 through 778.04
7.21 Sections 780.01 through 7780.10
7.22 Sections 782.01 through 782.04
7.23 Sections 784.01 through 784.25
7.24 Sections Sections 786.01 through 785.04
7.25 Sections 788.01 through 788.25
7.26 Sections 790.01 through 790.04
7.27 Sections 792.01 through 792.04
7.28 Sections 796.05 through 796.15
7.29 Sections 796.25 through 796.37
7.30 Sections 796.48 through 796.55
7.31 Section 796.60
7.32 Sections 796.70 through 796. 95

[Personnel Commission homepage] [PC Digest Introduction]

Table of Cases

Once you have determined the classifications numbers that are of interest to you, make a note of them and open the Entry to case summaries page

The Commission is beginning to create direct links from case names listed in this table to the underlying decision. Those case names in red and underlined are linked to the decision. The decision, in PDF format, requires free Acrobat Reader software.

[A] [B] [C] [D] [E] [F] [G] [H] [I] [J] [K] [L] [M]
[N] [O] [P] [Q] [R] [S] [T] [U] [V] [W] [X] [Y] [Z]

A

***Acharya v. DHSS*, 82-PC-ER-53, 5/29/86 --- §702.01**

***Acharya v. DOA*, 88-0197-PC-ER, 10/3/89 --- §§717.2, 736**

***Acharya v. DOA*, 88-0197-PC-ER, 5/3/89 --- §§702.07, 732**

***Acharya v. DOR*, 89-0014, 0015-PC-ER, 11/3/89 --- §§780.02(2), 796.15, .60**

***Acharya v. DOR*, 89-0014, 0015-PC-ER, 9/11/89 --- §732**

***Acharya v. DOR*, 89-0014, 0015-PC-ER, 7/14/89 --- §§712.4, 726, 730**

***Acharya v. UW*, 78-PC-ER-53, 2/13/81; affirmed by DILHR, 11/20/81; affirmed by LIRC, 1/19/82 --- §§786.02(2), 796.15**

***Acharya v. UW*, 79-PC-ER-51, 10/1/79 --- §702.01**

***Ackley v. DNR & DER*, 00-0135-PC, 12/14/01 ---**

***Ackley v. DNR & DER*, 00-0135-PC, 8/1/01; rehearing denied, 9/5/01 ---**

***Acoff v. UWHCB*, 97-0159-PC-ER, 1/14/98 --- §706.01**

***Adams v. DHSS*, 83-0050-PC, 8/17/83 --- §102.13**

***Adams v. DNR*, 01-0088-PC-ER, 2/11/02 ---**

***Adams v. DNR & DER*, 80-PC-ER-22, 1/8/82 --- §§706.07, 712.05**

***Adams v. HEAB*, 80-54-PC, 4/29/82 --- §630.06**

***Adams v. UW-Madison*, 90-0051, 0052-PC-ER, 12/29/92 --- §734**

***Adasiewicz v. DER*, 84-0046-PC, 2/14/85 --- §403.12(2)**

***Adkins v. DP*, 79-PC-CS-23, 9/25/80 --- §102.15**

***Akey v. DNR & DER*, 92-0843-PC, 6/21/94 --- §403.12(2)**

***Al Yasiri v. UW (Platteville)*, 98-0110, 0129-PC-ER, 7/10/01 ---**

***Albedyll v. DER*, 95-0087-PC, 5/21/97 --- §403.12(2)**

***Alderden v. Wettengel*, 73-87, 3/22/76 --- §601.04(2)(b)**

***Alderden v. Wettengel*, 73-87, 11/24/75 --- §601.04(2)(a), (b)**

***Alderden v. Wettengel*, 73-87, 6/2/75 --- §§403.12(2), (3)(a), (4)(i), 403.13(1), 403.16(3), (4), 502.07**

***Aldrich v. DHFS*, 01-0040-PC-ER, 6/15/01 ---**

***Alexander v. Wis. State Pers. Bd.*, 139-490, 9/13/73 --- §§202.19(1), 203.03, 401.02, 403.05**

Alfano*, see *Nestigen & Alfano v. DP

***Alff v. DOR*, 78-227, 243-PC, 10/1/81; affirmed by Dane County Circuit Court, *Alff v. PC*, 81-CV-5489, 1/3/84 --- §§202.04, 205.8(5), 210.2, .5(5), 508.4, 510.6**

***Alff v. DOR*, 78-227, 243-PC, 6/13/79 --- §506.03**

***Alff v. DOR*, 78-227, 243-PC, 5/23/79 --- §§506.03, 506.04**

***Alff v. DOR*, 78-227-PC, 3/8/79 --- §201.05**

***Alff v. DOR*, 78-227-PC, 1/18/79 --- §§522.01(l), (2)**

***Alff v. PC*, 81-CV-5489, 1/3/84; affirmed by Court of Appeals District IV, *Alff v. PC*, 84-264, 11/25/85; petition for review by Supreme Court denied, 2/18/86 --- §§202.04, 205.8(5), 210.2, .5(5), 508.4, 510.6**

***Al-Hasan v. UW (System)*, 99-0110-PC-ER, 11/5/99 ---**

***Allen v. DHSS & DMRS*, 87-0148-PC, 8/10/88 --- §§102.05(6), 502.02**

***Allen v. DHSS & DMRS*, 87-0148-PC, 2/12/88 --- §§102.05(6), (10), 503.50, 510.08**

***Allen v. DHSS & DMRS*, 88-0020-PC, 6/29/88 --- §103.20**

***Allen v. DNR & DP*, 83-0045-PC, 8/17/83 --- §§513, 515.02**

***Allen v. DOC*, 95-0034-PC-ER, etc., 11/7/97 --- §706.50**

***Allen v. DOC*, 95-0057-PC-ER, etc., 11/4/98 --- §§732, 736**

***Allen et al. v. DMRS*, 89-0124-PC, 5/17/90; rehearing denied, 6/14/90; affirmed by Dane County Circuit Court, *Allen et al. v. Wis. Pers. Comm.*, 90-CV-2840, 2/28/91 --- §§403.04(1), (2), (8)**

***Allen et al. v. DMRS*, 89-0124-PC, 11/2/89 --- §506.03**

***Allison v. DOR*, 98-0190-PC-ER, 3/21/00 ---**

***Allison v. DOR*, 98-0190-PC-ER, 9/8/99 ---**

***Allison v. DOR*, 98-0190-PC-ER, 7/20/99 ---**

***Allison v. Wis. Lottery*, 90-0158-PC-ER, 7/11/91 --- §736**

***Alme v. DNR & DER*, 93-0129-PC, 9/21/94 --- §§103.03, 403.12(2)**

***Alsmo et al. v. Wettengel*, 73-107, etc., 7/3/75 --- §§403.12(2), (3)(b), (4)(b), (c), (d), (h)**

***Alvarado-Ortiz v. DOC*, 96-0019, 97-0197-PC-ER, 12/27/99 ---**

***Alwin v. DHSS*, 83-0122-PC-ER, 7/12/85 --- §738.4**

***Amacher v. Lehrmann*, 76-54, 12/21/76 --- §103.10(1)(b)**

***Amaya v. DOC*, 93-0104-PC-ER, 7/7/94 --- §§784.04, 796.60**

***Amaya v. DOC*, 93-0104-PC-ER, 1/11/94 --- §706.50**

***Amble v. DOA & DER*, 92-0705-PC, 11/23/93 --- §403.12(2)**

***Ames v. UW-Milwaukee*, 85-0113, 86-0123-PC-ER, 12/23/88 A ---**

***Ames v. UW-Milwaukee*, 85-0113-PC-ER, 12/23/88 B --- §§768.02(2), .03(2), 790.02(2), 796.15**

***Ames v. UW-Milwaukee*, 85-0113-PC-ER, 9/17/86 --- §§102.05(6), 403.12(e), 511.01**

***Ames v. UW-Milwaukee*, 85-0113-PC-ER, 11/7/85 --- §706.01**

***Ames v. UW-Milwaukee*, 86-0123, 0124-PC-ER, 6/7/88 --- §736.5**

***Amim v. DHSS*, 81-17-PC, 3/17/83 --- §202.10(2)**

***Amrheim v. Voigt*, 73-50, 7/22/74 --- §§202.01(1)(b), (c), 601.01(1)**

***Amrheim v. Voigt*, 73-50, 2/8/74 --- §202.01(1)(a)**

***Anand v. DHSS*, 81-438-PC, 1/8/82 --- §103.21(a)**

***Anand v. DHSS*, 82-136-PC, 3/17/83 --- §201.03(8)**

***Ancel v. DER*, 91-0117-PC, 10/17/91 --- §102.02(5)**

***Anderson v. Carballo*, 75-109-I, 2/23/76 --- §103.10(1)(a)**

***Anderson v. DATCP*, 80-175-PC, 4/9/81 --- §§103.05, 103.08(6)(b)**

***Anderson v. DER*, 86-0173-PC, 6/11/87 --- §403.12(2)**

***Anderson v. DILHR*, 79-320-PC, 79-PC-ER-173, 7/2/81; affirmed and remanded for additional findings on issues of mitigation of damages by**

Dane County Circuit Court, *DILHR v. Wis. Pers. Comm.*, 81-CV-4078, 6/7/82 --- §§103.20, 721.32, 788.03(1), 796.15

***Anderson v. DILHR & DER*, 84-0238-PC, 7/17/85 --- §403.12(2)**

***Anderson v. UW & DP*, 80-318-PC, 7/21/81 --- §103.21(b)**

***Anderson v. Weaver*, 74-83, 8/29/75 --- §403.052**

Anderson*, see *Creviston & Anderson v. DER

***Anderson & Parrish v. DER*, 94-0075, 0076-PC, 8/8/95 --- §403.12(2)**

***Anderson et al. v. DER*, 86-0098-PC, 11/18/87; affirmed in part, reversed in part by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 87-CV-7397, 11/7/88; [Note: the effect of the decision was to affirm the Commission's decision in all respects except as to the award of copying charges and the charge for tape recordings of the hearings] --- §§521.5, .7(1)**

***Anderson et al. v. DER*, 86-0098-PC, 9/29/87 --- §403.12(2)**

***Anderson et al. v. Weaver*, 73-160, 2/23/76 --- §403.051**

***Andrewjeski v.* DER, 90-0212-PC, 5/16/91 --- §403.12(2)**

***Andrews v. DHFS*, 99-0038-PC-ER, 7/27/01 (ruling by examiner) ---**

***Andrews v. UW*, 80-PC-ER-14, 10/21/81 --- §§766.02(2), 796.15**

***Andritzky v. UW-Milwaukee*, 88-0137-PC-ER, 12/23/91 --- §514**

***Angha v. DHFS*, 97-0135-PC, 1/14/98 --- §103.21(1)**

***Anglin v. DMRS*, 91-0193-PC, 5/1/92 --- §§403.04(8), 403.07**

***Arcamo v. UW*, 01-0025-PC, 12/14/01 ---**

***Arcamo v. UW-Milwaukee*, 99-0039-PC-ER; 6/30/99 ---**

***Arenz et al. v. DOT & DER*, 98-0073-PC, etc., 2/10/99 --- §§103.13, 103.20, 502.75**

***Aries v. DMA*, 90-0149-PC-ER, 11/6/91 --- §§702.03, 717.7**

***Arndt v. Goehring v. DP*, 82-251-PC, 9/13/85 --- §§403.12(2), (11)**

***Arneson v. UW*, 90-0184-PC, 11/13/92 --- §§130.5(4), 517.55, 521.5**

***Arneson v. UW*, 90-0184-PC, 5/14/92 --- §§521.5, .7(2)**

***Arneson v. UW*, 90-0184-PC, 2/6/92 --- §§103.01, 130.7(4), 202.10(2), 205.8(1), 210.5(1)**

***Arny v. PSC & DER*, 86-0200-PC, 10/27/87 --- §§403.12(2), (4)(f)**

***Asadi v. UW (Platteville)*, 85-0058-PC-ER, 4/10/92 --- §506.03**

***Asadi v. UW (Platteville)*, 85-0058-PC-ER, 1/24/92 --- §518.02**

***Asadi v. UW (Platteville)*, 85-0058-PC-ER, 4/7/88 --- §506.03**

***Asadi v. UW (Platteville)*, 85-0058-PC-ER, 11/13/87 --- §724**

***Asche v. DOC*, 90-0159-PC, 5/21/97 --- §§103.13, .20, 210.10(2), .2, .5(5)**

***Asche v. DOC*, 90-0159-PC, 3/10/93 ---**

***Asche v. DOC*, 90-0159-PC, 1/27/93 --- §508.8**

***Asche v. DOC*, 90-0159-PC, 4/1/92 ---**

***Asche v. State Pers. Comm.*, Dane County Circuit Court, 93-CV-1365, 12/8/93; affirmed by Court of Appeals, 94-0450, 4/6/95 --- §201.02**

***Aslakson et al. v. DER*, 91-0135-PC, etc., 10/22/96 --- §§403.12(2), (4)(f), (12)**

***Atkinson v. DILHR & DER*, 86-0042-PC, 6/12/86 --- §517.01**

***Attoe v. UW*, 90-0388-PC, 8/16/91; affirmed by Dane County Circuit Court, *Attoe v. Wis. Pers. Comm.*, 91-CV-3587, 5/12/92 --- §§302.05, 13, 303**

***Augustin v. DMRS & DOC*, 90-0254-PC, 10/3/91 --- §§403.04(3), .04(10), .07, 522.05(1)(c), (2)**

***Augustin v. DMRS & DOC*, 90-0254-PC, 11/28/90 --- §§102.05(10), .14**

***Augustine & Brown v. DATCP [& DER]*, 84-0036, 0037-PC, 9/12/84 -- §403.12(4)(f)**

***Austin v. DMA*, 81-PC-ER-30, 2/9/82 --- §§788.03(2), 796.15**

***Austin et al. v. DER*, 90-0285, 0294-PC, 10/31/91 --- §§403.12(2), (4)(d), (11)**

***Austin-Erickson v. DHFS & DER*, 97-0113-PC, 2/25/98 --- §§102.01, .04, .10, .13**

***Awe v. DATCP*, 89-0040-PC-ER, 2/9/90 --- §724**

***Aylesworth v. DOC*, 00-0110-PC, 12/13/00 ---**

B

***Bachman v. UW-Madison*, 85-0111-PC, 11/7/85 --- §102.13**

***Badsha v. DP*, 81-135-PC, 5/29/86 --- §403.12(4)**

***Baggott v. DNR & DER*, 87-0012-PC, 12/23/87; affirmed by Dane County Circuit Court, *Baggott v. Wis. Pers. Comm.*, 88-CV-0366, 8/11/88 -- §§403.12(l), (2), (13)**

***Baggott v. DNR & DER*, 87-0012-PC, 4/29/87 --- §§103.03, .18, 403.12(l)**

***Bahr v. Investment Board*, 89-0009-PC, 4/28/89; rehearing denied, 6/21/89 [Contrary conclusion reached in *Bahr v. State Inv. Board*, 186 Wis. 2d 379, 521 N.W.2d 152 (Court of Appeals, 1994)] --- §103.12**

***Baker v. Secretary of State*, 80-183-PC, 12/17/80 --- §615.2**

***Baker et al. v. DER*, 92-0087-PC, 1/8/93 --- §403.12(2)**

***Baldwin v. UW & DER*, 82-87-PC, 1/20/83 --- §403.12(2)**

***Balele v. DATCP et al.*, 98-0199-PC-ER, 4/19/00 ---**

***Balele v. DATCP et al.*, 98-0199-PC-ER, 2/11/00 ---**

***Balele v. DATCP et al.*, 98-0199-PC-ER, 5/12/99 ---**

***Balele v. DER & DMRS*, 98-0145-PC-ER, 7/19/00 ---**

***Balele v. DER & DMRS*, 98-0145-PC-ER, 2/28/00 ---**

***Balele v. DER & DMRS*, 98-0145-PC-ER, 12/3/99 ---**

***Balele v. DER & DMRS*, 98-0145-PC-ER, 4/7/99 ---**

***Balele v. DER & DMRS*, 98-0145-PC-ER, 12/18/98 --- §§717.1, 734**

***Balele v. DER et al.*, 97-0097-PC-ER, 9/24/97 --- §702.005, .03, 710**

***Balele v. DHFS*, 98-0045-PC-ER, 11/3/99 ---**

***Balele v. DHFS*, 99-0002-PC-ER, 5/31/00 ---**

***Balele v. DHFS*, 99-0123-PC-ER, 6/29/01 ---**

***Balele v. DHFS et al.*, 00-0133-PC-ER, 8/15/01 ---**

***Balele v. DHFS et al.*, 00-0133-PC-ER, 5/24/01 ---**

***Balele v. DHSS & DMRS*, 91-0118-PC-ER, 6/17/93 --- §742**

***Balele v. DHSS & DMRS*, 91-0118-PC-ER, 4/30/93 --- §§770.03(2), 780.03(2), 784.03(2), 796.15**

***Balele v. DHSS & DMRS*, 91-0118-PC-ER, 3/19/92 --- §710**

***Balele v. DHSS et al.*, 95-0005-PC-ER, 5/15/95 --- §714.1**

***Balele v. DILHR et al.*, 94-0020-PC-ER, 6/2/94 --- §724**

***Balele v. DILHR et al.*, 95-0063-PC-ER, 10/16/95 --- §§103.21(1), 702.90**

***Balele v. DNR*, 98-0046-PC-ER, 1/25/00 ---**

***Balele v. DNR*, 00-0087-PC-ER, 11/19/01 ---**

***Balele v. DNR et al.*, 95-0029-PC-ER, 6/22/95 --- §§522.10, 710, 713.3, .9, 732**

***Balele v. DOA*, 94-0090-PC-ER, 2/20/95 --- §717.3**

***Balele v. DOA*, 00-0057-PC-ER, 9/20/00 ---**

***Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92 --- §§770.02(2), 780.02(2), .10, 784.02(2), .10, 796.15**

***Balele v. DOA et al.*, 93-0144-PC-ER, 3/26/97; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm et al.*, 97-CV-1389, 10/30/97 --- §§714.1, 717.3**

***Balele v. DOA et al.*, 96-0156-PC-ER, 6/4/97; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm. et al.*, 97-CV-1927, 2/13/98; affirmed by Court of Appeals, 98-0687, 11/19/98 (unpublished) --- §§702.01, .07**

***Balele v. DOA et al.*, 99-0001, 0026-PC-ER, 8/28/00 ---**

***Balele v. DOA et al.*, 99-0001, 0026-PC-ER, 9/7/99 ---**

***Balele v. DOA et al.*, 99-0001, 0026-PC-ER, 5/10/99 ---**

***Balele v. DOA et al.*, 00-0077-PC-ER, 1/25/01 ---**

***Balele v. DOA et al.*, 00-0077-PC-ER, 10/18/00 ---**

***Balele v. DOA et al.*, 00-0077-PC-ER, 8/2/00 ---**

***Balele v. DOA et al.*, 00-0077-PC-ER, 7/19/00 ---**

***Balele v. DOA et al.*, 00-0104, 0077-PC-ER, 3/21/01 ---**

***Balele v. DOA et al.*, 00-0104-PC-ER, 2/23/01 ---**

***Balele v. DOA et al.*, 00-0104-PC-ER, 2/8/01 ---**

***Balele v. DOA et al.*, 00-0104-PC-ER, 12/1/00 ---**

***Balele v. DOA et al.*, 01-0067-PC-ER, 7/16/01 (ruling by examiner) ---**

***Balele v. DOC*, 00-0007-PC-ER, 7/13/01 ---**

***Balele v. DOC*, 00-0034-PC-ER, 6/13/01 ---**

***Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98 (appeal pending) --- §§506.03, 508.9, 510.06, 511.02, 517.01, 721.01, 724, 728.3, .9, 730, 742, 784.03(2), .04, .10, 786.03(2), 796.15**

***Balele v. DOC et al.*, 97-0012-PC-ER, 7/23/97 --- §724**

***Balele v. DOR*, 98-0002-PC-ER, 2/24/99 --- §§511.02, 515.2, 732**

***Balele v. DOR*, 99-0202-PC-ER, 1/25/02 ---**

***Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98 --- §§506.03, 724**

***Balele v. DOT*, 98-0104-PC-ER, 9/22/99 ---**

***Balele v. DOT*, 99-0103-PC-ER, 11/15/00 ---**

***Balele v. DOT*, 99-0103-PC-ER, 11/19/99 ---**

***Balele v. DOT*, 00-0044-PC-ER, 10/23/01 ---**

***Balele v. DOT*, 00-0088-PC-ER, 11/16/01 ---**

***Balele v. UW (System)*, 98-0159-PC-ER, 10/20/99 ---**

***Balele v. UW-Madison*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94-CV-1177, 2/17/95 --- §§770.03(2), .04, 780.03(2), .04, .06, .10, 784.03(2), .04, .06, .10, 796.15**

***Balele v. UW-Madison*, 91-0002-PC-ER, 10/29/92 --- §742**

***Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92 --- §§511.08, 717.3, 732**

***Balele v. UW-Madison*, 91-0002-PC-ER, 2/6/92 --- §714.9**

***Balele v. UW-Madison*, 99-0004-PC-ER, 1/19/00 ---**

***Balele v. UW-Madison*, 99-0004-PC-ER, 8/25/99 ---**

***Balele v. UW-Madison*, 99-0169-PC-ER, 2/26/01 ---**

***Balele v. UW-Madison*, 00-0012-PC-ER, 7/2/01 ---**

***Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98 --- §§506.50, 511.01, .02, .08, 710, 732**

***Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0257, 8/10/98 --- §510.50, 717.3**

***Balele v. WTCSB et al.*, see *Balele v. DER & DMRS*, 98-0145-PC-ER, and *Balele v. DER et al.*, 97-0097-PC-ER**

***Balele & Humphrey v. DMRS, DER & DETF*, 87-0047, 0048-PC-ER, 12/3/87 --- §503.50**

***Ballhorn v. DILHR & DER*, 87-0033-PC, 12/17/87 --- §403.12(4)(o)**

***Ballweg v. DHSS*, 92-0378-PC, 11/13/92 --- §103.05**

***Banoul v. DER*, 90-0158-PC, 12/13/90 --- §403.12(2)**

***Barden v. UW*, 82-237-PC, 6/9/83 --- §§202.03, 210.2, 210.5(1), 501.02(l)**

***Bare v. DOT*, 99-0119-PC-ER, 1/25/00 ---**

***Barker v. DOR*, 89-0116-PC, 5/16/90 --- §§202.10(2), 210.2**

***Barker v. UW & DER*, 88-0024-PC, 4/20/88 --- §§102.04, 102.05(10),**

***Barker v. UW & DER*, 88-0031-PC, 4/20/88 --- §103.20**

***Barker v. UW & DER*, 00-0021-PC, 1/9/02 ---**

***Barkus v. DHSS & DER*, 91-0254-PC, 92-0205-PC, 6/25/93 --- §403.12(13)**

***Barnett et al. v. DOT & DP*, 81-366-PC, 7/27/82 --- §103.03**

***Barry v. DP*, 80-346-PC, 11/19/81 --- §§403.12(2), 403.12(4)(g)**

***Bartell v. DHSS*, 84-0038-PC-ER, 9/13/85; affirmed by Fond du Lac County Circuit Court, *Bartell v. State Pers. Comm.*, 85-CV-808, 4/1/86; affirmed by Court of Appeals, District 11, 1/7/87 --- §§717.03, .10**

***Bartko v. DHSS & DP*, 81-341-PC, 4/2/82 --- §403.12(2)**

***Bartol v. DOT*, 79-309-PC, 4/25/80 --- §102.05(4)(a)**

***Basch v. UW*, 80-124-PC, 12/16/81 --- §103.21(a)**

***Basinas v. DHSS*, 77-121 (Personnel Board), 6/16/78 --- §§675.8, 686**

***Basinas v. State of Wis. (Personnel Commission)*, 104 Wis. 2d 539, 321 N.W.2d 483 (Sup. Ct., 1981) --- §103.21(b)**

***Batha v. DER*, 90-0134-PC, 6/12/91 --- §403.12(2)**

***Battalio v. Carballo*, 75-129, 3/22/76 --- §103.08(2)(a)**

***Bauer v. DATCP & DER*, 91-0128-PC, 6/25/93 --- §§403.12(1), 615.2**

***Bauer v. DATCP & DER*, 91-0128-PC, 4/1/92 --- §§103.03, .18, .20, .21(1)**

***Bauer v. DER*, 84-0116-PC, 4/12/85 --- §403.12(2)**

***Bauhs & Lilley v. DP*, 78-188, 189-PC, 1/15/79 --- §403.12(2)**

***Baxter v. DHSS*, 82-85-PC, 8/31/83 --- §§202.02(1), .10(1)**

***Beane v. DP*, 82-140-PC, 81-184-PC, 7/21/83 --- §§403.12(2), 403.12(13)**

***Beauchaine v. Schmidt*, 73-38, 7/22/74 --- §§511.02, 512.01(1), (2), 517.01(2)**

***Beauchaine v. Schmidt*, 73-38, 10/18/73 --- §§201.01(1)(2)(4), 201.02(1), 511.04(2)(a)**

***Beaumier v. DNR & DER*, 90-0203-PC, 1/24/91 --- §§403.12(2), 420**

***Beaver et al. v. Wettengel*, 74-55, 5/28/75 --- §§403.12(2), (3)(b), (4)(b), (j)**

***Beaverson v. DOT*, 88-0109-PC-ER, 11/19/90 --- §738.1**

***Beaverson v. DOT*, 88-0109-PC-ER, 10/4/90 ---**

***Beaverson v. DOT*, 88-0109-PC-ER, 2/22/90 --- §724**

***Beaverson v. DOT*, 88-0109-PC-ER, 6/29/89 --- §724**

***Bedynek-Stumm v. DPI*, 99-0186-PC-ER, 4/25/02 ---**

***Bedynek-Stumm v. DPI*, 99-0186-PC-ER, 4/7/00 ---**

***Bedynek-Stumm v. DOT*, 98-0168-PC, 98-0213-PC-ER, 7/26/01 ---**

***Beer v. DHSS*, 79-198-PC, 7/17/80 --- §515.02**

***Behling v. DOR & DER*, 88-0060-PC, 12/14/89 --- §403.12(2)**

***Behling v. DOR & DER*, 88-0060-PC, 12/14/88 --- §506.03**

***Behm v. UW*, 93-0212-PC, 3/31/94 --- §§302.05, .12, 303**

Behm*, see *Thoresen & Behm v. UW

***Behnke v. UW-Madison*, 89-0135-PC-ER, etc., 7/7/94; rehearing denied, 8/18/94 --- §736**

***Bell v. DOT*, 91-0098-PC, 10/17/91 --- §103.05**

***Bell-Merz v. UW-Whitewater*, 90-0138-PC-ER, 3/19/93 --- §§702.18(1), 774.03(2), .05, 796.60**

***Bell-White v. DHSS*, 89-0009-PC-ER, 4/30/92 --- §§778.03(2), 796.15**

***Belongia v. DP*, 79-263-PC, 6/30/81 --- §§403.12(2), 403.12(4)(p)**

Belshe*, see *Fullmer, Mastricola & Belshe v. DP

***Bender v. DER*, 86-0062-PC, 10/29/86 --- §403.12(2)**

***Bender v. DHSS*, 81-382, 383, 384-PC, 3/19/82 --- §§202.02(3)9 .10(2), 205.8(l), 210.2**

***Bender v. DOA & DP*, 80-210-PC, 7/1/81 --- §§403.12(2), 403.12(4)(d)**

***Bender v. DOC*, 90-0049-PC-ER, 8/8/91 --- §§788.02(1), 796.60**

***Bender v. DOR*, 87-0032-PC-ER, 8/24/89 --- §§782.02(2), 788.25, 796.60**

***Bender v. DOR*, 87-0032-PC-ER, 3/23/88 -- §706.50**

***Bengtson v. DILHR*, 92-0026-PC, 8/26/92 --- §615.2**

***Benish & Volden v. DILHR & DP*, 82-184-PC, 11/23/83 --- §403.12(2)**

Bennett*, see *Reinhold v. (& Office of Columbia County District Attorney)

***Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98 --- §§702.50, 706.01, 722, 732, 792.04**

***Benson v. UW (Whitewater)*, 98-0004, 0014-PC-ER, 8/26/98 --- §515.2,**

***Bertram v. DILHR*, 92-0241-PC-ER, 9/21/94 --- §§774.03(2), 796.15**

***Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90 --- §§722, 730, 774.01, 03(1), .04, .05, 796.15**

***Betz v. UW-Extension*, 88-0128-PC-ER, 12/17/92 --- §§766.03(2), 796.60**

***Betz v. UW-Extension*, 88-0128-PC-ER, 2/8/91 --- §702.01**

***Bever v. DNR & DER*, 92-0749-PC, 3/10/93 --- §403.12(2)**

***Biba v. DP*, 79-367-PC, 4/23/81 --- §403.12(2)**

***Biddick v. DHSS*, 82-127-PC, 10/14/82 --- §506.03**

***Biddle v. DILHR & DHSS*, 85-0118-PC-ER, 8/28/85; rehearing denied, 9/27/85 --- §706.01**

***Billingsley v. DOR*, 87-0132-PC-ER, 7/13/88 --- §736**

***Billingsley & Williams et al. v. DP*, 79-PC-CS-62, etc., 10/2/81 --- §403.12(2)**

***Bisbee v. DHSS*, 82-PC-ER-54, 6/23/83; affirmed by Dane County Circuit Court, *Bisbee v. State Pers. Comm.*, 617-636, 10/3/84 --- §§774.02(2), 786.02(2), 790.02(2), 796.15**

***Bjork v. DFI*, 01-0036-PC-ER, 11/14/01 ---**

***Bjorklund v. DHSS*, 79-327-PC, 2/13/81 --- §§103.15, 302.12, 302.13, 302.14**

***Bjornson v. UW*, 90-0004-PC, 10/4/90; rehearing denied, 1/11/91 --- §615.2**

***Bjornson v. UW-Madison*, 91-0172-PC-ER, 8/26/92 --- §§774.03(2), .05, 786.03(2), 796.60**

***Black et al. v. DP*, 81-266-PC, 11/19/81 --- §103.21(a)**

***Black-Radloff v. DER*, 90-0353-PC, 3/25/91 --- §102.02(2)**

***Blair v. DER*, 84-0098-PC, 11/8/84 --- §403.12(2)**

***Blake v. DHSS*, 82-208-PC, 1/4/84 --- §§202.03, 202.10, 501.01, 510.09**

***Blascoe et al. v. DHSS & DER*, 94-0920-PC, 12/20/95 --- §403.12(16)(m)**

***Bleich v. DHSS & DP*, 79-274-PC, 6/3/81 --- §403.12(2)**

***Blied v. DOT*, 81-290-PC, 3/4/83 --- §517.01**

***Block v. DILHR & DP*, 78-48-PC, 79-104-PC, 5/15/79 --- §403.12(2)**

***Block v. UW-Madison Extension*, 88-0052-PC-ER, 7/27/89 --- §736**

***Bloedow v. DHSS*, 87-0014-PC-ER, etc., 8/24/89 --- §§615.2, 786.02(2), 788.02(2), .04, 796.15**

***Blomquist v. DATCP*, 94-1032-PC, 5/26/95; petition for judicial review dismissed as untimely filed, *Blomquist v. Wis. Pers. Comm.*, 95-CV-230, Douglas County Circuit Court, 12/2/97--§§102.05(3), .10**

***Blood v. DP*, 78-278-PC, 12/17/79 --- §403.12(11)**

***Bloom v. DER*, 92-0088-PC, 8/25/93 --- §§403.12(2), (4)(j), 510.08**

***Bloom v. DHSS*, 85-0026-PC, 4/12/85 --- §103.08(8)**

***Bloss v. DOC*, 99-0079, 0095-PC-ER, 11/3/99 ---**

***Bluhm v. DER*, 92-0303-PC, 6/21/94 --- §§403.12(2), (4)(a), (4)(c), 502.07**

***Blum v. UW & DP*, 78-45-PC, 3/7/79 --- §403.12(2)**

Blumer*, see *Regan & Blumer v. DOT & DER

***Blunt v. DOC*, 01-0134-PC-ER, 1/24/02 ---**

***Board of Regents v. Wis. Pers. Comm. (Hollinger)*, 147 Wis. 2d 406, 433 N.W.2d 273, 11/3/88 --- §742**

***Board of Regents v. Wis. Pers. Comm.*, 103 Wis. 2d 545, 309 N.W. 2d 366 (Court of Appeals, 1981) --- §103.01**

***Boeding v. DER*, 95-0144-PC, 10/22/96 --- §§403.12(2), (4)(b)**

Boehrig*, see *Nagorsen & Boehrig v. DOC & DER

***Boetcher v. DER*, 90-0204-PC, 5/16/91 --- §403.12(2)**

***Bohl v. DOC*, 93-0004-PC-ER, 2/20/95 --- §§788.03(2), 796.60**

***Bohling v. DHFS*, 97-0032-PC-ER, 7/20/99 ---**

***Boinski v. UW-Milwaukee*, 92-0233-PC-ER, 4/23/93 --- §§706.01, .08**

***Boinski v. UW-Milwaukee*, 92-0233-PC-ER, 92-0702-PC, 4/19/93**

(ruling by examiner) --- §§510.09, 730, 732

***Boldon v. DATCP & DER*, 89-0141-PC, 10/4/90 --- §403.12(2)**

***Boldt v. DP*, 81-96-PC, 9/28/83; affirmed by Dane County Circuit Court, *Boldt v. Pers. Comm.*, 83-CV-2733, 3/6/84; affirmed by Court of Appeals District III, 84-864, 2/5/85 --- §403.12(2)**

***Bolton v. State of Wis. Pers. Bd.*, 143-340, 4/21/75 --- §517.02(1)**

***Bolton v. Wettengel*, 73-142, 7/3/74 --- §§202.09, 505.02(1), 517.02(2), (3), 518.01**

***Bong & Seemann v. DILHR*, 79-167-PC, 11/8/79 --- §§102.14, 522.05(l)(e), 522.05(2)**

***Borkenhagen v. DER*, 85-0076-PC, 5/15/86 --- §§403.12(2), (12)**

***Borkenhagen*, see *Lustig et al*.**

***Bornfleth v. DER*, 85-0200-PC, 5/29/86 --- §§403.12(2), (7),**

***Bornick v. DOC*, 91-0084-PC, 4/1/92 --- §§102.05(4), 102.11, 103.08(10)**

***Borowski v. DP & DOA*, 79-278-PC, 3/2/81 --- §403.12(2)**

***Botz v. UW & DP*, 83-0063-PC, 12/7/83 --- §403.12(2)**

***Bouche v. UW & DER*, 96-0095-PC, 10/29/96; rehearing denied, 12/20/96 --- §500.50**

***Boutwell-Pitt v. DWD*, 99-0107-PC-ER, 7/28/99 ---**

***Bower v. UW-Madison*, 95-0052-PC-ER, 8/15/96 --- §§721.01, 773.03(2), 786.01, 788.03(2)**

***Bowers v. UW-Milwaukee*, 78-PC-ER-1, 7/28/80 --- §§784.03(2), 796.60**

***Bowman-Farrell v. CESA #8*, 01-0053-PC-ER, 6/13/01 ---**

***Boxrucker v. DHSS & DER*, 92-0040-PC, 12/29/92 --- §§403.12(2), (4)(f)**

***Boyce v. UW*, 79-PC-ER-33, 2/17/81 --- §§721.32, 788.02(2), 796.25**

***Boyle v. DHSS*, 84-0090, 0195-PC-ER, 9/22/87, modified, 10/21/87 -- §§721.01, 738.01, 780.02(l), .06, 786.02(l), 796.35**

***Boyle v. DHSS*, 84-0090-PC-ER, 2/11/88 --- §706.05**

***Brackemyer v. UW (River Falls)*, 95-0172-PC-ER, 5/28/96 --- §§772.03(2), 796.35**

***Brady v. DER*, 91-0085-PC, 9/19/91 --- §102.10**

***Braith v. DER*, 83-0105-PC, 4/25/84 --- §§403.12(2), (4)(u),**

***Brandenburg v. DER*, 91-0063-PC, 3/19/92 --- §403.12(2)**

***Brandt v. DNR & DER*, 87-0155-PC, 11/3/88 --- §§403.12(2), (12)**

***Branski v. UW-Milwaukee*, 82-PC-ER-98, 2/29/84 --- §§721.26, 782.03(2)**

***Brassington v. DHSS & DER*, 92-0038-PC, 2/8/93 --- §403.12(2)**

***Bratley v. DILHR*, 83-0036-PC-ER, 7/21/83 --- §§702.07, 712.4**

***Braun & Merila v. DOT & DP*, 82-144-PC, 82-159-PC, 6/9/83 --- §403.12(2)**

***Brazeau & Johnson v. DP*, 79-PC-CS-357, 9/4/81 --- §403.12(2)**

***Breckon v. DOR*, 93-0199-PC, 10/4/94 --- §§202.10(2), .5(5)**

***Brehmer et al. v. DER*, 85-0218-PC, 4/4/86; explained in denial of petition for rehearing, 5/23/86 --- §§103.05, .18**

***Breitzman v. DP*, 81-61-PC, 1/27/82 --- §403.12(2)**

***Brenon v. UW*, 96-0016-PC, 11/19/99 ---**

***Brenon v. UW*, 96-0016-PC, 9/1/99 ---**

***Brenon v. UW*, 96-0016-PC, 2/12/98 --- §§202.10(2), 205.8(1), 210.2**

***Bresler v. UW & DP*, 79-37-PC, 8/30/79 --- §102.05(9)**

***Brey v. DHSS & DER*, 89-0051-PC, 2/22/90 --- §§403.12(15)(a), (15)(m)**

***Brice v. DOC*, 00-0136-PC-ER, 00-0172-PC, 8/13/01 ---**

***Bricklayers & Allied Craftsmen Union #8 and Radish v. DHSS*, 81-367-PC, 5/28/82 --- §§403.12(2), 503.50**

***Bridges v. DHSS*, 85-0170-PC-ER, 3/30/89 --- §§770.03(1), 784.03(1), 788.03(1), 796.60**

***Bridges v. DHSS*, 85-0170-PC-ER, 5/17/88 --- §518.01**

***Briggs v. DILHR*, 81-172, 445, 330, 352-PC, 1/8/82 --- §103.08(3)**

***Briggs v. DNR & DER*, 95-0196-PC, 10/22/96 --- §521.7(1)**

***Brink v. DHSS & DER*, 91-0061-PC, 8/26/92 --- §403.12(2)**

***Briskey v. DHSS*, 91-0016-PC, 4/5/91 --- §517.01**

***Broady-Dietz v. DOA & DER*, 92-0563-PC, 1/25/94 --- §403.12(2)**

***Brockington v. DOT & DMRS*, 91-0031-PC, 5/29/91 --- §§103.08(8), (10)**

***Brodbeck v. Warren & Wettengel*, 74-114, 11/25/75 --- §213**

***Brooke v. UW & DER*, 99-0034-PC, 5/15/00 ---**

***Brooke v. UW & DER*, 99-0034-PC, 2/28/00 ---**

***Brooks v. DOC*, 00-0142-PC, 10/4/00 ---**

***Broske v. DER*, 84-0171-PC, 1/2/85 --- §403.12(2)**

***Brown v. DOC*, 99-0006-PC, 8/25/99 ---**

***Brown v. DOC*, 99-0006-PC, 4/21/99 ---**

Brown*, see *Augustine & Brown v. DATCP [& DER]

Brown*, see *Guzniczak & Brown v. DER & [DHSS]

***Browne v. DHSS*, 85-0072-PC-ER, 8/5/87 --- §§770.02(2), 784.02(2), 786.02(2), 788.02(2), 796.15, .60, .70**

***Brownlee v. State Public Defender*, 83-0107-PC-ER, 12/6/85 --- §§518.02, 768.02(l), 784.02(2), 796.15**

***Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98 --- §§702.32(2), .50, 788.25, 792.04, 796.95**

***Brummond v. UW (La Crosse)*, 84-0178-PC-ER, 10/10/85 --- §§768.02(l), 774.02(2), 796.15**

***Brummond v. UW (Parkside)*, 83-0045-PC-ER, 5/30/86 --- §§768.02(2), 774.02(2), 796.60**

***Brummond v. UW-Madison*, 84-0185-PC-ER, 85-0031-PC-ER, 4/1/87 -- §§774.02(2), .05, .06, 786.02(2), 796.60**

***Bruns v. DOT*, 89-0058-PC-ER, 2/7/90 --- §706.03**

***Buchanan v. DOR*, 81-289-PC, 12/8/82 --- §202.04**

***Buchen v. DP*, 82-151-PC, 8/17/83, --- §403.12(2)**

***Buckley v. DER*, 91-0018-PC, 5/1/91 --- §103.18**

***Buechner & Koberle v. DER & UW*, 85-0089-PC, 11/22/85; reversing an interim decision issued, 9/13/85 --- §103.210)**

Bugge*, see *Mack & Bugge v. DER

***Buller v. UW*, 80-PC-ER-49, 10/14/82; factual findings modified by order on 12/2/82; appeal dismissed by Dane County Circuit Court, *Buller v. Pers. Comm.*, 83-CV-8, 12/14/89**

***Burgus v. DP*, 81-38-PC, 7/21/81 --- §403.12(2)**

***Burkhalter v. DP*, 80-389-PC, 11/19/81 --- §403.12(2)**

***Burnard v. DOA*, 83-0040-PC-ER, 1/30/85 --- §§774.02(2), .05, 796.60**

***Burnard v. DOA*, 83-0040-PC-ER, 5/25/83 --- §706.01,**

***Burns v. UW-Madison*, 96-0038-PC-ER, 4/8/98 --- §§503.01, 719**

***Burnson v. DER*, 92-0096, 0847-PC, 10/24/94 --- §§403.12(2), .12(13)**

***Burton v. DNR*, 82-PC-ER-36, 8/31/83 --- §§702.18(l), 772.02(2), 774.02(2), 796.60**

***Busch v. DHSS*, 78-PC-ER-8, 5/15/81; reversed in part, affirmed in part, by Dane County Circuit Court, *DHSS v. Pers. Comm. (Busch)*, 81-CV-2997, 3/9/82 --- §§774.03(l), 796.15**

***Busch v. HEAB*, 82-58-PC, 6/25/82 --- §103.12**

***Bush v. UW-Madison*, 93-0069-PC-ER, 9/30/93 --- §§734, 736**

***Butler v. DHSS*, 95-0160-PC-ER, 1/14/98 --- §§788.03(2), 788.25, 796.39**

***Butler et al. v. DILHR & DER*, 79-138-PC, 9/29/80 --- §403.04(5)**

***Butler et al. v. DILHR & DER*, 79-138-PC, 11/8/79 --- §102.10**

***Butzlaff v. DER*, 91-0043-PC-ER, 8/8/91 --- §§702.005, 760.9**

***Butzlaff v. DHSS*, 90-0097-PC-ER, 1/23/96; affirmed by Dane County Circuit Court, *Butzlaff v. State of Wis. Pers. Comm.*, 96-CV-0431, 3/19/97 --- §§773.03(2), 796.60**

***Butzlaff v. DHSS*, 90-0097, 0162-PC-ER, 4/2/93 --- §730**

***Butzlaff v. DHSS*, 90-0097-PC-ER, 9/19/90; reversed by Dane County Circuit Court, *Butzlaff v. Wis. Pers. Comm.*, 90-CV-4043, 4/23/91; affirmed by Court of Appeals, 166 Wis. 2d 1028, 1/28/92 --- §§702.01**

***Butzlaff v. DHSS*, 90-0162-PC-ER, 11/13/92**

***Butzlaff v. DHSS*, 90-0162-PC-ER, 4/5/91 --- §706.07**

***Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92 --- §§702.50, 773.02(2), 778.02(2), 786.02(2), 792.04, 796.25**

***Butzlaff v. Wis. DHFS*, Dane County Circuit Court , 97 CV 1319, 2/4/98 --- §717.3**

***Butzlaff v. Wis. DHFS*, Dane County Circuit Court , 97 CV 1319, 9/3/97 --- §702.01**

***Butzlaff v. Wis. Pers. Comm.*, Dane County Circuit Court, 90-CV-4043, 4/23/91; affirmed by Court of Appeals, 166 Wis. 2d 1028, 1/28/92 --- §702.17**

***Byrd v. DP*, 81-350-PC, 11/24/82 --- §403.12(2)**

***Byrne v. DOT & DMRS*, 92-0672-PC, 92-0152-PC-ER 9/8/93; affirmed by Dane County Circuit Court, *Byrne v. State Pers. Comm.*, 93-CV-3874, 8/15/94 --- §§615.2, 702.18(1), 774.03(2), 784.03(2), 796.15**

***Byrne v. State Pers. Comm.*, Dane County Circuit Court, 93-CV-3874, 8/15/94 --- §§102.01, 615.2**

C

Cady*, see *DER v. PC (Cady)

***Cady v. DP*, 78-2-PC, 9/5/79; affirmed, *DER v. Wis. Pers. Comm. (Cady)*, Dane County Circuit Court, 79-CV-5099, 7/24/81 --- §§130.5(6), .7(8), 503.50**

***Campbell v. UW & DER*, 99-0091-PC, 5/3/00 ---**

***Canter-Kihlstrom v. UW-Madison*, 86-0054-PC-ER, 6/8/88 --- §§702.50, 712.2, .4, 732**

***CaPaul v. UW-Extension*, 92-0225-PC-ER, 1/27/93 --- §706.05**

***Card v. UW & DER*, 83-0198-PC, 2/2/84 --- §§403.12(2), (4)(f)**

***Carey v. DMRS & DOR*, 85-0179-PC, 3/13/86 --- §§103.01, 420**

***Carlin v. DHSS & DER*, 94-0207-PC, 12/22/94 --- §102.05(10)**

***Carlin v. DHSS & DER*, 94-0207-PC, 6/22/95 --- §403.12(13)**

***Carpenter v. DOC & DER*, 97-0115-PC, 11/18/98 --- §403.12(2), (4)(a),**

***Carr*, see *Lustig et al*.**

***Carratt v. DOC*, 98-0063-PC, 98-0143-PC-ER, 1/19/01 ---**

***Carratt v. DOC*, 98-0063-PC, 98-0143-PC-ER, 4/7/00 ---**

***Carroll v. DER*, 86-0112-PC, 1/8/87 --- §§403.12(2), (4)(c)**

***Carroll v. DER*, 94-0434-PC, 3/20/96 (ruling by examiner) --- §506.03**

***Carroll v. DHSS & DER*, 93-0012-PC, 5/27/94 --- §403.12(2)**

***Carter v. DNR & DER*, 97-0052-PC, 2/11/98 --- §403.12(2)**

***Carter v. Wis. Pers. Comm.*, 98-CV-2620, 1/28/99 --- §§505.50, 735**

***Casper v. DHSS*, 80-320-PC, 6/3/81 --- §102.05(10)**

***Casper v. UW & DER*, 96-0013-PC, 6/28/96 --- §§102.02(5), .05(10)**

***Cassity v. DHSS*, 82-195-PC, 11/11/82 --- §103.09**

***Cepress v. DP*, 80-16-PC, 6/3/81 --- §403.12(2)**

***Cernohous v. UW & DER*, 89-0131-PC, 9/13/90 --- §§103.03, .11, 403.12(2), (6), 502.75**

***Cestkowski v. DOC*, 90-0403-PC, 2/8/91 --- §§103.08(10), .20**

***Chadwick v. DMRS & DHSS*, 91-0177-PC, 8/26/92 --- §§403.07, 506.50**

***Chadwick v. DHSS*, 81-PC-ER-14, 4/2/82 --- §§717.03, 788.05**

***Chadwick v. DMRS & DHSS*, 91-0177-PC, 10/21/91 --- §§103.21(1), 506.50**

***Chandler v. DPI*, 81-333-PC, 82-94-PC, 11/17/83 --- §§302.13, .15**

***Chandler v. UW-La Crosse*, 87-0124-PC-ER, 88-0009-PC-ER, 8/24/89 --- §§766.02(2), 786.02(2), 788.02(2), 796.15**

***Chapman v. DILHR*, 79-247-PC, 8/19/80; aff'd by Dane County Circuit**

Court, *Chapman v. PC*, 80-CV-5422, 9/8/81 --- §102.05(13)

***Chase v. DER*, 85-0033-PC, 3/13/86 --- §§403.12(2), (10), (11)**

***Chatfield v. DOT & DER*, 83-0171-PC, 3/14/84 --- §403.12(2)**

***Chavera v. DILHR*, 90-0404-PC, 90-0181-PC-ER, 5/21/93; affirmed by Dane County Circuit Court, *Chavera v. Wis. Pers. Comm.*, 93-CV-2441, 8/25/94; affirmed by Court of Appeals, 94-2674, 6/1/95 --- §§660, 774.05**

***Chaykowski v. DOD & DMRS*, 91-0136-PC, 10/17/91 --- §§102.01, .05(9), 403.04(1)**

***Chelcun v. UW-Stevens Point*, 91-0159-PC-ER, 3/9/94 --- §§702.50, 706.05, .07, 712.5, 788.25**

***Chiat v. WCCJ*, 78-152-PC, 6/5/79 --- §205.1**

***Chiodo v. UW (Stout)*, 90-0150-PC-ER, 6/25/96; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98 --- §§730, 766.03(1), 796.15**

***Chiodo v. UW (Stout), 90-0150-PC-ER*, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98 --- §§722, 742**

***Chiodo v. UW (Stout)*, 93-0124-PC-ER, 5/25/01 ---**

***Chou v. DNR*, 00-0019-PC-ER, 1/25/02 ---**

***Chou v. DNR*, 00-0019-PC-ER, 8/28/00 ---**

***Chou v. DNR*, 01-0147-PC-ER, 11/29/01 ---**

***Christensen v. DER*, 86-0103-PC, 3/18/87 --- §403.12(2)**

***Christensen v. DHSS & DP*, 77-62, 1/5/78 --- §510.07**

***Christensen v. DNR & DER*, 89-0097-PC, 90-0125-PC, 11/16/90 --- §403.12(2)**

***Christensen v. DNR & DER*, 90-0368-PC, 5/16/91 --- §403.12(2)**

***Christensen v. DOC & DER*, 90-0144-PC-ER, 2/3/94 --- §§784.03(2), 788.04, 796.25**

***Christensen v. DOC & DER*, 91-0210-PC, 4/17/92 --- §403.12(2)**

***Christensen v. UW-Stevens Point*, 91-0151-PC-ER, 1/24/92 --- §§702.005, 706.01**

***Christensen v. UW-Stevens Point*, 91-0151-PC-ER, 11/13/92 --- §706.03**

***Christie v. Office of the Fond du Lac County District Attorney*, 96-0003-PC-ER, 2/25/98 ---- §§510.09, 730, 732**

***Christofferson et al. v. DER & UW*, 90-0058-PC, etc., 11/27/90 --- §403.12(2)**

***Christofferson et al. v. DER & UW*, 90-0058-PC, etc., 2/7/91 --- §521.7(1)**

***Chyba v. DOC*, 94-0500-PC, 7/23/96 --- §§202.10(2), 210.2**

***Cihlar v. DHSS*, 79-106-PC, 8/30/79 --- §103.20**

***Cirilli & Jones v. DP*, 81-39-PC, 4/10/81 -- §102.16**

***Cirilli & Lindner v. DP*, 81-39-PC, 8/4/83 --- §§403.12(2), (4)(t)**

***Clark v. DOR*, 80-98-PC, 6/3/81 --- §202.10(1)**

***Clark v. DOT*, 79-117-PC, 10/17/80 --- §§202.04, 210.5(l), 501.02(l)**

***Cleary v. UW-Madison*, 84-0048-PC-ER, 11/21/85 --- §§522.10, 714**

Cleary-Hinz*, see *Nesse & Cleary-Hinz v. UW & DER

***Cleveland v. DHSS*, 86-0104-PC-ER, 7/8/87 --- H704, 706.07**

***Cleveland v. DHSS*, 86-0133, 0151, 0152-PC, 7/8/87 --- §102.13**

***Cloutier v. DNR*, 81-34-PC, 4/2/82 --- §103.08(10)**

***Clover et al. v. DP*, 79-PC-CS-165, etc., 1/27/82 --- §403.12(2)**

***Cody et al. v. DNR & DER*, 82-214,etc.-PC, 6/26/84, --- §403.12(2)**

***Coenen v. UW*, 99-0039-PC, 7/14/99 ---**

***Coequyt v. DER*, 92-0189-PC, 8/11/93 --- §§403.12(2), (4)(b)**

***Coffaro & Thompson v. DER*, 92-0348, 0352-PC, 7/27/94 --- §§403.12(2), (4)(f)**

***Coffey v. DHSS [DHFS]*, 95-0076-PC-ER, 7/16/97 --- §§511.20, 515.2, 732**

***Coffey v. UW & DER*, 86-0141-PC, 7/22/87 --- §403.12(2)**

***Cohen v. DHSS*, 84-0072-PC, etc., *Cohen v. DHSS & DER*,**

84-0094-PC, 2/5/87 --- §240.1

***Cohen v. DP*, 81-208-PC, 1/28/82 --- §103.08(9)**

***Cohn v. DHSS & DER*, 88-0028-PC, 6/29/88 --- §103.03**

***Cohn v. DHSS*, 88-0028-PC, 1/25/89 --- §§403.12(17)(a), (17)(m)**

***Cole v. DMRS*, 84-0013-PC, 4/25/84 --- §403.04**

***Cole v. UW*, 79-PC-ER-50, 1/13/81 --- §§728.01, 786.03(2), 788.03(2), 796.60**

***Collins v. DHSS*, 83-0080-PC-ER, 8/17/83 --- §702.01**

***Collins v. DOT & DER*, 84-0105-PC, 5/9/85 --- §§403.12(2), (15)(m), (17)(m)**

***Collins v. UW & DER*, 85-0165-PC, 8/20/86 --- §403.12(2)**

***Conkle v. DOA & DP*, 81-100-PC, 12/16/81 --- §403.12(2)**

***Conklin v. DNR*, 82-PC-ER-29, 7/21/83 --- §§721.01, 760.01, 766.03(l), 796.37**

***Conley v. DHSS & DP*, 83-0075-PC, 9/28/83 --- §102.05(10)**

***Conley v. DHSS*, 83-0075-PC, 5/18/84 --- §517.01**

***Conley v. DHSS*, 83-0075-PC, 5/23/84 --- §§403.13, 517.01**

***Conley v. DHSS*, 84-0067-PC-ER, 6/29/87 --- §§721.18, 730, 774.01, 03(2), .05, 796.35, .60**

***Conner v. WHEDA*, 93-0154-PC-ER, 12/14/94 --- §702.01**

***Conrady & Janowski v. DILHR & DP*, 80-363-PC, 81-PC-ER-9 & 19, 11/9/83 --- §§403.12(2), 726, 788.02(l), 796.40**

***Conrady & Janowski v. DILHR & DP*, 81-PC-ER-9, 81-PC-ER-19, 3/27/85 --- §726**

Conrady*, see *Janowski & Conrady v. DER

***Conroy & Nelson v. DER*, 84-0047, 0048-PC, 11/21/84 --- §403.12(2)**

***Cook v. Weaver*, 74-144, 3/22/76 --- §103.01(6)**

***Corcoran v. DHSS*, 79-147, 199-PC, 2/15/80 --- §103.08(10)**

***Corcoran v. DHSS*, 86-0175-PC, 2/5/87 --- §103.08(8)**

***Corcoran v. DHSS*, 86-0175-PC, 4/29/87 --- §690**

***Cordle v. DATCP*, 89-0037-PC, 8/24/89 --- §103.05, .20**

***Corning v. DER & DP*, 82-185-PC, 10/27/82 --- §§103.18, 502.75**

***Costa & Hollister v. DER*, 92-0459, 0460-PC, 5/16/94 --- §§403.12(2), (12)**

***Cothrine v. DPI*, 00-0092-PC-ER, 10/9/00 ---**

***Coulter v. DOC*, 90-0355-PC, 1/24/91 --- §§102.05(6), 103.05, .20**

***Coulter v. DOC*, 90-0355-PC, 1/24/92 --- §683**

***Courchane v. DOT*, 01-0100-PC-ER, 4/19/02 ---**

***Cowie & Decker v. DHSS*, 80-PC-ER-115 and 114, 5/28/82 --- §§788.01, 788.02(2), 796.55**

***Cowie v. DHSS*, 80-PC-ER-115, 4/15/83 --- §§717.03, 766.04, 788.03(l), 796.55**

***Cox v. DER*, 92-0806-PC, 11/3/94 --- §§103.18, .21(1), 403.12(2), 502.07**

***Cozzens-Ellis v. UW*, 87-0085-PC, 9/26/88; affirmed by Dane County Circuit Court, *Cozzens-Ellis v. Wis. Pers. Comm.*, 88 CV 5743, 4/17/89; affirmed, 155 Wis. 2d 271, 455 N.W. 2d 246, (Court of Appeals, 1990) --- §102.05(6)**

***Cozzens-Ellis v. UW-Madison*, 87-0070-PC-ER, 2/26/91 --- §§518.02, 721.01, 784.02(2), 786.02(2), 788.02(2), 796.15**

***Craft v. DHSS*, 80-159-PC, 6/11/81; aff'd by Dane County Circuit Court, *DHSS (Percy) v. Wis. Pers. Comm. (Craft)*, 81-CV-3310, 6/28/83 --- §670**

***Cramey v. DER*, 92-0268-PC, 6/4/93 --- §403.12(2)**

***Crary v. DNR & DER*, 89-0133-PC, 6/1/90 --- §§403.12(2), (4)(f), (4)(w), (12)**

***Cravillion v. Wis. Lottery*, 91-0213-PC, 92-0004-PC, 5/7/93 --- §522.01(3)**

Crawley*, see *Krebs & Crawley v. DILHR

***Creviston & Anderson v. DER*, 92-0099-PC, 12/17/92 --- §403.12(2)**

Crisp*, see *Gerseth & Crisp v. DER

***Critchley v. UW & DER*, 86-0037-PC, 1/8/87 --- §§403.12(2), (4)(f), (12),**

***Crocker v. DOT*, 81-28-PC, 12/18/81 --- §403.12(2)**

***Cronin v. DHSS*, 82-118-PC, 9/23/82 --- §102.14**

***Cross-Madsen et al. v. UW & DER*, 92-0828-PC, 7/30/93 --- §§103.05, .20**

***Crownhart v. Investment Board*, 87-0170-PC-ER, 1/13/88 --- §702.03**

***Cruz v. DER*, 00-0083-PC, 7/19/00 ---**

***Cuff v. DP*, 79-PC-CS-100, 12/17/80 --- §403.12(2)**

***Cunningham v. DOC*, 98-0206, 99-0050-PC-ER, 7/20/99 ---**

***Cunningham v. DOC*, 99-0050-PC-ER, 1/19/01 ---**

***Curtis v. DP*, 81-192-PC, 4/15/82 --- §403.12(2)**

***Curtis v. UW*, 79-84-PC, 1/15/79 --- §403.12(2)**

***Curwen v. UWHCB*, 01-0098-PC-ER, 1/24/02 ---**

***Cutts v. DER*, 92-0472-PC, 7/24/95 --- §§403.12(2), (12), (15)(a)**

***Cygan v. DOC*, 96-0167-PC-ER, 1/28/98 --- §§508.6, 732, 724**

***Cygan v. DOC*, 96-0167-PC-ER, 9/10/97 --- §702.26**

***Czeshinski v. DP*, 80-6-PC, 4/10/81 --- §403.12(2)**

D

***Dahl v. UW-Milwaukee*, 84-0205-PC-ER, 11/7/85 --- §706.01**

***Dahlberg v. UW-River Falls*, 88-0166-PC-ER, 89-0048-PC-ER, 3/29/94 --- §§786.03(2), 788.03(2), .25, 796.30, .95**

***Dahm v. Wis. Lottery*, 92-0053-PC-ER, 8/26/92 --- §§702.50, 717.2**

***Dalton v. DHSS*, 87-0168-PC-ER, 9/26/88 --- §702.03**

***Dama v. DOC*, 96-0126-PC-ER, 5/19/99 ---**

***Daniels & Johnson v. DP*, 81-285, 286-PC, 7/5/84 --- §403.12(2)**

***Danielski et al. (Siehoff & Rau) v. DER*, 85-0196-PC, 9/17/86 -- §§403.12(2), (4)(f), (12),**

***Darland v. UW & DER*, 89-0160-PC, 7/12/90 --- §§403.12(2), 502.75, 510.11**

***Darnell v. DP*, 79-PC-CS-225, 6/3/81 --- §403.12(2)**

***Darnill v. DHSS & DMRS*, 87-0194-PC, 5/5/88 --- §102.05(6)**

***Darrington v. DOC*, 97-0108-PC-ER, 12/3/97 --- §§732, 772.01**

***Dasgupta v. UW-Eau Claire*, 78-PC-ER-22, 2/19/80 --- §780.02(l), 796.15**

***Davidson v. DP*, 81-291-PC, 1/20/83 --- §§403.12(2), .12(4)(w)**

Davies*, see *ACE & Davies v. DMRS

***Davis v. DHSS*, 82-1-PC, 6/25/82 --- §103.21(a)**

***Davis v. ECB*, 91-0214-PC, 12/5/94 --- §§521.2, .7(2)**

***Davis v. ECB*, 91-0214-PC, 5/14/92 --- §§103.21(1), 240.1, 302.005**

***Davis v. ECB*, 91-0214-PC, 6/12/92 --- §§102.05(10), (13), 103.13, 201.01, 202.10(2), 240.1, 501.02(1), 502.04**

***Davis v. UW-Stout*, 82-PC-ER-129, 1/17/85 --- §§784.02(2), 796.15**

***Davison et al. v. DER*, 90-0243,0263-PC, 5/1/91 --- §403.12(2)**

***Davison v. DPI*, 92-0191-PC, 1/27/93 --- §§240.1, 625.01**

***Dawsey v. DHSS*, 89-0061-PC-ER, 10/29/92 --- §§706.05, 712.5**

***Day et al. & Jerdee v. DILHR & DER*, 95-0195, 0201-PC, 9/17/96 --- §§103.03, .18, 403.12(2)**

***Dayton v. DHSS & DER*, 85-0021-PC, 6/11/87 --- §§403.12(l)(d), .12(2), . 12(4)(a)**

Decker*, see *Cowie & Decker v. DHSS

***Declaratory Ruling*, see *Paul v. DHSS & DMRS*, 81-PC-ER-69 & 82-156-PC, 10/11/84**

***DeJongh v. DFI*, 98-0121-PC-ER, 6/10/99 ---**

DeLaMater*, see *Roberts & DeLaMater v. DER

***Delaney v. State Investment Board*, 79-21-PC, 11/8/79 --- §630.03**

Delaney*, see *Tuttle, Oinonen & Delaney v. DATCP & DER

***Dell et al. v. DOT & DER*, 87-0202-PC, 10/20/88; rehearing denied 12/8/88 --- §403.12(16)(m)**

***DeMarb v. DILHR & DP*, 81-391-PC, 1/10/83 --- §403.12(2)**

***Dement v. Baum & Wettengel*, 73-1, 10/24/73 --- §102.04**

***Deneen v. DOR*, 88-0093-PC, 3/24/89 --- §210.5(1)**

***DePagter v. UW-Madison*, 93-0003-PC-ER, 7/22/93 --- §§517.55, 717.3, 738.1**

***Deppen v. DILHR & DER*, 91-0083-PC, 3/5/92 --- §§103.11, .18**

***Deppen v. UW-Madison*, 90-0110-PC-ER, 8/8/90 --- §710**

***DOT (Beaverson) v. Wis. Pers. Comm.*, 176 Wis. 2d 731, 500 N.W. 2d 545 (6/9/93) --- §724**

***DER & DP v. PC (Doll)*, Dane County Circuit Court, 79-CV-3860, 9/2/80; appeal settled, Court of Appeals, 80-1689, 2/9/81 --- §403.12(4)(b)**

***DER et al. v. Pers. Comm. & WSEU*, Dane County Circuit Court, 80-CV-4433, 12/9/82 --- §512.01(l)**

***DER v. Wis. Pers. Comm. (Anderson)*, Dane County Circuit Court, 87-CV-7397, 11/7/88 --- §§521.2, .5**

***DER v. Wis. Pers. Comm. (Cady)*, Dane County Circuit Court, 79-CV-5099, 7/24/81 --- §§130.5(6), .7(8), 503.50**

***DER v. Wis. Pers. Comm. (Klepinger)*, Dane County Circuit Court, 85-CV-3022, 12/27/85 --- §§103.03, 103.21(l), 403.12(13), 510.50**

***Desrosiers v. DMRS*, 87-0078-PC, 8/5/87; motion for reconsideration denied, 9/10/87 --- §§102.05(10), 102.10**

***Desrosiers v. DMRS*, 87-0078-PC, 9/10/87 -- §102.10**

***DeVries v. DOC*, 98-0158-PC-ER, 6/5/00 (ruling by examiner) ---**

***Dewane v. UW-Madison*, 99-0018-PC-ER, 12/3/99 ---**

***Dewane v. UW-Madison*, 99-0018-PC-ER, 7/28/99 ---**

***DHSS v. Pers. Comm. (Busch)*, Dane County Circuit Court, 81-CV-2997, 3/9/82 --- §§788.03(2), 796.15**

***DHSS v. Pers. Comm. (Hovel)*, Dane County Circuit Court, 79-CV-5630, 1/29/81 --- §103.08(10)**

***DHSS v. Pers. Comm. (Lyons)*, Dane County Circuit Court, 80-CV-4948, 7/14/81 --- §502.03(l)**

***DHSS v. State Pers. Bd. (Ferguson)*, 84 Wis. 675, 267 N.W.2d 644 (1978) -- §103.01(1)**

***DHSS v. Wis. Pers. Comm. (Eschenfeldt)*, Dane County Circuit Court, 81-CV-5126, 4/27/83 --- §§130.5(6), .7(8)**

***DHSS v. Wis. Pers. Comm. (Paul)*, Dane County Circuit Court, 81-CV-1635, 9/18/83 (dictum) --- §§130.5(2), .7(6), 615.2**

***Dicks v. Schmidt*, 74-103, 2/25/75 --- §103.08(1)**

***DILHR & DER v. Pers. Comm. (Foust)*, aff'd by Dane County Circuit Court, 85-CV-3206, 7/29/86 --- §§403.12(17), 501.03,**

***DILHR & Martin v. Pers. Comm.*, Dane County Circuit Court, 79-CV-389, 6/30/80 --- §519.03**

Disterhaft*, see *Peabody & Disterhaft v. DILHR & DER

***Dittberner v. DOC & DHFS*, 01-0065-PC-ER, 11/14/01 ---**

***Division of Personnel v. Pers. Comm.(Marx)*, Court of Appeals District IV, 84-1024, 11/21/85 --- §403.12(4)(b)**

***Doan v. DP*, 78-11-PC, 4/15/82 --- §403.12(2)**

***Dobbins v. DHSS*, 81-91-PC, 6/3/81 --- §103.05**

***Dobratz v. DNR & DP*, 82-40-PC, 2/9/83 --- §§403.12(2), 403.12(11)**

***Doelger v. DNR & DER*, 85-0011-PC, 9/26/85 --- §403.12(2)**

***Doemel v. DER*, 94-0146-PC, 5/18/95 --- §§403.12(2), .12(4)(k), .12(12)**

***Dohve v. DOT*, 84-0200-PC-ER, 11/3/88 --- §717.3**

***DOJ (Dowd & Linssen) & Linssen v. DER*, 85-0101, 0102, 0116-PC, 1/13/87 §403.12(2)**

Doll*, see *DER & DP v. PC (Doll)

***Dolphin v. DATCP & DP*, 79-64-PC, 7/26/82 --- §403.12(2)**

***Dolphin v. DATCP*, 79-PC-ER-31, 5/26/83 --- §518.02**

***Dolsen v. UW & DER*, 93-0066-PC, 6/21/94 --- §§403.12(2), (4)(s), (11)**

***Dombrowski v. UW & DER*, 88-0054-PC, 11/30/88 --- §§403.12(2), (11)**

***Donahue v. DATCP & DP*, 79-189-PC, 3/21/80 --- §403.12(13)**

***Doran & Kelm v. DER*, 94-0277, 0278-PC, 3/7/96 --- §403.12(2)**

***Dorf v. DOC*, 93-0121-PC-ER, 5/27/94 --- §§506.04, 724**

***Dorf v. DOC*, 93-0121-PC-ER, 6/9/95 --- §§742, 788.03(2), 796.15**

***Dorn v. DER*, 90-0154-PC, 4/5/91 --- §403.12(2)**

***Doro v. UW*, 92-0157-PC-ER, 8/15/96 --- §§732, 734**

***Doro v. UW-Parkside*, 92-0157-PC-ER, 12/28/93 --- §706.05**

***Dorsey et al. v. DER*, 94-0471-PC, etc., 1/23/96 --- §§403.12(2), (4)(b), 517.01**

***DOT (Potts) v. DP*, 80-362-PC, 6/25/82 --- §403.12(2)**

***DOT et al. v. DER*, 84-0071,etc.-PC, 9/20/85, rev'd by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 85-CV-5383, 7/9/86; rev'd by Court of Appeals District IV 86-1483, 1/22/87 --- §§403.12(4)(b), (c), (d) (12), (15),**

***DOT v. PC (Jansen)*, 81-CV-0648, 9/30/81 --- §403.12(2)**

DOT v. PC (Jansen)*, see *Jansen et al. v. DOT & DP

***DOT v. Pers. Comm. (Kennel, Brauer & Murphy)*, Dane County Circuit Court, 79-CV-1312, 7/21/80 --- §§103.08(l), .08(7)**

DOT v. Pers. Comm. (Porter)*, see *Porter v. DOT

DOT v. Pers. Comm. (Stasny)*, see *Stasny v. DOT

Dowd*, see *DOJ (Dowd & Linsen) & Linsen v. DER

***Doyle v. DER*, 89-0016-PC, 6/15/90 --- §403.12(2)**

***Doyle v. DER*, 94-0191-PC, 5/26/95 --- §403.12(2)**

***Doyle v. DNR & DMRS*, 86-0192-PC, 2/8/89, rehearing denied, 3/17/89 --- §521.5**

***Doyle v. DNR & DMRS*, 86-0192-PC, 3/24/87 --- §§506.03, .04,**

***Doyle v. DNR & DMRS*, 86-0192-PC, 87-0007-PC-ER, 11/3/88 --- §§420, 511.08, 521.5, 732**

***Drewieck v. UW*, 92-0810-PC, 6/25/93 --- §§202.03, 210.5(5)**

***Drigot v. DOT & DER*, 00-0099-PC, 3/21/01 ---**

***DuBois v. DOC & DER*, 00-0151-PC, 12/13/00 ---**

***Duello v. UW-Madison*, 87-0044-PC-ER, 3/9/90 --- §§521.5, 719, 742**

***Duerst v. DNR & DER*, 90-0188-PC, 1/11/91 --- §403.12(2)**

***Duesterhoeft v. DER*, 90-0343-PC, 12/17/92 --- §403.12(2), (4)(a)**

***Dugan & Fisher v. DMRS*, 88-0043, 0044-PC, 1/13/89 --- §§403.07, 501.03, 502.06**

***Dugan v. DOT & DMRS*, 88-0169-PC-ER, 4/17/92 --- §717.3**

***Dugas v. DHSS*, 86-0073-PC-ER, 87-0143-PC-ER, 7/14/88 --- §706.50**

***Dumas v. Carballo*, 75-111, 3/31/76 --- §101.07, 103.03**

***Duncan v. DOC*, 96-0064-PC-ER, 7/31/97 --- §724**

***Dunn-Herfel v. DOJ & DER*, 94-0043-PC, 12/14/94 --- §§403.12(2), (4)(a), (4)(h)**

***DuPlessis v. DHSS*, 80-PC-ER-111, 3/17/83 --- §517.55**

***DuPuis v. DHSS*, 90-0219-PC, 10/18/90 --- §102.05(6)**

***DuPuis v. DHSS*, 90-0219-PC, 10/4/94 --- §§667, 675.8**

***DuPuis v. DHSS*, 90-0219-PC, 7/25/91 --- §502.75**

***DuPuis v. DHSS*, 90-0219-PC, 9/3/92 --- §§622.02, 630.08, 667, 675.8**

***Duran v. DOC*, 94-0005-PC-ER, 10/4/94 --- §§702.50, 706.01, 712.4, 792.01**

***Duran v. DOC*, 94-0035-PC, 6/21/94 --- §103.20**

***Durfee v. DATCP*, 94-0042-PC-ER, 12/22/94 --- §§788.04, 796.15**

***Durfee v. DOJ*, 94-0047-PC-ER, 12/14/94 --- §§788.04, 796.15**

***Dusso v. DER & DRL*, 94-0490-PC, 11/1/95; explained further, 3/7/96 --- §683**

***Dusso v. DER & DRL*, 94-0490-PC, 12/22/94 --- §103.20**

***Dusso v. DER & DRL*, 94-0490-PC, 3/7/96 --- §§522.03, 683**

E

***Eldred v. DNR & DER*, 87-0158-PC, 11/3/88 --- §§403.12(2), (12)**

***Ellingson v. DNR & DER*, 93-0057-PC, 5/28/96 --- §§403.12(2), (4)(b), (4)(w), 502.07**

***Ellis v. DER*, 92-0548-PC, 3/9/94 --- §§403.12(2), 510.06, .08**

***Ellis v. DHFS*, 99-0080-PC-ER, 7/20/99 ---**

***Ellis v. DOT*, 83-0137-PC-ER, 4/30/86 --- §§784.02(2), 796.40**

***Ellis v. UWHCA*, 98-0052-PC, 8/12/98 --- §103.21(1)**

***Ellsworth & Parrell v. DP*, 83-0021, 0022-PC, 8/23/83 --- §§403.12(2), 403.12(4)(u), 510.08**

***Elmer v. DATCP*, 94-0062-PC-ER, 11/14/96 --- §§702.50, 732**

***Elmer v. UW-Madison*, 88-0184-PC-ER, 8/24/89 --- §§702.18(1), 760.2**

***Elvord v. DOT*, 95-0126-PC-ER, 4/9/96 (ruling by examiner) --- §724**

Emery*, see *Mincy & Emery v. DER

***Emmerich v. DER*, 00-0165-PC, 1/19/01 ---**

***Emmons v. DHSS*, 93-0097, 0112-PC-ER, 11/27/95 --- §§773.01, .03(2), .04, 796.60**

***Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98 --- §§774.03(2), .05, 786.03(2), 796.37, .50, 796.95**

***Engebregsten v. DHSS & DER*, 85-0156-PC, 3/13/86 --- §§403.12(2), (11), (12),**

***Engel v. UW-Oshkosh*, 89-0103-PC-ER, 8/26/92 --- §§766.03(2), 774.03(2), 796.60**

***Enghagen v. DPI & DER*, 95-0123-PC, 2/15/96; rehearing denied, 4/4/96 --- §§403.12(13), 522.05(2)**

***Enghagen v. DPI & DER*, 95-0123-PC, 4/4/96 --- §403.12(13)**

***England v. DOC*, 97-0151-PC, 9/23/98 --- §§202.10(2), 2055.8(1), 210.5(1)**

***Enke v. DOT*, 97-0202-PC-ER, 12/16/98 --- §§714.1, 730, 788.03(2), .04, 796.30**

***Erdmann v. UW-Stevens Point*, 92-0104-PC-ER, 4/23/93 --- §§712.4,**

788.25

***Erickson v. WGC*, 92-0207-PC-ER, 92-0799-PC, 5/15/95 --- §§202.10(1), 210.2, 768.03(2), 786.03(2), 788.03(2), 796,50, .95**

***Ernst v. DATCP*, 97-0152-PC, 7/1/98 --- §§103.20, .21(1), 503.50**

***Escalada-Coronel v. DMRS*, 86-0189-PC, 11/26/86 --- §403.04(l)(h)**

***Escalada-Coronel v. DMRS*, 86-0189-PC, 4/2/87 --- §§521.2, .5**

***Eschenfeldt v. DP & DHSS*, 78-257-PC, 7/22/81; aff'd except as to remedy by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm.*, 81-CV-5126, 4/27/83 --- §§403.12(2), (11)**

***Eslien v. DER*, 84-0020-PC, 8/1/84 --- §§403.12(2), 522.05(2)**

***Esqueda v. DWD*, 99-0027-PC, 8/25/99 ---**

***Evrard v. DNR*, 79-251-PC, 1/22/80 --- §§202.04, 210.2**

***Evrard v. DNR*, 79-251-PC, 2/19/80 --- §103.02**

F

***Fagan v. DOC & DER*, 92-0756-PC, 11/29/93 --- §403.12(2)**

***Falk v. DP*, 81-23-PC, 12/29/82 --- §403.12(2)**

***Farr v. DER*, 92-0512-PC, 5/2/94 --- §403.12(2)**

***Farr v. DOC*, 93-0065, 0111-PC-ER, 8/23/94 --- §506.04**

***Farrar v. DNR & DER*, 84-0127-PC, 1/17/85 --- §403.12(2)**

***Farrar v. DOJ*, 94-0077-PC-ER, 11/7/97 --- §§774.05, 796.60, .95**

***Fauber v. DOR*, 82-138-PC, 8/21/84; aff'd by Milwaukee County Circuit Court, *Fauber v. State Pers. Comm.*, 649-551, 10/8/85 --- §§201.03(0.5), 202.04, 210.2**

***Fay v. DER*, 92-0438-PC, 7/7/94 --- §§403.12(2), (4)(b), (4)(f)**

***Feeney v. DER*, 92-0025-PC, 6/13/96 --- §403.12(2)**

***Felsner et al. v.DER*, 91-0197-PC, etc., 7/8/92 --- §403.12(2), (4)(w)**

***Fenster v. DER*, 95-0160-PC, 8/5/96 --- §403.12(2)**

***Ferguson v. DOC*, 99-0165-PC-ER, 1/25/00 ---**

***Ferguson v. DOCom*, 98-0099-PC-ER, 3/22/00 ---**

***Ferguson v. DOCom*, 98-0099-PC-ER, 12/16/99 ---**

***Ferguson v. DOCom*, 00-0143-PC-ER, 3/21/01 ---**

***Ferguson v. DOJ & DP*, 80-245-PC, 7/22/81 --- §§102.10, 522.05(l)(c)**

***Ferguson v. DP*, 80-386-PC, 2/18/82 --- §403.12(2)**

***Ferguson v. Schmidt*, 73-161, 7/3/74 --- §103.01(1)**

***Ferguson v. State Pers. Bd.*, 84 Wis. 675, 267 N.W. 2d 644 (1978) -- §103.01**

***Ferrill v. DHSS*, 87-0096-PC-ER, 8/24/89 --- §712.5**

***Figueroa v. DHSS*, 95-0116-PC-ER, 3/11/98 --- §§774.03(2), 796.60**

***Finley v. UW-Madison*, 95-0007-PC-ER, 3/26/97 --- §§734, 736, 738.1**

***Finley v. Wiegner*, 637, 7/28/72 --- §102.05(2)**

***Finn v. DOJ*, 88-0125-PC, 8/24/89; affirmed by Dane County Circuit Court, *Finn v. Wis. Pers. Comm.*, 89-CV-5343, 3/22/90; affirmed by Court of Appeals, 90-1126, 6/13/91 --- §650**

***Finnegan v. State Pers. Bd.*, Dane County Circuit Court, 164-096, 7/19/79 --- §§201.03(5), 202.04, 205.8(5)**

***Firlus v. DOC*, 96-0030-PC, 11/14/96 --- §§508.2, 615.2**

***Fischer v. DOC*, 96-0131-PC, 11/22/96 --- §103.01**

***Fischer v. UW-Madison*, 84-0097-PC-ER, 12/18/86 --- §717.03**

***Fischer v. UW-Madison*, 84-0097-PC-ER, 7/22/92 --- §§774.02(2), .03(2), .05, 796.60**

***Fischer-Guex v. UW-Madison*, 92-0205-PC-ER, 12/17/92 --- §§702.005, .03**

Fisher*, see *Dugan & Fisher v. DMRS

***Fisk v. DOT*, 79-83-PC, 1/23/80 --- §§102.09, 522.01(4)**

***Fitzgerald v. DER*, 92-0308-PC, 1/11/94 --- §§403.12(2), (4)(j)**

***FitzGibbon v. UW-Madison*, 00-0017-PC-ER, 3/29/00 ---**

***Flannery v. DOC*, 91-0047-PC, 2/21/92 --- §§102.05(4), 103.08(1), 504**

***Flannery v. DOC*, 90-0157-PC-ER, 91-0047-PC, 7/25/91 --- §792.04**

***Fleming v. UW-River Falls*, 92-0012-PC-ER, 12/13/93 --- §§786.03(2), 796.60**

***Fletcher v. ECB*, 91-0134-PC, 12/23/91 --- §§102.10, 522.05(1)(a)**

Fletcher*, see *Kumrah & Fletcher v. DATCP

***Fliehr v. DOA*, 85-0155-PC-ER, 12/17/85 --- §§706.01, 712.2, 732**

***Florey v. DOT*, 91-0086-PC-ER, 9/16/93 --- §§706.07, 726, 732**

***Flottum v. DMRS*, 90-0155-PC, 5/10/90 --- §403.04(3)**

***Foder v. DHSS*, 78-185-PC, 12/28/79 --- §103.21(a)**

***Fofana v. DHSS*, 88-0150-PC, 1/10/90 --- §202.02**

***Fofana v. DHSS*, 90-0120-PC, 6/28/91; rehearing denied, 8/15/91 --- §205.8(1)**

***Fofana v. DHSS*, 90-0120-PC, 8/15/91 --- §205.8(1)**

Fogelberg*, see *Zeier/Fogelberg v. DHSS

***Follett v. DHSS*, 96-0017-PC-ER, 7/5/96 --- §§706.01, 719**

***Fondow v. DOR*, 99-0136-PC-ER, 1/19/00 ---**

***Fonte v. UW & DP*, 82-131-PC, 4/15/83 --- §§403.12(2), 403.12(4)(d)**

***Forbush v. DP*, 79-PC-CS-270, 1/27/82 --- §403.12(2)**

***Ford v. DER*, 84-0032-PC, 10/1/84 --- §403.12(2)**

***Ford v. DHSS & DP*, 82-243-PC, 83-0011-PC, 83-0020-PC, 6/9/83 --- §§103.08(l), 103.08(8), 103.18, 103.21(a),(b)**

***Foris v. DHSS & DER*, 90-0065-PC, 1/24/92 --- §§403.12(2), (4)(a)**

***Forrester v. DP & DNR*, 80-252-PC, 3/19/82 --- §103.21(a)**

***Forslund et al. v. DHSS & DP*, 79-182, 193, 194-PC, 4/1/81 --- §513**

***Foss v. DER*, 95-0048-PC, 2/10/97 --- §403.12(2)**

***Fosshage v. DER*, 92-0395-PC, 3/31/94 --- §403.12(2)**

***Foster v. DOT & DER*, 89-0008-PC, 10/25/89 --- §403.12(2)**

***Foust v. DILHR & DER*, 84-0218-PC, 5/22/85; aff'd by Dane County**

Circuit Court, *DILHR & DER v. Wis. Pers. Comm.*, 85-CV-3206, 7/29/86 -- §§403.12(2), (13), (17) (m)

***Fox v. DILHR & BP*, 540, 2/2/73 --- §102.03**

***Fox v. DNR*, 81-381-PC, 2/9/82 --- §103.08(10)**

***Fox v. UW-Madison*, 01-0157-PC-ER, 2/8/02 ---**

***Frank v. DHSS*, 83-0173-PC, 3/13/85 --- §508.2**

***Frank v. DHSS*, 83-0173-PC, 9/28/84 --- §103.20**

***Frank v. Pers. Comm.*, Court of Appeals, 141 Wis. 2d 431 (1987); affirming decision of Dane County Circuit Court, 85-CV-5490, 3/11/86 --- §§667, 675.8**

***Franz v. UW-Oshkosh*, 86-0110-PC-ER, 10/4/89 --- §712.4**

***Franz v. UW-Oshkosh*, 86-0110-PC-ER, 8/24/89 --- §706.01**

***Fraser v. DOC*, 99-0058-PC, 4/7/00 ---**

***Fredisdorf et al. v. DP*, 80-300-PC, 3/19/82 --- §§403.12(2), 403.12(4)(s)**

***Fredrick v. DER*, 84-0204-PC, 4/17/86 --- §403.12(2)**

***Freihoefer v. DOC*, 99-0048-PC-ER, 11/7/01 ---**

***Frey v. DOT*, 79-107-PC, 8/30/79 --- §103.21(a)**

***Friedman v. UW*, 84-0033-PC-ER, 8/1/84 --- §724**

***Friedrich v. UW-Platteville*, 86-0210-PC, 6/24/87 --- §615.2**

***Friedrichs v. DOC*, 96-0023-PC, 11/22/96 --- §§503.06, 517.01**

***Frisch et al. v. DHSS & DER*, 86-0191-PC, 3/18/87 --- §§103.08(8.5),(9)**

***Frisch v. DOR & DER*, 92-0744-PC, 1/20/95 --- §403.12(2)**

***Fritchen v. DP*, 79-PC-CS-269, 4/29/82 --- §403.12(2)**

***Froh & Lach v. DER*, 84-0130, 0136-PC, 2/13/85 --- §§403.12(2), (16)(m),**

***Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96 --- §§403.12(2), (4)(d), (4)(f), (8), (11), (12), (14), 511.80**

***Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 5/28/96 ---§521.7(1)**

***Fuller v. UW*, 78-47-PC, 2/14/79 --- §660**

***Fuller v. UW*, 78-PC-ER-55, 3/13/80 --- §§774.03(2), 796.60**

***Fullmer, Mastricola & Belshe v. DP*, 83-0008-PC, 1/4/84 --- §§403.12(2), 503.01**

G

***Gabay v. DMRS & DOC*, 90-0410-PC, 10/1/92 --- §§511.20, 515.02**

***Galbraith et al. v. DOT*, 91-0067-PC-ER, etc., 12/23/91 --- §724**

***Galbraith v. DP*, 82-55-PC, 3/31/83 --- §403.12(2)**

***Gallagher v. DER*, 92-0335-PC, 4/19/94 --- §403.12(2)**

***Gallenbeck v. Wis. Lottery*, 92-0116, 0119-PC, 6/24/92 --- §§103.08(8), (10)**

***Gandt v. DOC*, 91-0168-PC-ER, 1/8/92 --- §702.23**

***Gandt v. DOC*, 93-0170-PC, 1/11/94 --- §103.05**

***Ganther v. DOR*, 97-0152-PC-ER, 10/15/01; rehearing denied, 12/3/01 ---**

***Ganther v. DOR*, 97-0152-PC-ER, 10/20/00 ---**

***Ganther v. DOR*, 97-0152-PC-ER, 4/21/99 ---**

***Ganther v. DOR*, 99-0175-PC-ER, 10/3/00; rehearing denied, 11/8/00 ---**

***Gardipee et al. v. DER*, 88-0004-PC, 8/10/88 --- §502.75**

***Gardipee et al. v. DER*, 88-0004-PC, 1/24/92 --- §420**

***Garner v. DOC*, 94-0013-PC, 7/27/94 --- §§202.10(2), .2**

***Garner v. DOC*, 94-0031-PC, 11/22/94; affirmed by Milwaukee County Circuit Court, *Garner v. Wis. Pers. Comm.*, 94-CV-013477, 11/28/95--§§202.02, .03, 210.5(5), 510.05, .08**

***Garner v. SPD*, 88-0015-PC, 88-0183-PC-ER, 8/11/93 --- §§506.03, 724**

***Garr et al. v. DER*, 90-0163-PC, etc., 1/11/91 --- §§103.03, .21(1)**

***Garrette v. DRL & DER*, 90-0092-PC-ER, 91-0184-PC-ER, 8/4/95 ---**

§706.50

***Garvoille v. DMRS*, 90-0379-PC, 1/11/91 --- §103.18**

***Gauthier v. DHSS & DER*, 93-0207-PC, 7/5/96 --- §403.12(2)**

***Gebhart v. UW & DER*, 84-0023-PC, 12/20/84 --- §403.12(2)**

***Geen v. DHFS*, 97-0100-PC-ER, 1/13/99 --- §735**

***Gensch v. DER*, 87-0072-PC, 7/8/87 --- §§102.02(l), 102.10**

***Georgia v. DOR*, 90-0091-PC-ER, 1/24/92 --- §773.04**

Gerlat*, see *Roszak & Gerlat v. DER

***Germain v. DHSS*, 90-0005-PC-ER, 12/18/00 ---**

***Germain v. DHSS*, 90-0005-PC-ER, 91-0083-PC-ER, 4/11/97 --- §§732, 736**

***Germain v. DHSS*, 91-0083-PC-ER, 5/14/92 --- §§714.1, 724**

***Germain v. DHSS*, 91-0083-PC-ER, 7/30/93 --- §724**

***German v. DOT*, 83-0034-PC-ER, 11/8/84 --- §§788.02(2), 796.35**

***Germane v. DILHR*, 79-50-PC, 8/30/79 --- §403.12(4)(m)**

***Germanson et al. v. DER*, 91-0223-PC, etc., 3/19/92 --- §502.75**

***Germanson et al. v. DER*, 91-0223-PC, etc., 5/20/93 --- §403.12(2), (4)(w)**

***Gerseth & Crisp v. DER*, 90-0205, 0206-PC, 6/12/91 --- §403.12(2)**

***Gerstmann v. DER*, 92-0147-PC, 2/25/93 --- §403.12(2)**

Gertsch*, see *Hollinger & Gertsch

***Geske et al. v. Wettengel*, 74-53, 11/24/75 --- §103.04**

***Getsinger et al. v. UW-Stevens Point*, 91-0140-PC-ER, etc., 6/11/92 --- §713.9**

***Getsinger v. UW-Stevens Point*, 91-0140-PC-ER, 4/30/93 --- §§702.50, 706.03, .05, 732**

***Ghilardi & Ludwig v. DER*, 87-0026, 0027-PC, 4/14/88 --- §§403.12(2), (4)(d), 420**

***Gibas v. DOJ*, 92-0247-PC, 10/5/93 --- §510.50**

***Gibas v. DOJ*, 92-0247-PC, 9/10/93 (ruling by examiner) --- §513**

***Giebel v. WGC*, 93-0041-PC, 3/15/94 (ruling by examiner) --- §506.03**

***Giese v. DNR*, 83-0100-PC-ER, 1/30/85 --- §§722, 774.02(2), .06,**

***Gifford v. DOT*, 94-0034-PC, 7/24/95 --- §§202.04, .10(2), .5(1)**

***Gilbert v. DOA & DER*, 90-0397-PC, 8/16/91 --- §§403.12(2), (11)**

***Gillett v. DHSS*, 89-0070-PC-ER, 8/24/89 --- §706.01**

***Girens v. DMRS & DHSS*, 87-0167-PC, 2/l/88 --- §102.05(10)**

***Givens v. DILHR & DP*, 83-0046-PC, 7/12/83 --- §502.75**

***Givens v. DILHR*, 87-0039-PC, 3/10/88, 3/22/88; affirmed by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm. (Givens)*, 88-CV-2029, 1/6/89--§302.13**

***Givens v. DILHR*, 87-0039-PC, 3/28/88, affirmed by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm. (Givens)*, 88-CV-2029, 1/6/89----- §521.7(2)**

***Glaser v. DHSS*, 79-66-PC, 79-PC-ER-63, 7/27/81 --- §§702.32(2), 786.05, 788.07, 788.08, 796.39, .60**

***Glaser v. DHSS*, 79-66-PC, 79-PC-ER-63, 7/31/79 --- §510.07**

***Glasnapp v. DHSS*, 78-249-PC, 1/26/79 --- §510.08**

***Goehring v. DHSS & DMRS*, 92-0735-PC, 2/3/94 --- §506.03**

***Goehring v. DHSS*, 78-133-PC, 10/27/78 --- §103.09**

***Goehring v. DHSS*, 92-0735-PC, 10/20/93 --- §§506.03, .50**

***Goehring v. DHSS*, 92-0735-PC, 2/8/93 --- §506.03**

***Goehring v. DHSS*, 92-0735-PC, 7/30/93 --- §506.03**

***Goehring v. DHSS*, 92-0735-PC, 9/24/93 --- §506.03**

Goehring*, see *Arndt & Goehring v. DP

***Goeltzer v. DVA*, 82-11-PC, 5/12/82 --- §522.05(l)(e)**

***Goers v. DOR*, 82-101-PC, 7/8/82 --- §102.05(l)**

***Goetz v. DOA & Office of the Columbia County District Attorney*, 95-0083-PC-ER, 11/14/95 --- §§702.01, 710**

***Goetz v. DOA & Office of the Columbia County District Attorney*, 95-0083-PC-ER, 1/16/98 --- §§717.2, 734**

***Gohl v. DOR*, 78-67-PC, 11/22/78 --- §§103.08(7), 103.08(10)**

***Gold v. UW & DER*, 91-0032-PC, 6/11/92 --- §403.12(2)**

***Goldberg v. DP*, 78-PC-ER-66, 74, 10/17/80 --- §§702.18(2), 774.03(2)**

***Golde v. DER*, 92-0162-PC, 8/11/93 --- §403.12(2), (4)(f), 522.05(2)**

***Goodhart v. UW (La Crosse)*, 98-0065-PC-ER, 1/25/01 ---**

***Goodhue v. UW-Stevens Point*, 82-PC-ER-24, 11/9/83 --- §§706.07, 712.02**

***Gosz v. DER*, 90-0192-PC, 5/29/91 --- §403.12(2)**

***Gozinske v. DHSS*, 86-0038-PC-ER, 6/25/86 --- §706.01**

***Graff v. DHSS & DER*, 88-0046-PC, 1/25/89 --- §§403.12(4)(m), (15)(m)**

***Graham v. DILHR & DER*, 84-0052-PC, 4/12/85 --- §§403.12(2), (4)(s),**

***Grams v. DOC & DER*, 92-0762-PC, 6/23/93 --- §403.12(2)**

Grant*, see *Proft & Grant v. DP

***Graves v. UW (Parkside)*, 96-0055-PC-ER, 10/2/96 --- §732**

***Gray v. DHSS*, 83-0132-PC-ER, 10/23/85 --- §§784.02(2), 796.60**

Gray*, see *Ray & Gray v. UW-La Crosse

***Green v. DHSS*, 92-0237-PC-ER, 12/13/93 --- §§770.03(2), 772.03(2), 784.02(2), 786.03(2), 796.60**

***Green v. UW*, 79-PC-ER-129, 5/13/82 --- §§774.03(2), 796.60**

***Greene v. DOA & DP*, 76-264, 10/27/78 --- §103.18**

***Greene v. Wettengel*, 73-4, 6/2/75 --- §102.02(4)**

***Greuel v. DOC*, 96-0135-PC, 1/16/97 --- §§103.20, 503.06**

***Grimes v. Wis. Lottery*, 91-0158-PC, 10/31/91 --- §102.14**

Grimmenga*, see *Goers v. DOR

***Grinnell v. DP*, 81-101-PC, 4/29/82 --- §403.12(13)**

***Grueter v. DHSS & DP*, 79-266-PC, 9/23/81 --- §403.12(2)**

***Gullickson v. DHSS*, 95-0133-PC-ER, 12/20/95 --- §706.01**

***Gums & Snart v. DP*, 79-PC-CS-299 and 695, 1/27/81 --- §403.12(2)**

***Gunderson v. DER*, 95-0095-PC, 8/5/96 --- §403.12(2), .12(8), 512.03**

***Gundlach v. DER*, 88-0016-PC, 6/29/88 --- §103.04**

***Gundlach v. DP & DOT*, 79-PC-CS-296, 6/2/80 --- §512.01(2)**

***Gurrie v. DOJ*, 97-0083, 98-0130-PC-ER, 8/25/99 ---**

***Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98 --- §§702.07, 706.01, .05, 732, 774.05**

***Guthrie v. UW (Whitewater)*, 97-0164-PC-ER, 8/28/00 ---**

***Gutierrez v. DOT & DER*, 96-0096-PC, 4/11/97 --- §§403.12(2), (4)(h), (4)(s), 502.75**

***Guzniczak & Brown v. DHSS & DER*, 83-0210, 0211-PC, 5/13/87; petition for rehearing granted and decision reaffirmed, 6/11/87 --- §§403.12(l), (13), 522.05(3)**

***Guzniczak & Brown v. DHSS & DER*, 83-0210, 0211-PC, 4/6/88 --- §130.5(8)**

***Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94 --- §§510.05, 730, 788.01, .03(2), 796.10, 15**

H

***Haak v. DHSS & DER*, 85-0130-PC, 4/30/86 --- §§403.12(2), (11),**

***Haasl v. DER*, 92-0125-PC, 9/8/93 --- §403.12(2)**

***Haberman v. DP*, 81-334-PC, 11/11/82 --- §403.12**

***Hagan v. DHSS & DER*, 92-0803-PC, 10/27/95 --- §§403.12(2), (4)(b), (4)(h)**

***Hagen v. Weaver*, 76-49, 12/21/76 --- §102.05(7)**

***Hagengruber v. DHSS*, 79-PC-ER-131, 4/29/82 --- §§788.02(2), 796.15**

***Hagman v. DNR*, 84-0194-PC, 1/30/85 --- §103.21(a)**

***Hagmann v. UW (Eau Claire)*, 96-0044-PC-ER, 4/25/00 ---**

***Hagmann v. UW (Eau Claire)*, 96-0044-PC-ER, 2/11/00 ---**

***Haidinger v. DNR & DER*, 95-0038-PC, 6/13/96 ---§403.12(2)**

***Halliburton v. DOJ*, 01-0132-PC-ER, 11/14/01 ---**

***Hallman v. WCC & DOA*, 96-0146-PC, 2/12/97 --- §102.01, .10**

***Halter v. DILHR*, 78-144-PC, 11/22/78 --- §502.75**

***Hamele v. DER*, 85-0172-PC, 8/6/86 --- §§403.12(2), (4)(h),**

***Hamilton v. DOC*, 93-0216-PC-ER, 12/22/94 --- §724**

***Hammond v. DOT*, 83-0172-PC, 5/16/84—§202.10(2)**

***Haney v. DOT & DER*, 89-0091-PC, 6/15/90 --- §403.12(15)(m)**

***Haney v. DOT*, 93-0232-PC, 94-0012-PC, 3/9/95; affirmed by Dane County Circuit Court, *Haney v. Wis. Pers. Comm.*, 95-CV-0867, 2/15/96--§§202.03, 205.8(1), 210.2**

***Haney v. DOT*, 94-0165-PC-ER, 9/24/97 --- §706.01**

***Hanke v. DHSS*, 91-0041-PC-ER, 6/25/93 --- §§774.03(2), 796.25**

***Hansen v. DATCP*, 87-0092-PC, 10/7/87—§§102.04, .05(13)**

***Hansen v. DNR*, 85-0119-PC, 3/19/86 --- §403.12(2)**

Hansen*, see *Berger & Hansen v. DOR & DP

***Hanson v. DHFS*, 97-0163-PC-ER, 7/27/00 ---**

***Hanson v. DHSS*, 92-0765-PC, 8/4/95 --- §§511.20, 515.2**

***Hanson v. DOT*, 00-0027, 0103-PC-ER, 5/30/01 ---**

***Harbort v. DILHR*, 81-74-PC, 4/2/82 --- §615.2**

***Harden & Nash v. DRL & DER*, 90-0106-PC-ER, etc., 1/23/96 --- §§505.02(2), 717.1**

***Harden et al. v. DRL & DER*, 90-0092-PC-ER, etc., 12/17/92 --- §§724, 736**

***Harden et al. v. DRL & DER*, 90-0092-PC-ER, etc., 5/20/93 --- §724**

***Harder v. DNR & DER*, 95-0181-PC, 8/5/96 --- §§103.03, 403.12(2), (4)(b), (4)(f), 501.03, 502.07**

***Hardy et al. v. DNR & DER*, 00-0106-PC, etc., 10/3/01 ---**

***Harley v. DOT & DP*, 80-77-PC, 11/7/80 --- §§302.11, 403.16(1)9 605.5(2), 622.01, 622.04**

***Harley v. DOT & DP*, 80-77-PC, 5/15/80 --- §§103.08(5)(a), 103.08(7), 103.08(10)**

***Harpster v. DER*, 84-0121-PC, 8/31/84 --- §103.06**

***Harpster v. DNR & DER*, 83-0216-PC, 5/9/84 --- §403.12(2)**

Harring*, see *Olbrantz & Harring v. DHSS

***Harris v. DER*, 86-0115-PC, 12/14/89 --- §§403.12(2), .13**

***Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88 --- §§774.012 .05**

***Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 4/22/87 --- §§506.03, 510.20,**

***Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 8/18/87 --- §717.02**

***Harris v. DILHR*, 81-PC-ER-52, 6/21/83 --- §§7342 784.03(2)**

***Harris v. DILHR*, 86-0021, 0022-PC-ER, 2/22/90 --- §§784.02(2), 786.02(2), 788.02(2), 796.15, .95**

***Harris v. DILHR*, 89-0151-PC-ER, 6/23/93 --- §§786.03(2), 796.25**

***Harris v. DPI*, 99-0052-PC, 3/10/00 ---**

***Harris v. UW & DER*, 87-0046-PC, 9/26/88 --- §403.12(2)**

***Harris v. UW (La Crosse)*, 87-0178-PC-ER, 11/23/88 --- §706.01**

***Harrison v. DNR*, 99-0112-PC, 8/28/00 ---**

***Harron v. DHSS*, 89-0152-PC, 6/27/90 --- §§202.10(2), 210.2**

***Harron v. DHSS*, 91-0204-PC, 8/26/92 --- §§202.10(1), 210.5(1), 508.2, 510.15**

***Harrsch v. DHFS*, 99-0023-PC-ER, 12/11/01 ---**

***Harshman v. UW*, 91-0019-PC, 4/18/91 --- §§103.01, 103.05**

***Hart v. UW & DER*, 83-0190-PC, 11/9/83 --- §103.12**

***Hartl v. DILHR*, 82-PC-ER-126, 7/6/84 --- §§766.02(2)2 796.60**

***Hartling v. DER*, 94-0275-PC, 7/24/95 --- §403.12(2)**

***Harwell v. DPI*, 98-0210-PC-ER, etc., 12/3/01 ---**

***Harwell v. DPI*, 98-0210-PC-ER, etc., 6/28/01 ---**

***Harwell v. DPI*, 98-0210-PC-ER, etc., 11/5/99 ---**

***Harwell v. DPI*, 98-0210-PC-ER, etc., 6/21/99 ---**

***Harwell v. DPI*, 98-0210-PC-ER, 5/12/99 ---**

***Haselow v. UW-Madison*, 94-0171-PC-ER, 6/9/95 --- §702.01**

***Hassan v. UW-Madison*, 93-0189-PC-ER, 3/29/94 --- §702.01**

***Haule v. UW-Milwaukee*, 85-0166-PC-ER, 8/26/87 --- §738.02**

***Havel-Lang v. DHSS & DER*, 91-0052-PC, 8/26/92 --- §403.12(2), (4)(u)**

***Hawk v. DOCom*, 99-0047-PC-ER, 4/7/00 ---**

***Hawk v. DOCom*, 99-0047-PC-ER, 1/19/00 ---**

***Hawk v. DOCom*, 99-0047-PC-ER, 6/2/99 ---**

***Hawk v. DOCom*, 99-0047-PC-ER, 4/7/99 ---**

***Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98 --- §§722, 742, 774.03(1), .05, 782.04, 786.03(1), 792.04, 792.04, 796.95**

***Hayes v. DHSS & DP*, 83-0039-PC, 9/28/83 --- §403.12(2)**

***Hayford v. UW & DER*, 90-0103-PC, 4/5/91 --- §403.12(2)**

***Hazelton v. DMA*, 88-0179-PC-ER, 11/6/91; reversed by Dane County Circuit Court, *Hazelton v. Wis. Pers. Comm.*, 91-CV-4770, 7/13/92; reversed by Court of Appeals, *Hazelton v. State Pers. Comm.*, 178 Wis. 2d 776, 505 N.W.2d 793 (1993) --- §717.7**

***Hazelton v. DMA*, 88-0179-PC-ER, 3/14/89 --- §702.03**

***Heath & Mork v. DOC & DER*, 93-0143-PC, 6/23/94 --- §§102.01, 102.05(10), 102.08, 102.09, 103.03, 403.12(4)(m), 403.12(15)(a), 502.75**

***Heath & Mork v. DOC & DER*, 94-0550-PC, 12/22/94 --- §§103.03, .05, .18**

***Hebert v. DHSS*, 84-0233-PC, 4/12/85, --- §102.05(13)**

***Hebert v. DHSS*, 84-0233-PC, 84-0193-PC-ER, 10/1/86 -- §§102.05(13), 615.5(9), 702.18(l), 774.02(l), . 05, 796.37, .60**

***Hebert v. DHSS*, 89-0093-PC, 6/27/90 --- §§202.10(2), 210.2**

***Hebert v. DILHR*, 84-0206-PC-ER, 84-0242-PC, 9/13/85 --- §506.04**

***Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99 --- §§730, 786.04, 788.03(2), .04, .15, .25**

***Hecox & Hillestad v. DER*, 96-0043, 0045-PC, 1/16/97 --- §403.12(2)**

***Hedrich v. UW (Whitewater)*, 98-0165-PC-ER, 2/10/99 (appeal pending) --- §706.01**

***Heidari v. DER*, 92-0029-PC, 3/19/93 --- §403.12(2)**

***Heikkinen v. DOT & DER*, 85-0055-PC, 3/13/86 --- §403.12(2)**

***Heikkinen v. DOT & DMRS*, 90-0006-PC, 3/9/90 --- §403.04(1)**

***Heikkinen v. DOT*, 90-0006-PC, 4/16/90 --- §§420, 521.5**

***Heil v. DP & DHSS*, 78-13-PC, 12/20/78 --- §503.50**

***Hein v. DER*, 92-0583-PC, 4/17/95 --- §403.12(2)**

Heineman, see *Nessler & Heineman v. DHSS & DER*

***Heinz-Breitenfeld v. DOC*, 95-0153, 0155-PC-ER, 5/6/98 --- §732**

Heiser*, see *Johnson & Heiser v. DOR

***Heldt et al. v. DOC & DMRS*, 90-0092-PC, etc., 7/25/90 --- §403.04(3)**

***Hellenbrand v. DNR & DER*, 87-0188-PC, 6/15/88 --- §403.12(2)**

***Helm v. UW*, 81-65-PC, 10/21/81 --- §102.08**

***Hemstead v. DER*, 00-0155-PC, 3/21/01 ---**

***Hence v. UW-Madison*, 99-0116-PC-ER, 10/6/99 ---**

***Henderson et al. v. DHSS & DER*, 92-0804-PC, 8/18/94 --- §403.12(4)(h)**

***Henderson v. DHSS*, 85-0045-PC, 8/15/85 --- §§103.08(8), .13**

***Hendricks v. DER*, 91-0066-PC, 1/8/92 --- §403.12(2)**

***Henebry v. DHSS*, 96-0023-PC-ER, 7/29/98 --- §§786.02(2), 788.02(2), 796.60**

***Henert v. DP*, 82-134-PC, 9/16/83 --- §403.12(2)**

***Hensley v. DER*, 85-0074-PC, 12/19/85 --- §403.12(2)**

***Hensley v. DER*, 92-0377-PC, 9/21/94 --- §403.12(2)**

Herald*, see *Jobelius & Herald v. DP

***Herrbold v. DOC*, 91-0003-PC-ER, 5/16/91 --- 706.05**

***Herrick v. DER*, 90-0395-PC, 2/8/91 --- §§103.03, .18**

***Herringa v. Schmidt & Wettengel*, 449, 9/15/71 --- §103.05(2)**

***Hertel v. DER*, 94-0348-PC, 10/16/95 --- §403.12(12)**

***Hess v. DNR & DER*, 85-0104-PC, 11/23/88 --- §403.12(2)**

***Hess v. DNR*, 79-203-PC, 12/4/79 --- §201.03M**

***Hess v. DNR*, 79-203-PC, 8/19/80; aff'd by Dane County Circuit Court, *DNR v. Pers. Comm. (Hess)*, 80-CV-5437, 6/24/81 --- §§202.10(l), 210.5(l), 501.02(l), 502.75**

***Hewett v. DER*, 92-0594-PC, 9/21/94 --- §403.12(2)**

***Higgins v. DOA & DER*, 91-0216-PC, 8/26/92 --- §403.12(2)**

***Higgins v. Wis. Racing Bd.*, 92-0020-PC, 1/11/94 --- §§202.10(2), 205.8(1), 501.01, 502.03**

***Higgins v. Wis. Racing Bd.*, 92-0020-PC, 3/31/94 --- §§521.2, 521.5, 521.7(2)**

***Hildebrandt v. DER*, 87-0139-PC, 6/11/92 --- §403.12(2)**

***Hill v. DHSS*, 93-0077-PC-ER, 3/29/94 --- §706.50**

***Hill v. DNR*, 82-111-PC, 12/8/82 --- §650**

***Hillestad v. DOA & DER*, 92-0823-PC, 3/29/94 --- §403.12(2)**

Hillestad*, see *Hecox & Hillestad v. DER

***Hillner v. DP*, 79-238-PC, 11/24/80 --- §403.12(2)**

***Hilmes v. Wis. Lottery*, 91-0093-PC-ER, 9/24/93 --- §717.2**

Hilton*, see *Ziegler & Hilton v. DP

***Hintz v. DOC*, 97-0079-PC, 8/2/99 ---**

***Hinze v. DATCP*, 91-0085-PC-ER, 12/28/93 --- §§766.03(2), 788.03(2), 796.15**

***Hinze v. DATCP*, 91-0085-PC-ER, 7/13/93 --- §§728.3, 730**

***Hochmuth v. DP*, 81-76-PC, 10/27/82; aff'd by Dane County Circuit Court, *Hochmuth v. Pers. Comm.*, 82-CV-6130, 6/27/84; aff'd by Court of Appeals District IV, 84-1603, 9/19/85 --- §403.12(2)**

***Hodorowicz v. WGC*, 91-0078-PC, 91-0177-PC-ER, 4/23/93 --- §§513, 717.2, 734**

***Hoefs v. DMRS*, 91-0244-PC, 7/22/92 --- §403.07**

***Hoeft v. Carballo & Knoll*, 74-37, 5/24/76 --- §102.08**

Hoel et al. v. DOR*, see *Peterson

***Hoepner v. DHSS*, 79-191-PC, 6/30/81 --- §§706.01, 706.05**

***Hoffman v. DNR & DER*, 00-0133-PC, 5/17/01 ---**

***Hogle v. UW(Parkside)*, 93-0120-PC-ER, 4/28/95 --- §§766.03(2), 774.03(2), 796.37, .60**

***Hogoboom. v. Commissioner of Insurance*, 80-107-PC, 10/2/81; aff'd by Dane County Circuit Court, *Hogoboom v. State Pers. Comm.*, 81-CV-5669, 4/23/84; aff'd by Court of Appeals District IV, 84-1726, 12/11/85 -- §§202.04. 210.2, 501.01, 511.50**

***Holley v. DOCom*, 98-0016-PC, 6/21/99 ---**

***Holley v. DOCom*, 98-0016-PC, 1/13/99 --- §§502.75, 504, 615.5(6), (9), 712.5**

***Hollinger & Gertsch v. UW-Milwaukee*, 84-0061, 0063-PC-ER, 8/15/85 -- §§702.50, 715.5**

***Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 10/14/85 --- §§732, 734**

***Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 11/21/85, reconsidering 10/14/85 decision; --- §§702.03, .50, 712.02, 715.5,**

***Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Bd. of Regents v. Wis. Pers. Comm (Hollinger)*, 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis. 2d 406, 433 N.W.2d 273, 11/3/88; [Note:**

the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case] --- §742

***Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 9/28/84 --- §712.2**

***Hollis v. DOT*, 97-0153-PC-ER, 6/23/99 ---**

Hollister*, see *Costa & Hollister v. DER

***Holmblad v. DILHR*, 84-0091-PC, 8/31/84 --- §103.08(10)**

***Holmblad v. DILHR*, 85-0159-PC, 10/9/85 --- §103.08(8)**

***Holmblad v. DP & LAB*, 78-169-PC, 1/30/79 --- §§506.03, 510.05**

***Holmblad v. DP & LAB*, 78-169-PC, 3/9/79 --- §622.02**

***Holmblad v. DP*, 79-334-PC, 12/8/80 --- §403.12(2)**

***Holmes v. DILHR*, 85-0049-PC-ER, 4/15/87 --- §§742, 784.03(1), 796.15**

***Holmes v. UW-Madison*, 97-0037-PC-ER, 4/24/97 --- §706.01**

***Holt v. DOT & DMRS*, 88-0022-PC, 5/18/88 --- §102.05(9)**

***Holt v. DOT*, 79-86-PC, 11/8/79 --- §§202.10(2), 210.2**

***Holton v. DOC*, 99-0032-PC-ER, 12/14/01 ---**

***Holton v. DOC*, 00-0075-PC-ER, 11/3/00 ---**

***Holton v. DER & DILHR*, 92-0717-PC, 11/29/93 --- §§102.05(10), 103.03, 103.18, 403.127**

***Holton v. DER & DILHR*, 92-0717-PC, 1/20/95 --- §§403.12(2), (4)(f), (12)**

***Holubowicz et al. v. DHSS & DER*, 88-0039-PC, 1/25/89 --- §§403.12(2), (4)(h), (4)(s), (15)(a)**

***Holubowicz et al. v. DHSS & DER*, 88-0039-PC, 7/13/88 --- §506.50**

***Holubowicz v. DHSS*, 88-0097-PC-ER, 4/7/89 --- §712.5**

***Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91 --- §§706.01, .08, 782.02(2), 792.02(2), 796.95**

***Holubowicz v. DOC*, 90-0048, 0079-PC-ER, 8/22/90 --- §§103.21(1), 724**

***Holubowicz v. DOC & DER*, 94-0030-PC-ER, 11/14/96 --- §782.02(2)**

***Holubowicz v. DOC*, 96-0136-PC-ER, 4/24/97 --- §§728.9, 782.02(2), 786.02(2), 792.02(2), 796.15, .40**

***Holzbauer v. DILHR & DER*, 87-0074-PC, 1/13/88 --- §403.12(2)**

***Holzhueter v. State Historical Society*, 83-0166-PC, 4/4/84 --- §645**

***Honer v. DOT*, 97-0005, 98-0122-PC-ER, 9/22/99 ---**

***Hoppenrath v. DOT*, 83-0065-PC, 2/29/84 --- §615.2**

***Hopwood v. UW & DP*, 83-0013-PC, 5/25/83 --- §403.12(2)**

***Horstman v. DER*, 85-0085-PC, 3/13/86 --- §403.12(2)**

***Houff v. DHFS*, 00-0035-PC-ER, 3/22/01 ---**

***Hruska et al. v. DATCP et al.*, 85-0069, 0070, 0071-PC-ER, 8/13/85 --- §713.9,**

***Hsu v. DER*, 97-0047-PC, 8/26/98 --- §403.12(2)**

***Hubbard v. DER*, 91-0082-PC, 11/6/91 --- §506.03**

***Hubbard v. DER*, 91-0082-PC, 3/29/94; affirmed by Dane County Circuit Court, *Hubbard v. Wis. Pers. Comm.*, 94-CV-1408, 11/27/96--- §§403.12(2), 502.07**

Hubbard*, see *Sanders & Hubbard v. Wis. Pers. Comm.

***Huempfner v. DOC*, 97-0106-PC-ER, 5/6/98 --- §§506.03, 724**

***Huesmann v. State Historical Society*, 81-348-PC, 1/8/81 --- §§201.02(2),**

***Huesmann v. State Historical Society*, 82-67-PC, 8/5/82 --- §§522.01(4), 522.06**

***Huff v. UW (La Crosse)*, 95-0113-PC-ER, 7/27/00 ---**

***Huff v. UW (La Crosse)*, 95-0113-PC-ER, 12/17/97 --- §724**

***Huff v. UW (Stevens Point)*, 97-0092-PC-ER, 11/18/98 --- §§506.03, 724, 736**

***Huff v. UW (Superior)*, 97-0105-PC-ER, 3/10/99 --- §§722, 728.3, 732, 736**

***Huff v. UW (System)*, 96-0013-PC-ER, 5/2/96 --- §702.07**

***Jackson v. State Personnel Board*, Dane County Circuit Court, 164-086, 2/26/79 -- §§501.01, 502.07**

Jackson*, see *Lee & Jackson v. UW-Milw.

***Jackson-Ward v. DER*, 95-0021-PC, 4/28/95 --- §102.05(10)**

***Jacobs v. DER*, 83-0123-PC, 4/23/85 --- §403.12(2)**

***Jacobs v. DOC*, 94-0158-PC, 5/15/95 --- §§202.10(1), .10(2), 210.2**

***Jacobsen v. DHFS*, 96-0089-PC-ER, 2/6/97 --- §§717.3, .5, 732**

***Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; rehearing denied, 91-0220-PC, 12/9/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.*, 92-CV-4574, 93-CV-0097, 9/9/94 --- §§250, 660, 721.18, 774.01, 774.03(2)**

***Jacobson v. DER*, 94-0147-PC, 4/20/95 --- §§403.12(2), .12(4)(f)**

***Jacobson v. DILHR & LIRC*, 78-PC-ER-49, 4/23/81 --- §§706.01, 706.05, 712.04**

***Jacobson v. DILHR*, 79-28-PC, 4/10/81 --- §§615.2, 615.5(6), 625.02, 721.30, 721.32**

***Jacobson v. DILHR*, 79-PC-ER-11, 6/3/81 --- §717.03**

***Jacobson v. LIRC & DILHR*, 78-192-PC, 12/4/79 --- §102.05(4)**

***Jacobson v. LIRC & DILHR*, 78-192-PC, 9/12/80 --- §103.20**

***Jacobus v. UW*, 88-0079-PC, 10/20/88 --- §102.11**

***Jacobus v. UW-Madison*, 88-0159-PC-ER, 3/19/92; affirmed by Dane County Circuit Court, *Jacobus v. Wis. Pers. Comm.*, 92CV1677, 1/11/93 --- §§702.18(1), 774.03(2), 774.04, 796.60**

***Jahnke v. DHSS*, 89-0094-PC-ER, 89-0098-PC, 12/13/90 --- §§615.2, 702.18(1), 766.02(2), 788.02(2), 796.15**

***Jahns v. DER*, 92-0239-PC, 3/9/94 --- §403.12(2)**

***Janeck v. UW*, 88-0035-PC, 8/2/88 --- §103.01**

***Janowski & Conrady v. DER*, 86-0125, 0126-PC, 10/29/86 --- §§107, 738.02**

Janowski*, see *Conrady & Janowski v. DILHR & DP

***Jansen et al. v. DOT & DP*, 78-170-PC, etc., 1/8/81; aff'd by Dane**

County Circuit Court

***Jansen et al. v. DOT & DP*, 78-170-PC, etc., 10/4/82 --- §§515.02, 517.01**

***Janssen v. DOC*, 93-0072-PC-ER, 10/20/93 --- §§702.17, 704, 717**

***Jaques v. DOC*, 94-0124-PC-ER, 3/31/95 --- §§506.03, 724**

***Javenkoski v. DOT*, 99-0101,-PC-ER, etc., 8/28/00 ---**

***Javenkoski & Kubinek v. DOT*, 95-0092-PC-ER, etc., 9/11/00 ---**

***Jazdzewski v. UW-Madison*, 92-0179-PC-ER, 11/29/93 --- §706.50**

***Jazdzewski v. UW-Madison*, 92-0179-PC-ER, 2/20/95 --- §§788.04, 796.60**

***Jelinek v. DOC*, 96-0161-PC, 7/2/97 --- §§202.10(1), 210.2, .5(1)**

***Jellings v. DOJ & DER*, 90-0369-PC, 1/24/91 --- §102.05(10)**

***Jenkins v. DHSS*, 86-0056-PC-ER, 6/14/89 --- §§760.2, 784.03(2), 796.15**

***Jenkins v. DOJ*, 00-0051-PC-ER, 10/4/00 ---**

***Jenkins v. DOR & DER*, 88-0061-PC, 5/31/89 --- §§403.12(2), (4)(f), (4)(g), (8), (12)**

***Jensen v. DHSS*, 88-0128-PC, 6/29/89 --- §202.10(1)**

***Jensen v. DP*, 79-PC-CS-386, 9/26/80 --- §102.05(11)**

***Jensen v. DPI*, 99-0070-PC, 8/28/00 ---**

***Jensen v. DPI*, 99-0070-PC, 2/11/00 ---**

***Jensen v. UW*, 78-84-PC, 7/5/79 --- §403.12(2)**

***Jensen v. UW*, 88-0077-PC, 12/14/88 --- §§103.01, .20**

***Jensen v. UW-Milwaukee*, 86-0144-PC, 11/4/87 --- §§103.18, .20, 615.2, 615.5(6)**

Jensen*, see *Ochs & Jensen v. DILHR

Jerdee*, see *Day et al. & Jerdee v. DILHR

***Jerrick v. DER*, 90-0392-PC, 6/12/91 --- §403.12(2)**

***Jesse v. DHSS & DER*, 92-0036-PC, 9/18/92 --- §403.12(2), (4)(w),**

(11)

***Jobelius & Herald v. DP*, 80-306, 250-PC 1/8/82 --- §§403.12(2), 505.02(2)**

***Johann v. LRB & DMRS*, 93-0010-PC, 4/30/93 --- §506.50**

***Johann v. Office of Milwaukee County District Attorney*, 97-0045-PC-ER, 10/9/97 --- §736**

***Johnson & Heiser v. DOR*, 78-35, 44-PC, 8/29/80 --- §640**

***Johnson v. DOC*, 98-0029-PC-ER, 4/25/00 ---**

***Johnson v. DOC*, 99-0014-PC-ER, 3/21/01 ---**

***Johnson v. DOC*, 99-0098-PC-ER, 8/25/99 ---**

***Johnson v. DOC & DER*, 99-0001-PC, 7/20/99 ---**

***Johnson v. DOC & DETF*, 99-0098-PC-ER, 5/24/01 ---**

***Johnson v. DER*, 88-0139-PC, 1/10/90 --- §§403.12(2), (4)(a)**

***Johnson v. DER*, 94-0064-PC, 7/25/94 --- §§103.03, .18, .21(1)**

***Johnson v. DER*, 94-0332-PC, 12/20/95 --- §403.12(2)**

***Johnson v. DER*, 95-0122-PC, 1/31/96 --- §§403.12(2), (11)**

***Johnson v. DHSS*, 81-450-PC, 6/10/82 --- §§103.08(8), 103.08(10)**

***Johnson v. DHSS*, 83-0032-PC-ER, 1/30/85 --- §§712.05, 726, 770.02(2), 774.02(2), 784.02(2), 796.60**

***Johnson v. DHSS*, 89-0080-PC-ER, 10/4/94 --- §774.04**

***Johnson v. DHSS*, 89-0080-PC-ER, 4/30/93 --- §717.7**

***Johnson v. DHSS*, 94-0009-PC, 3/3/95 --- §§667, 675.5**

***Johnson v. DNR & DER*, 85-0206-PC, 5/16/86 --- §403.12(2)**

***Johnson v. DNR*, 84-0250-PC, 4/12/85 --- §103.08(8)**

***Johnson v. DOR & DP*, 80-360-PC, 8/5/82 & 9/2/82 --- §403.12(2)**

***Johnson v. DOT & DER*, 94-0442-PC, 11/27/95 --- §403.12(1)**

***Johnson v. DOT & DP*, 81-326-PC, 3/17/83 --- §403.12(2)**

***Johnson v. DOT*, 81-256-PC, 12/4/81 --- §202.03**

***Johnson v. DP*, 78-28-PC, 4/3/79 --- §403.125**

***Johnson v. DP*, 79-45-PC, 9/14/79 --- §403.12(2)**

***Johnson v. UW-Eau Claire & DER*, 85-0198-PC, 9/17/86 --- §403.12(2)**

Johnson*, see *Brazeau & Johnson v. DP

Johnson*, see *Daniels & Johnson v. DP

Johnson*, see *Wakely & Johnson v. DER

***Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89 --- §§730, 766.02(2), .06, 786.02(2), 796.15, .37, .40**

***Jones v. DER*, 91-0145-PC, 11/13/92 --- §403.12(2), (4)(b)**

***Jones v. DHSS & DER*, 90-0370-PC, 7/8/92 --- §§403.12(13), 522.05(2)**

***Jones v. DNR & DER*, 85-0127-PC, 1/24/86 --- §§403.12(2), (4)(o)**

***Jones v. DNR*, 78-PC-ER-12, 11/8/79 --- §§704, 706.07, 715.01**

***Jones v. DOC*, 98-0069-PC, 11/18/98 --- §§103.05, .21(1)**

***Jones & Hunter v. DOT*, 01-0001, 0002-PC, 4/4/01 ---**

***Jones v. UW-System*, 87-0102-PC, 1/14/88 --- §738.01**

***Jones v. UW-System*, 87-0102-PC, 12/3/87; rehearing denied, 1/14/88 --- §515.02**

Jones*, see *Cirilli & Jones v. DP

***Jordan v. DNR*, 90-0386-PC, 1/11/91 --- §§103.08(8), (10)**

***Jordan v. DNR*, 96-0078-PC-ER, 1/30/97 --- §§702.005, 738.1, 742**

***Jorgensen v. DOT*, 90-0298-PC, 6/12/91 --- §§103.05, 615**

Joubert*, see *McFarland & Joubert v. UW-Whitewater

***Junceau v. DILHR*, 92-0768-PC, 9/30/93 --- §§403.023, 683**

***Junceau v. DOR & DP*, 82-112-PC, 10/14/82 --- §§102.05(4), 102.05(10), 522.05(2)**

K

***Kaeske v. DER*, 90-0382-PC, 11/14/91 --- §102.05(10)**

***Kaeske v. DHSS & DP*, 78-18-PC, 11/22/78 --- §§102.05(10), 103.18, 503.02, 503.03, 503.50**

Kaeske*, see *Moran & Kaeske v. DER

***Kafar v. DHSS*, 92-0076-PC-ER, 7/22/93; affirmed by Racine County Circuit Court, *Kafar v. Pers. Comm.*, 93 CV 1985, 6/10/94 --- §717.7**

***Kalashian v. Office of the Jefferson County District Attorney*, 97-0157-PC-ER, 2/25/98 --- §§506.03, 724**

***Kamath v. UW-Madison*, 95-0104-PC-ER, 11/20/97 --- §702.03**

***Kaminski (Erickson) v. UW & DER*, 01-0023-PC, 1/24/02 ---**

***Kaminski et al. v. DER*, 84-124-PC, 12/6/84 --- §§103.04, .18**

***Kaminski et al. v. DER*, 91-0121-PC, 9/30/93 --- §§403.12(2), (4)(u)**

***Kanitz v. UW*, 97-0019-PC, 5/21/97 --- §§103.21(1), 510.08**

***Kaplan v. UW-Madison*, 96-0097-PC-ER, 2/9/00 ---**

***Karlen v. DHSS & DP*, 82-204-PC, 3/31/83 --- §403.12(2)**

***Kastel et al. v. DILHR & DP*, 82-16, 17, 18-PC, 3/17/83 --- §403.12(2)**

***Katzmark v. DNR & DER*, 91-0073-PC, 4/17/92 --- §403.12(2)**

***Kaufman v. UW (Eau Claire)*, 85-0010-PC-ER, 1/9/86 --- §706.01**

***Kaufman v. UW-Madison*, 84-0065-PC-ER, 8/6/86 --- §§774.02(2), 796.60**

***Kawczynski v. DOT*, 80-181-PC, 11/4/80 --- §§103.20, 702.24**

***Keith v. Carballo*, 75-65, 1/22/76 --- §102.05(3)**

***Keleher v. UW-Madison*, 84-0105-PC-ER, 9/26/85 --- §§714.4, 715.2**

***Kelekovich v. DER*, 83-0112-PC, 10/26/84 --- §403.12(2)**

***Keller v. UW & DER*, 86-0168-PC, 4/15/87 --- §403.12(2)**

***Keller v. UW*, 91-0006-PC, 11/14/91 --- §§302.01, .13, 303**

***Keller v. UW-Milwaukee*, 90-0140-PC-ER, 3/19/93 --- §§717.3, 721.18, 730, 732, 774.01**

***Keller v. UW-Milwaukee*, 90-0140-PC-ER, 6/21/94 --- §§774.03(2), 774.05, 796.60**

***Kelley v. DILHR*, 93-0208-PC, 2/23/94 --- §§103.20, 21(1)**

***Kelley v. DILHR*, 93-0208-PC, 3/16/95--- §§103.20, 501.04, 502.75, 622.01, .04, 667**

***Kelley v. DMRS*, 88-0151-PC, 1/31/89 --- §403.07**

***Kelling v. DHSS*, 87-0047-PC, 3/12/91 --- §§102.05(6), 511.01, 522.05(1)(a), (2), 615.5(9)**

***Kelling v. DHSS*, 87-0047-PC, 5/30/90 --- §102.05(6)**

Kelm*, see *Doran & Kelm v. DER

***Kemp v. DHSS*, 81-370-PC, 11/19/81 --- §103.02**

***Kemp v. DILHR*, 94-0178-PC-ER, 3/2/95 --- §702.01**

***Kenitz v. Weaver*, 76-29, 2/28/79 --- §630.08**

***Kennedy et al. v. DP*, 81-180, etc.-PC, 1/6/84 --- §§103.03, 403.12(2), 403.12(12), 501.03, 508.2, 510.10**

***Kennedy-Sheahen v. DILHR & DER*, 88-0120-PC, 6/27/89 --- §403.12(2)**

***Kenyon v. DER*, 95-0126-PC, 9/14/95 --- §102.10**

***Kerndt v. DP*, 81-151-PC, 1/10/83 --- §403.12(2)**

***Kerr v. DER*, 92-0195-PC, 5/20/93 --- §403.12(2)**

***Kerr v. DOT*, 85-0042-PC, 7/3/85 --- §103.08(9)**

***Kesterson v. DILHR & DER*, 85-0081-PC & 85-0105-PC-ER, 12/29/86 --- §§615.2, 615.5(2), 615.5(9), 742, 784.03(l), 796.15**

***Kesterson v. DILHR & DER*, 85-0081-PC & 85-0105-PC-ER, 4/4/88 --- §742**

***Ketter v. DNR & DER*, 90-0342-PC, 4/5/91 --- §403.12(2)**

***Ketterhagen v. UW*, 90-0323-PC, 11/21/90 --- §103.01**

***Keul v. DHSS*, 87-0052-PC-ER, 2/3/94 --- §§521.5, 732, 742**

***Keul v. DHSS*, 87-0052-PC-ER, 5/14/92 --- §§506.03, 724**

***Keul v. DHSS*, 87-0052-PC-ER, 6/1/90 --- §§103.21(1), 715.7**

***Keul v. DHSS*, 87-0052-PC-ER, 6/23/93 --- §§774.03(1), 774.05,**

796.60

***Kiefer v. DER*, 92-0634-PC, 5/2/94 --- §§103.03, 403.12(12), 503.50, 506.50**

***Kienbaum v. UW*, 79-213-PC, 12/13/79 - §§103.05, 503.50**

***Kienbaum v. UW*, 79-246-PC, 4/25/80 --- §103.13**

Kihlstrom*, see *Canter-Kihlstrom v. UW-Madison

***Kilbreth v. UW & DP*, 81-463-PC, 1/2/85 --- §403.12(2)**

***Kildow v. DER*, 92-0582-PC, 7/7/94 --- §403.12(2)**

***Kilian v. DHFS*, 01-0077-PC-ER, 4/26/02 ---**

***Kimball v. DP & DHSS*, 79-236-PC, 4/23/81 --- §403.12(13)**

***Kimble v. DILHR*, 87-0061-PC-ER, 2/19/88 --- §§706.03, .05, 712.5**

***King v. DHFS*, 00-0165-PC-ER, 4/18/02 ---**

***King v. DHFS*, 00-0165-PC-ER, 6/13/01 ---**

***King v. DHSS*, 86-0085-PC-ER, 8/6/86 --- §706.01**

***King v. DHSS*, 88-0007-PC-ER, 5/29/91 --- §736**

***King v. DOC*, 94-0057-PC-ER, 11/18/98 --- §§518.02, 784.03(2), 792.03(2), 796.30, .35, .50**

***King v. DOC*, 94-0057-PC-ER, 3/22/96 --- §§702.50, 724, 792.01, .04**

***Kingzett v. UW & DER*, 90-0417-PC, 1/24/92 --- §403.12(2)**

***Kinzel v. UW (Extension)*, 92-0218-PC-ER, 8/21/96 --- §§772.03(2), 780.03(2), 788.03(2), 796.25, .35**

***Kircher v. DHSS*, 87-0065-PC-ER, 8/10/88 --- §§772.02(2), 796.25**

***Kirchesh v. DP*, 80-356-PC, 2/18/82 --- §403.12(2)**

***Kirk v. DILHR*, 87-0177-PC-ER, 7/11/91 --- §§706.01, .03**

***Kirkeeng v. DP*, 79-PC-CS-531, 12/8/82 --- §403.12(2)**

***Klein v. DATCP*, 95-0014-PC-ER, 12/20/95 --- §§702.07, 732**

***Klein v. DATCP*, 95-0014-PC-ER, 5/21/97 --- §§702.07, 786.03(2), 796.95**

***Klein v. DHSS & DER*, 95-0074-PC, 12/20/95 --- §403.12(16)(m)**

***Klein v. UW & DER*, 91-0208-PC, 2/8/93 --- §403.12(2), (4)(a), 515.5**

***Kleiner v. DOT*, 80-PC-ER-46, 1/28/82 --- §§660, 774.03(l), 774.05, 786.02(2), 796.35**

***Kleinert v. DER*, 87-0206-PC, 2/24/88 --- §103.03, 502.75**

***Kleinert v. DER*, 87-0206-PC, 8/29/88 --- §§403.12(2), 502.75**

***Kleinschmidt v. DILHR*, 81-395-PC, 6/4/82 --- §303**

***Kleinsteiber v. DOC*, 97-0060-PC, 8/25/99 ---**

***Kleinsteiber v. DOC*, 97-0060-PC, 9/23/98 --- §202.10(2), 210.2**

***Kleisch v. DHSS*, 78-151-PC, 1/23/79 --- §§510.06, 510.50**

***Klemmer v. DHFS*, 97-0034-PC, 7/2/97 --- §§103.08(10), .21(1)**

***Klemmer v. DHFS*, 97-0054-PC, 10/9/98 --- §§510.90, 521.7(2)**

***Klemmer v. DHFS*, 97-0054-PC, 4/8/98 --- §§503.06, 521.7(2)**

***Klemmer v. UW-Milw. & DER*, 85-0134-PC, 9/4/86 --- §403.12(4)(b)**

***Klepinger v. DER*, 83-0197-PC, 5/9/85; aff'd in part, rev'd in part by Dane County Circuit Court, *DER v. Wis. Pers. Comm. (Klepinger)*, 85-CV-3022, 12/27/85 --- §§107, 403.12(4)(b)**

***Klett v. DNR*, 00-0141-PC, 1/19/01 (ruling by examiner) ---**

***Klitzke v. UW (Whitewater)*, 85-0022-PC, 6/18/85 --- §403.12(2)**

***Kloehn v. DHSS*, 86-0009-PC-ER, 1/10/90 --- §712.5**

***Kloehn v. DHSS*, 86-0009-PC-ER, 9/8/89 --- §§788.02(1), .25, 796.60**

***Klopp v. UW*, 79-33-PC, 5/7/79 --- §103.21(a)**

***Kluesner v. DER*, 95-0224-PC, 7/5/96 --- §403.12(2)**

Klumpyan*, see *Schmit (Klumpyan) v. DOC

***Kluttermann et al. v. DHSS & DP*, 78-12, 22, 91, 69, 70, 88, 100, 167, 166-PC, 8/19/80; aff'd by Dane County Circuit Court, *Kluttermann et al. v. PC*, 80-CV-5546, 3/2/82 --- §403.12(4)(1)**

***Knight v. DER*, 85-0178-PC, 9/17/86 --- §§403.12(2), (11)**

***Knipp v. Schmidt*, 480, 3/72 --- §103.02(1)**

***Knoll v. Pers. Bd.*, 79-103-PC, 10/12/79 --- §103.14**

***Knueppel v. DOT*, 92-0194-PC, 7/22/92 --- §103.08(8)**

Koberle*, see *Buechner/Koberle v. DER & UW

***Koch v. DER*, 92-0555-PC, 8/22/94 --- §§403.12(2), (4)(v), (4)(x)**

Koch*, see *Koch/DOT v. DP

***Koch/DOT v. DP*, 81-19-PC, 9/21/83, --- §403.12(2)**

***Kochanowski v. Mid State Technical College*, 02-0018-PC-ER, 3/21/02 ---**

***Kode v. DHSS*, 87-0160-PC, 11/23/88 --- §§202.03, 205.8(1), .9, 210.5(1), 510.06**

***Koeller v. DER*, 86-0099-PC, 3/18/87 --- §403.12(2)**

***Kohl v. DOT & DMRS*, 89-0064-PC-ER, 5/1/91 --- §732**

***Kolonick v. State of Wisconsin (Personnel Board)*, Dane County Circuit Court, 162-178, 2/26/79 --- §502.75**

***Koremenos v. DOC*, 01-0046-PC, 8/27/01 ---**

***Kortman v. UW-Madison*, 94-0038-PC-ER, 11/17/95 --- §§702.50, 706.05, 792.04**

***Kortright v. DP*, 81-454-PC, 10/7/82 --- §403.12(2)**

***Koshere v. DER*, 92-0531-PC, 12/7/95 --- §403.12(2)**

***Kosinski, et al. v. UW-Madison & DER*, 92-0243-PC-ER, etc., 4/30/93 --- §710**

***Kostello v. DHFS*, 98-0177-PC-ER, 12/3/99 ---**

***Kotecki et al. v. DOT & DP*, 82-34, etc.-PC, 8/5/82 --- §403.12(2)**

***Kotten v. DILHR*, 81-PC-ER-23, 1/31/83 --- §717.3**

***Kovacik v. DHFS*, 97-0076-PC-ER, 11/13/01 ---**

***Kovacik v. DHFS*, 97-0076-PC-ER, 9/7/00 ---**

***Kovacik v. DHFS*, 97-0076-PC-ER, 4/19/00 ---**

***Kovacik v. DHFS*, 97-0076-PC-ER, 1/19/00 ---**

***Kowing v. UWHCB*, 99-0102-PC-ER, 11/5/99 ---**

***Kozich v. UW & DP*, 81-77-PC, 6/4/82 --- §§506.03, 508.4, .6**

***Krahling v. DER*, 90-0315-PC, 1/11/91; rehearing denied, 2/26/91 --- §§102.02(2), (3)**

***Krahling v. DER*, 90-0315-PC, 2/26/91 --- §102.02(2)**

***Kraklow v. UW*, 84-0237-PC, 7/3/85 --- §615.2**

***Kramer v. DATCP & DP*, 80-197-PC, 3/4/83 --- §403.12(2)**

***Krasny v. DOC*, 94-0036-PC, 11/17/95 --- §§101, 103.05**

***Kraus & Kraus v. DHSS*, 78-268-PC and 79-63-PC, 12/4/79 --- §§103.19, 655**

***Krause v. DHSS & DMRS*, 89-0057-PC, 10/4/89 --- §103.18**

***Krause v. DHSS*, 89-0057-PC, 6/29/89 --- §103.18**

***Krause v. UW-La Crosse*, 85-0026-PC-ER, 1/22/87 --- §§766.02(2), 788.02(2), 796.15**

***Krebs & Crawley v. DILHR*, 85-0131-PC-ER, etc., 3/11/94 --- §717.3**

***Krenzke-Morack v. DOC*, 91-0020-PC-ER, 3/22/96 --- §§722, 788.03(2), 796.60**

***Krewson et al. v. DP*, 78-23-PC, 1/30/79 --- §515.02**

***Krewson et al. v. DP*, 78-23-PC, 5/18/79 --- §403.12(2)**

***Kriedeman v. UW & DER*, 85-0048-PC, 10/23/85 --- H102.04, 102.10**

***Kriedeman v. UW & DER*, 85-0048-PC, 6/18/85, --- §102.05(10)**

***Krishan v. DOC*, 99-0171-PC-ER, 1/9/02 ---**

***Krueger v. DHSS*, 89-0070-PC, 1/10/90 --- §§103.21(1), 517.55**

***Krueger v. DHSS*, 92-0065-PC-ER, 7/8/92 --- §706.50**

***Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95 --- §§774.02(1), .02(2), .04, .05, 796.60, .95**

***Krueger v. DHSS*, 92-0068-PC-ER, 7/23/96 --- §§103.05, 728.9, 774.03(2), 796.95**

***Krueger v. DOA & DMRS*, 92-0196-PC, 5/22/92 --- §403.04(8)**

***Krueger v. DP*, 80-308-PC, 9/3/81 --- §403.12(2)**

***Krusche v. DOJ*, 80-152-PC, 4/10/81 --- §650**

***Ksicinski v. DER*, 92-0798-PC, 6/21/94 --- §§403.12(2), (4)(s)**

***Kubala v. DER*, 90-0338-PC, 92-0107-PC, 2/23/94 --- §403.12(2)**

***Kuck v. CESA #8*, 01-0042-PC-ER, 6/13/01 ---**

***Kuick v. DP*, 81-68-PC, 1/27/82 --- §403.12(2)**

***Kumrah & Fletcher v. DATCP*, 87-0058, 0059-PC, 4/20/88; reversed by Brown County Circuit Court, *Kumrah v. Wis. Pers. Comm. & DATCP*, 88-CV-1543, 3/14/89; affirmed by Court of Appeals, 89-0825, 11/21/89-- §302.13**

***Kumrah & Pradhan v. DATCP & DER*, 94-0146, 0147-PC-ER, 2/27/97 --- §§715.9, 726**

***Kumrah v. DATCP*, 87-0058-PC, 4/17/90 --- §§521.5, .7(2)**

***Kundiger et al. v. DP*, 79-PC-CS-327, 329 and 703, 10/2/81 --- §403.12(2)**

***Kuri v. UW-Stevens Point*, 91-0141-PC-ER, 4/30/93 --- §§702.03, 702.50, 706.01**

***Kurowski v. DER*, 92-0441-PC, 4/19/94 --- §403.12(2)**

***Kuschel v. DER*, 90-0190-PC, 11/16/90 --- §103.03**

***Kuter v. DILHR*, 82-0083-PC, 5/23/84 --- §§301.03, 302.12, 510.11,**

***Kuter v. DILHR*, 82-0083-PC, 7/15/85; rev'd by Fond du Lac County Circuit Court, *Kuter v. State Pers. Comm.*, 85-CV-636, 10/1/86; rev'd by Court of Appeals District 11, 86-1950, 5/20/87 --- §§302.05, .12, 303**

L

***Laber v. UW-Milwaukee*, 81-PC-ER-143, 11/28/84 --- §§742, 772.03(l), (2), 796.39, .60**

Lach*, see *Froh & Lach v. DER

***Lahti v. DER*, 92-0556-PC, 6/21/94 --- §403.12(2)**

***Lambert v. DILHR & DMRS*, 93-0063-PC, 8/23/93 --- §403.04(1)**

***Landphier v. DER*, 90-0373-PC, 8/21/91 --- §§403.12(2), (4)(d)**

***Landwehr v. DOA*, 90-0289-PC, 6/12/91 --- §103.18**

***Lane v. DOC*, 95-0070-PC-ER, 95-0096-PC, 6/7/01 ---**

***Lane v. DER*, 95-0064-PC, 2/10/97 --- §403.12(2)**

***Lang v. SPD*, 98-0197-PC-ER, 8/23/00 ---**

***Lange et al. v. DOT & DER*, 90-0118-PC, etc., 6/11/92 --- §§102.05(10), 403.12(13)**

***Langford v. SPD*, 99-0013-PC-ER, 2/11/00 ---**

***Langford v. SPD*, 99-0013-PC-ER, 6/30/99 ---**

***Langkamp et al. v. DER*, 92-0160-PC, etc., 12/17/92 --- §403.12(2)**

***Langteau v. UW & DER*, 83-0246-PC, 2/13/85 --- §§403.12(2), (4)(f)**

***LaPlante v. DMRS*, 87-0168-PC, 3/10/88 --- §515.02**

***LaPorte v. DILHR*, 81-153-PC, 10/30/81 --- §103.12**

***LaRoche v. DHSS & DER*, 85-0227-PC, 4/30/86 --- §102.13**

***LaRose v. DP*, 82-205-PC, 12/23/83 --- §403.12(2)**

***LaRose v. UW & DMRS*, 92-0229-PC, 8/26/92 --- §102.05(9)**

***LaRose v. UW*, 82-153-PC, 1/2/85 --- §302.15**

***LaRose v. UW-Milwaukee*, 94-0125-PC-ER, 3/22/96 --- §724**

***LaRose v. UW-Milwaukee*, 94-0125-PC-ER, 3/31/95 --- §§706.05, 724**

***LaRose v. UW-Milwaukee*, 94-0125-PC-ER, 4/2/97 --- §§706.01, .05, 719**

***Larsen v. DOC*, 90-0374-PC, 91-0063-PC-ER, 5/14/92 --- §§202.03, 210.2, 786.04**

***Larsen v. DOC*, 91-0063-PC-ER, 7/11/91 --- §702.07**

***Larsen v. DOC*, 90-0374-PC, 8/26/92 --- §521.7(2)**

***Larson & Timm v. DHSS & DER*, 89-0046-PC, 9/8/89 --- §102.05(10)**

***Larson v. DHSS*, 86-0152-PC-ER, 7/8/87 --- §503.50**

***Larson v. DILHR*, 86-0013-PC, 6/12/86 --- §102.08**

***Larson v. DILHR*, 86-0019-PC-ER, 86-0013-PC, 1/12/89 --- §§615.2,**

766.02(2), 778.02(2), 788.04, 796.15

***Larson v. DOR*, 94-0114-PC, 12/22/94 --- §103.08(10)**

***Larson v. UW*, 84-0017-PC, 7/19/84 --- §103.05**

***LaSavage v. UW & DER*, 90-0378-PC, 5/14/92 --- §403.12(2)**

***LaSota v. DOC*, 94-1062-PC, 1/23/96 --- §625.02**

***Lathrop v. DER*, 97-0004-PC, 3/11/98 --- §403.12(2)**

***Latimer v. UW-Oshkosh*, 84-0034-PC-ER, 11/21/84 --- §706.01**

***Lauri v. DHSS*, 87-0175-PC, 11/3/88 --- §§103.01, .20, 615.2, 726, 774.02(1), 796.15**

***Lautz v. DER*, 91-0091-PC, 6/23/93 --- §403.12(2), (4)(b), (12)**

***Lawler v. UW-Madison*, 99-0131-PC-ER, 3/10/00 ---**

***Lawless v. UW-Madison*, 90-0023-PC-ER, 6/1/90; precedential value qualified, 1/11/91 --- §§720, 738.1, 773.01**

***Lawrence & Wermuth v. DER*, 94-0443-PC, 1/20/95 --- §102.01**

***Lawry v. DP*, 79-26-PC, 7/31/79 --- §502.01(l), .02**

***Lawton v. DP*, 81-47-PC, 12/16/81 --- §403.12(2)**

***Laxton v. DOT*, 79-PC-ER-65, 12/4/79 --- §510.50**

***Lazarus v. DETF*, 90-0014-PC-ER, 2/15/91 --- §§706.05, 720**

***Lazarus v. DETF*, 90-0014-PC-ER, 9/21/92; affirmed by Dane County Circuit Court, *Lazarus v. State Pers. Comm.*, 92 CV 4252, 6/7/93 --- §§721.16, 772.01, .03(2), 796.30**

***Leahy-Gross & Langhoff v. UW & DER*, 90-0035, 0086-PC, 8/26/92 --- §403.12(2)**

***Leavitt v. DMA*, 88-0094-PC-ER, 12/13/90 --- §702.005**

***LeBoeuf v. DNR & DER*, 93-0026-PC, 11/23/93 --- §403.12(2)**

***Ledvina v. DHSS*, 93-0194-PC-ER, 3/3/95 --- §774.05**

***Ledwidge v. UW-Madison & UWHCB*, 96-0066-PC-ER, 5/20/98 --- §§766.03(2), .04, 774.04, 796.15**

***Ledwidge v. UW-Madison*, 96-0066-PC-ER, 1/16/96 --- §717.7**

***Lee & Jackson v. UW-Milw.*, 81-PC-ER-11 and 12, 10/6/82 --- §§103.05, 510.50, 702.005**

***Lee v. DER*, 90-0301-PC, 3/29/94 --- §403.12(2)**

***Lee v. DNR*, 97-0081-PC, 10/9/98 --- §615.5(6)**

***Lee v. DP*, 79-371-PC, 11/24/80 --- §403.12(2)**

***Leer v. DNR & DER*, 85-0125-PC, 10/1/86 --- §403.12(2)**

***Lehman v. DNR*, 95-0033-PC-ER, 5/19/99 ---**

***Lehman v. DNR*, 95-0033-PC-ER, 7/16/97 --- §717.7**

***Lehr v. DILHR & DER*, 93-0006-PC, 8/23/93 --- §403.12(2)**

***Leick v. DOT*, 81-305-PC, 11/19/81 --- §103.05**

***Leinweber v. DOC*, 97-0104-PC-ER, 8/14/97 --- §§702.26, 706.01, 782.01**

***Leiterman v. DER*, 92-0557-PC, 9/9/94 --- §§403.12(2), .12(4)(s)**

***Leith v. DNR & DER*, 87-0154-PC, 11/3/88 --- §§403.12(2), (12)**

***Lemmen v. UW (Green Bay)*, 99-0170-PC-ER, 4/4/01 ---**

***Lentz v. UW & DER*, 93-0217-PC, 9/9/94 --- §§103.05, .20, .21(1)**

***Leonhardt v. DHSS*, 79-171-PC, 12/4/79 --- §103.21(a)**

***Letzing v. DOD*, 88-0036-PC, 1/25/89 --- §205.8(1)**

***Leverette v. DOA*, 82-PC-ER-50, 9/3/82 --- §702.05**

***Levy v. DP*, 78-289-PC, 10/12/79 --- §§403.023**

***Lewis & Myers v. DP*, 81-154, 156-PC, 7/26/82 --- §403.12(2)**

***Lien & Marsden v. DP*, 80-27, 30-PC, 4/3/81 --- §403.12(2)**

***Liethen v. WGC*, 93-0095-PC, 10/20/93 --- §201.01**

Lilley*, see *Bauhs & Lilley v. DP

***Lincoln v. DHFS*, 98-0170-PC-ER, 8/28/00 ---**

***Lindas v. DER*, 93-0102-PC, 5/26/95 --- §403.12(2)**

***Lindas v. DHSS*, 80-231-PC, 10/2/81 --- §103.02**

***Lindas v. DHSS*, 80-PC-ER-96, 1/3/85 --- §§788.02(2), 796.60**

***Linde v. DER*, 84-0050-PC, 8/31/84 --- §103.05**

***Lindeman v. UW-Madison*, 98-0221-PC-ER, 5/31/01 ---**

Lindner*, see *Cirilli & Lindner v. DER

Linsen*, see *DOJ (Dowd & Linsen) & Linsen v. DER

***Lipford v. DER & UW*, 91-0118-PC, 7/22/92 --- §102.09**

***Lipford v. UW & DER*, 91-0118-PC, 12/23/91 --- §102.09**

***Livingston v. DOT*, 98-0001-PC, 4/8/98 --- §102.10**

***Lloyd v. UW*, 78-127-PC, 8/30/79 --- §§403.12(2), 508.2**

***Lobner v. Voigt*, 73-168, 3/29/74 --- §103.01(4)**

***Lochner v. DNR & DER*, 88-0094-PC, 9/8/89 --- §403.12(2)**

***Locke et al. v. DHSS & DER*, 90-0384-PC, 7/11/91 --- §§403.12(13), 522.05(3)**

***Loeffler v. DHSS*, 80-367-PC, 7/27/81 --- §650**

***Loeffler v. DHSS*, 81-376-PC, 12/17/81 --- §§103.19, 650**

***Logan v. UW-Milwaukee*, 99-0124-PC-ER, 1/19/00 ---**

***Logan & Samsel v. UW-Milwaukee*, 99-0124, 0125-PC-ER, 3/17/00 ---**

***Long v. DILHR*, 81-PC-ER-1, 11/24/82 --- §§784.03(2), 796.15**

***Longdin v. DOC*, 93-0026-PC-ER, 7/27/95 --- §§702.005, 717.7, 788.03(2)**

***Look v. UW & DER*, 88-0140-PC, 2/22/89 --- §102.15(10)**

***Loomis v. UW*, 92-0035-PC, 2/15/96 --- §§102.11, 103.08(10), 503.01**

***Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 505 N.W. 2d 462 (Court of Appeals, 1993) --- §§103.08(8), .08(10), 522.01(1)**

***Lorscheter v. DILHR*, 94-0110-PC-ER, 4/24/97 --- §§721.01, 766.03(2), 796.60**

***Lott v. DHSS & DER*, 79-PC-ER-72, 5/16/80 --- §706.09**

***Lott v. DHSS & DP*, 79-160-PC, 3/24/80 --- §§103.05, 506.50**

***Lott v. DOR*, 81-PC-ER-71, 3/4/83 --- §701**

***Louis v. DOT*, 85-0126-PC-ER, 8/26/87 --- §712.05**

***Lovell v. DER & DOR*, 90-0240-PC, 12/13/90 --- §102.05(10)**

***Lowe v. DP*, 79-PC-CS-591, 9/30/82 --- §403.12(2)**

***Lowe v. UW-Milwaukee*, 98-0152-PC-ER, 5/5/99 ---**

***Loy et al. v. UW & DP*, 81-421, 422, 423, 424, 425-PC, 3/19/82 --- §403.12(13)**

***Lubitz v. Wis. Pers. Comm. & UW System*, Court of Appeals, 99-0628, 2/24/00, affirming *Lubitz v. UW*, 95-0073-PC-ER, 1/7/98--- §§742, 760.2, 773.01, .03(1), .04, 796.45**

***Luchsinger v. PSC*, 82-192-PC, 1/31/83 --- §103.08(10)**

***Luchsinger v. SPD*, 00-0177-PC, 2/25/02 ---**

***Ludeman v. DER*, 90-0108-PC-ER, 12/29/92 --- §§732, 766.04, 796. 15**

***Ludka v. UW-Stout*, 88-0026-PC-ER, 4/28/89 --- §706.03**

Ludwig*, see *Ghilardi & Ludwig v. DER

***Luebers v. DHSS*, 84-0095-PC-ER, 5/29/86 --- §§774.02(2), .05, 796.60**

***Lulling & Arneson v. DER*, 88-0136, 0137-PC, 9/13/89 --- §§403.12(2), (12)**

***Lulloff v. DER*, 90-0347-PC, 4/19/94; affirmed by Dane County Circuit Court, *Lulloff v. Wis. Pers. Comm.*, 94-CV-1633, 6/6/96; affirmed by Court of Appeals, *Lulloff v. Wis. Pers. Comm.*, 96-2189, 1/8/98--- §§403.12(2), (4)(o)**

***Lundeen v. DOA*, 79-208-PC, 6/3/81 --- §§103.20, 501.04, 667**

***Lundeen v. DOA*, 79-PC-ER-107, 8/5/81 --- §702.10**

***Lundquist v. UW*, 95-0081-PC-ER, 9/23/98 --- §§766.03(2), 784.03(2), 796.15**

***Lustig et al. v. DILHR et al.*, 78-277-PC, etc., 1/12/81; aff'd by Dane County Circuit Court, *Lustig et al. v. Pers. Comm.*, 81-CV-0542, 8/13/81 --- §§103.05, 103.08(7), 103.08(8), 103.18, 103.21(a)**

***Lutze v. DOT*, 97-0191-PC-ER, 2/23/01 ---**

***Lutze v. DOT*, 97-0191-PC-ER, 8/28/00 ---**

***Lutze v. DOT*, 97-0191-PC-ER, 7/28/99 ---**

***Lynch v. DHSS*, 88-0041-PC, 8/10/88 --- §103.05**

***Lyons v. DHSS*, 79-81-PC, 4/26/79; aff'd by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm.*, 80-CV-4948, 7/14/81 --- §103.15**

***Lyons v. DHSS*, 79-81-PC, 7/23/80; aff'd by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm.*, 80-CV-4948, 7/14/81 --- §§102.05(4)(a), 103.08(3), 130.5(8), 202.03, 210.2, 502.03, 502.09**

***Lyons v. DP*, 79-PC-CS-468, 12/3/81 --- §403.12(2)**

***Lyons v. WGC*, 93-0206-PC, 12/5/94 --- §§302.11, .13, 303, 510.08, .15, 517.01, 522.05(3)**

***Lyons v. WGC*, 93-0206-PC, 2/20/95 --- §521.7(8)**

***Lyons v. WGC*, 93-0206-PC, 3/11/94 --- §506.04**

M

***MacDonald v. Sec. of State*, 80-364-PC, 8/17/83 --- §202.10(2)**

***Mack & Bugge v. DER*, 87-0182, 0183-PC, 6/2/88 --- §103.08**

***MacKenzie v. UW & DER*, 91-0028-PC, 1/24/92 --- §403.12(2)**

***Maday v. DOC & DER*, 92-0838-PC, 6/23/93 --- §503.06**

***Maegli v. Schmidt*, 74-6, 1/20/75 --- §102.01(1)**

***Maegli v. Schmidt*, 74-13, 1/20/75 --- §102.05(1)**

***Magel v. UW-Madison*, 98-0167-PC-ER, 1/27/99 --- §§102.01, 706.01**

***Magnuson v. DILHR & DP*, 82-22-PC, 11/9/83 - §§403.1015, .12(2)**

***Maher (Eiseley) v. DHSS & DER*, 85-0192-PC, 9/4/86 --- §§403.12(2), (11)**

***Maher (Eiseley) v. DHSS & DER*, 85-0215-PC, 7/24/86 --- §§103.08(8), (8.5)**

***Makl v. UW-Stevens Point*, 92-0038-PC-ER, 4/30/93 --- §§712.4, 788.03(2), .25, 796.95**

***Malesevich v. DHSS*, 96-0087-PC, 3/26/97 --- §§202.03, 210.2**

***Malzahn v. Carballo*, 75-39, 2/23/76 --- §102.05(4)**

***Mangardi v. DER*, 90-0335-PC, 3/29/94 --- §§403.12(2),**

***Manlove v. DILHR*, 80-355-PC, 4/23/81 --- §103.12**

***Mann v. DER*, 83-0245-PC, 8/l/84 --- §403.12(2)**

***Mann v. DP*, 79-PC-CS-612, 11/24/80 --- §403.12(2)**

***Manning v. UW & DER*, 89-0102-PC, 12/13/90 --- §§403.12(2), (4)(b)**

***Manthei et al. v. DER*, 86-0116, etc.-PC, 1/13/88 --- §§420, 521.7(1)**

***Manthei v. DILHR*, 81-394-PC, 10/14/82 --- §§301.02, 302.12**

***Mares et al. v. DOC & DER*, 91-0002-PC, 12/12/91 --- §403.12(2)**

***Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97 --- §§702.07, 773.04, 782.03(2), .04, 786.03(2), .04, 796.50**

***Marfilius v. UW-Madison*, 96-0047-PC-ER, 5/14/96 --- §§702.07, .26, .50**

***Markert v. DILHR & DER*, 89-0029-PC, 6/29/89 --- §403.12(2)**

***Markham v. DHSS*, 79-PC-ER-151, 2/9/82; aff'd by Dane County Circuit Court, *Markham v. DHSS & State Pers. Comm.*, 82-CV-1187, 8/20/86 -- §§766.03(2), 796.15**

***Marks v. DOA & DER*, 90-0421-PC, 10/31/91 --- §402.12(2)**

***Marquardt v. DHSS & DER*, 89-0106-PC, 10/4/89 --- §103.21(1)**

***Marquardt v. DPI*, 90-0349-PC, 1/11/91 --- §102.05(6)**

Marsden*, see *Lien & Marsden v. DP

***Marshall et al. v. DP & DHSS*, 79-136, 169-PC, 3/6/81 --- §§103.08(10), .18**

***Martin et al. v. DOC*, 90-0080-PC-ER, etc., 10/16/92 --- §714.9**

***Martin et al. v. DP*, 83-0031, 0035, 0036, 0037-PC, 5/25/83 --- §505.02(2)**

***Martin v. DILHR*, 74-132, 12/16/81 --- §§103.15, 675.5**

***Martin v. DOC & UW-Madison*, 90-0080-PC-ER, etc., 1/11/91 --- §§702.50, 710**

***Martin v. DOC*, 94-0103-PC-ER, 12/22/94 --- §§702.005, .07**

***Martin v. Hart*, 76-73, 8/24/76 --- §101.06**

***Martin v. Transportation Commission & DER*, 80-366-PC, 5/25/83 --- §517.55**

***Martin v. Transportation Commission*, 80-366-PC, 3/21/83 --- §§301.02, 302.12, 501.02(2), 517.01**

***Martin v. UW & DER*, 85-0092-PC, 1/9/86 --- §403.12(2)**

***Marty v. DP*, 79-PC-CS-587, 12/8/80 --- §403.12(2)**

***Marx v. DATCP & DP*, 82-0050-PC, 3/18/87 --- §§403.12(8), 519**

***Marx v. DER*, 91-0087-PC, 2/5/93 --- §403.12(2), (4)(b)**

***Marx v. DILHR & DP*, 79-345-PC, 4/28/80 --- §102.05(10)**

***Marx v. DP*, 78-138-PC, 10/l/81; rev'd by Dane County Circuit Court, *DP v. Pers. Comm.*, 81-CV-5798, 11/8/83; rev'd by Court of Appeals District IV, 84-10 , 11/21/85 --- §403.12(2)**

Marx*, see *Tiedeman & Marx v. DHSS & DER

***Marxer v. DMRS*, 86-0070-PC, 8/20/86 --- §403.04(l)(h)**

***Masear v. DILHR*, 89-0065-PC, 11/1/89 --- §§102.05(4), 103.08(10)**

***Masko v. DHSS*, 95-0096-PC-ER, 2/15/96; rehearing denied, 4/4/96 --- §706.03**

***Masko v. DHSS*, 95-0096-PC-ER, 4/4/96 --- §§706.01, .03**

***Massart v. UW (La Crosse)*, 00-0029-PC-ER, 10/18/00 ---**

***Massenberg v. UW-Madison*, 81-PC-ER-44, 7/21/83 --- §717.03**

***Massenberg v. UW-Madison*, 81-PC-ER-44, 9/14/84 --- §§770.02(l), 784.02(l), 796.60**

***Massenberg v. UW-System*, 81-PC-ER-44, 2/6/86 --- §§784.03(l), 796.60**

Mastricola*, see *Fullmer, Mastricola & Belshe v. DP

***Masuca v. UW-Stevens Point*, 95-0128-PC-ER, 11/14/95 --- §732**

***Matakas v. DOC*, 99-0088-PC, 4/19/00 ---**

***Matthews v. UW & DER*, 92-0820-PC, 1/25/94 --- §§403.12(2), 510.01**

***Matulle v. State Pers. Comm.*, Winnebago County Circuit Court, 85-CV-207, 11/19/82 --- §103.02**

***Matulle v. UW*, 81-433-PC, 1/27/82; aff'd by Winnebago County Circuit Court, *Matulle v. State Pers. Comm.*, 82-CV-207, 11/19/82 --- §103.05**

***May v. DILHR & DP*, 82-23-PC, 7/8/82 --- §503.50**

***Mayer et al. v. DHSS & DER*, 95-0002-PC, 12/7/95 --- §403.12(13)**

***Mayer et al. v. DHSS & DER*, 95-0002-PC, 7/24/95 --- §102.08**

***Mayer v. DHSS & DER*, 95-0002-PC, 1/16/96 --- §515.2**

Mayfield*, see *Starczynski & Mayfield v. DOA

***McBeath v. DHSS*, 82-119-PC, 7/7/83 --- §§202.10(2), 511.03**

***McCabe v. DER*, 86-0059-PC, 12/18/86 --- §403.12(4)(d)**

***McCabe v. DILHR & DER*, 83-0204-PC, 7/6/84 --- §§403.12(15), .127,**

***McCabe v. UW*, 82-20-PC, 9/30/82 --- §615.5(2)**

***McCallum v. DOT*, 85-0036-PC, 6/18/85 --- §§103.20, .21(l)**

***McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99 --- §§721.32, 760.4, 786.04, 788.03(2), .25, 796.60**

***McClain v. Comm. of Insurance*, 79-325-PC, 7/25/80; aff'd by Dane County Circuit Court, *Comm. of Ins. v. State Pers. Comm.*, 80-CV-5649, 4/14/81 --- §302.10**

***McClements v. DP*, 81-167-PC, 5/28/82 --- §403.12(2)**

***McClure v. UW-Madison*, 88-0163-PC-ER, 4/21/92 --- §§774.03(2), 796.60**

***McClure v. UW-Madison*, 88-0163-PC-ER, 9/19/90 --- §717.2**

***McCoic v. Wis. Lottery*, 88-0157-PC-ER, 12/17/92 --- §§702.20, 766.03(2), 776.01, 796.05, .15**

***McCord v. DER*, 85-0147-PC, 3/13/86 --- §§403.12(2), (4)(f), (12),**

***McCrae v. UW-Milwaukee*, 81-PC-ER-99, 2/7/83 --- §§784.02(2), 788.02(2), 796.15**

***McCready & Paul v. DHSS*, 85-0216, 0217-PC, 5/28/87 --- §205.8(l)**

***McCready & Paul v. DHSS*, 85-0216, 0217-PC, 9/10/87 --- §§521.5, .7(2)**

***McCreedy v. DOC*, 00-0038-PC, 4/4/01 ---**

***McCullough v. DER*, 94-0394-PC, 6/9/95 --- §§403.12(2), .12(11)**

***McDonald v. UW-Madison*, 94-0159-PC-ER, 8/5/96 --- §§706.05, 712.5**

***McDowell v. DER*, 87-0006-PC, 4/15/87 --- §502.75**

***McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/4/86 --- §§702.005, .03, .07, .24, 720,**

***McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/8/88 --- §§702.03, 706.50, 780.04, .10**

***McGhie v. DHSS*, 80-PC-ER-67, 3/19/82 --- §§742, 784.03(l), 786.03(2), 796.35, .60**

***McGrath v. UW-Parkside*, 83-0090-PC-ER, 9/26/85 --- §§766.03(2), 796.55**

***McGrew v. UW & DP*, 81-443-PC, 1/7/83 --- §§130.5(6), .7(8), 403.12(2)**

***McIntosh v. DP & UW*, 81-442-PC, 8/5/82 --- §403.12(2)**

***McIntyre v. DHSS*, 86-0140-PC, 4/15/87 --- §§615.2, 615.5(6)**

***McKee et al. v. DILHR*, 80-PC-ER-92, etc., 7/26/82 --- §§784.03(2), .04, 769.55, 796.15**

***McKibbins v. UW-Milwaukee*, 94-0099-PC-ER, 4/4/95 --- §§782.03(2), .04, 784.03(2), 788.03(2), 796.45**

***McKnight v. DER*, 92-0493-PC, 5/2/94 --- §§403.12(2), (4)(w)**

***McLester v. Personnel Commission*, Court of Appeals District 111, 84-1715, 3/12/85 --- §720**

***McLester v. UGLRC*, 79-PC-ER-38, 10/14/82; aff'd by Outagamie County Circuit Court, *McLester v. Pers. Comm.*, 82-CV-1315, 7/30/84; aff'd by Court of Appeals District 111, 84-1715, 3/12/85 --- §§784.02(2), 796.60**

***McLlquham v. UW*, 79-207-PC, 4/25/80 --- §§102.05(6), 503.02**

***McMillan v. DOC*, 99-0009-PC-ER, 9/21/01 ---**

***McMullen v. DER*, 97-0110-PC, 7/1/98 --- §403.12(2)**

***McNown [Williams] v. DILHR & DER*, 94-0828-PC, 11/14/95 --- §§403.12(17)(a), (17)(m), 420, 502.07**

***McPeek v. DILHR & DP*, 78-252-PC, 1/30/79 --- §103.11**

***McSweeney v. DOJ & DMRS*, 84-0243-PC, 3/13/85 --- §§103.18, .21(a)**

***Medina v. DHSS*, 86-0076-PC-ER, 2/11/88 --- §706.01**

***Medora, et al. v. DER*, 90-0324-PC, etc., 9/18/92 --- §403.12(2), (4)(s)**

***Mehler v. DHSS*, 94-0114-PC-ER, 12/22/94 --- §702.01**

***Meinholz v. DOR & DP*, 79-352-PC, 6/30/80 --- §403.12(13)**

***Meinholz v. DOT*, 90-0147-PC-ER, 1/11/91 --- §717.7**

***Meisenheimer v. DILHR & DER*, 94-0829-PC, 4/28/95 --- §§102.14, 522.05(2)**

***Meredith v. DHSS*, 79-172-PC, 3/24/80 --- §103.08(6)**

***Meredith v. UW-La Crosse*, 90-0170-PC-ER, 9/15/93; affirmed, *Meredith v. Wis. Pers. Comm.*, Dane County Circuit Court., 93CV3986, 8/29/94. --- §§788.03(2), .04, 796.25, .35**

***Meredith v. Wis. Pers. Comm.*, Dane County Circuit Court., 93CV3986, 8/29/94 --- §§702.005, 722, 788.01**

***Mergen v. UW & DER*, 91-0247-PC, 11/13/92 --- §403.12(2), (13), 522.05(3)**

***Mergen v. UW & DP*, 83-0064-PC, 2/15/84 --- §403.12(2)**

Merilla*, see *Braun & Merilla v. DOT & DP

***Mertens v. DER*, 90-0237-PC, 8/8/91 --- §§403.12(2), (12)**

***Mertz v. DER*, 92-0747-PC, 8/18/94 --- §403.12(2)**

***Mertz v. DNR & DER*, 90-0250-PC, 5/1/91 --- §403.12(2)**

***Meschefske v. DHSS & DMRS*, 88-0057-PC, 7/14/89 --- §§522.05(2), 615.5(9), 622.02, 625.02**

***Meschefske v. DHSS*, 88-0057-PC, 7/13/88 --- §§103.18, .20, .21(1)**

***Meschefske v. DP*, 80-37-PC, 1/8/81 --- §403.12(2)**

***Metzig v. DHSS*, 90-0383-PC, 1/24/91 --- §103.20**

***Meyer v. DHFS*, 98-0162-PC-ER, 5/5/99 ---**

***Meyer v. DHSS*, 91-0006-PC-ER, 6/11/92 --- §§773.03(1), 796.60**

***Meyer v. UW-Madison*, 98-0103-PC-ER, 10/21/98 --- §§706.01, 706.05**

***Meyer-Grover et al. v. DER*, 94-1011-PC, etc., 1/23/96 --- §403.12(2), (4)(b)**

Meyers*, see *Lewis & Meyers v. DP

***Meyett & Rabideaux v. DILHR*, 80-PC-ER-140, 81-PC-ER-2, 4/15/83 -- §§766.02(2), 784.02(2), 788.02(2), 796.15**

***Michalski v. DOT*, 82-228-PC, 6/9/83 --- §§403.12(2), 403.12(4)(q), 403.12(13)**

***Mickelson v. DNR & DER*, 95-0182-PC, 7/23/96 --- §403.12(2)**

***Milchesky v. DOT & DER*, 94-0546-PC, 5/15/95 --- §§102.05(10), 103.03**

***Millard v. DER*, 92-0713-PC, 3/19/93; affirmed, *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94 --- §§102.10, 522.05(1)(e), .05(2)**

***Millard, Eckes & Peterson v. DOT & DER*, 84-0076, 0077, 0079-PC, 6/6/85 – §403.12(2)**

***Miller et al. v. DER*, 92-0122-PC, etc., 5/5/94 --- §§403.12(2), (4)(u)**

***Miller v. DER*, 85-0066-PC, 4/16/86 --- §§403.12(2), (4)(j), (o)**

***Miller v. DER*, 92-0095, 0851-PC, 9/9/94 --- §§403.12(2), 510.15, 522.05(2)**

***Miller v. DER*, 95-0077-PC, 4/4/96 --- §§403.12(2), (4)(b)**

***Miller v. DHSS & DER*, 91-0129-PC, 5/1/92 --- §§403.12(1), (2), (4)(s)**

***Miller v. DHSS & DER*, 92-0840-PC, 1/25/94 --- §403.12(2), (4)(d), 502.07**

***Miller v. DHSS*, 78-114-PC, 2/5/79 --- §680**

***Miller v. DHSS*, 81-137-PC, 10/2/81 --- §103.21(a)**

***Miller v. DHSS*, 87-0209-PC, 2/8/89 --- §§103.08(8), (10)**

***Miller v. DHSS*, 91-0106-PC-ER, 5/27/94 --- §§774.03(2), .05, 788.03(2), 790.03(2)**

***Miller v. DNR & DER*, 90-0202-PC, 12/13/90 --- §403.12(2)**

***Miller v. DPI*, 00-0011-PC, 2/8/01 ---**

***Miller v. DOR*, 82-196-PC, 3/17/83 --- §103.08(8)**

***Miller v. DOT*, 89-0092-PC-ER, 11/23/93 --- §§702.18(1), 774.03(2), 796.60**

***Miller v. DOT*, 91-0117, 0142-PC-ER, 3/10/93 --- §717.3**

***Miller v. DOT*, 91-0117-PC-ER, 1/8/93 --- §742**

***Miller v. DP*, 82-236-PC, 12/22/83 --- §403.12(2)**

***Miller v. LaFollette*, 76-121, 1976 --- §102.05(6)**

***Miller v. UW*, 76-238, 8/30/79 --- §§510.06, 510.50**

***Mincy v. DER*, 90-0229-PC, 10/3/91 --- §518.02**

***Mincy & Emery et al. v. DER*, 90-0229, 0257-PC, 8/28/91; rehearing denied 10/3/91 --- §403.12(2)**

***Mincy et al. v. DER*, 90-0229, 0257-PC, 2/21/91 (ruling by examiner); rehearing denied, 3/12/91 --- §§103.03, .18, 403.12(12), (16), 506.03**

***Minor v. Nusbaum*, 73-173, 1/3/75 --- §101.03, 103.01(2)**

***Minor v. WCCJ*, 80-329-PC, 3/2/81 --- §103.08(9)**

***Minton v. DVA & DER*, 94-0002-PC, 11/22/94 --- §403.12(2)**

***Mirandilla v. DVA*, 82-189-PC, 7/21/83 --- §§103.21(b), 683**

***Misterek v. DER*, 92-0511-PC, 4/17/95 --- §403.12(2)**

***Mitchell v. DNR*, 83-228-PC, 8/30/84 --- §§202.10(2), 210.2, 501.02(l)**

***Mitchell v. DOC*, 95-0048-PC-ER, 8/5/96 --- §§721.01, 773.03(2), 784.03(2), 786.03(2), 788.03(2), 790.03(2)**

***Mitchell v. UW-Milwaukee*, 84-0170-PC-ER, 4/4/86 --- §§784.02(2), 786.02(2), 796.55**

***Mittelstadt v. DOT & DP*, 81-31-PC, 10/2/81 --- §403.12(4)(m)**

***Mog v. Department of Agriculture*, 504, 8/72 --- §103.02(2)**

***Molitor v. DHSS*, 89-0086-PC, 89-0105-PC-ER, 5/1/92 --- §§615.2, 778.02(2), 796.15**

***Mongold v. UW-Madison*, 89-0052-PC-ER, 12/17/92 --- §§788.03(2), 796.60**

***Monk v. DP*, 81-0118-PC, 6/4/86 --- §403.12(4)**

***Monson v. DHSS*, 87-0076-PC, 6/20/88; affirmed by Dane County Circuit Court, *Monson v. Wis. Pers. Comm.*, 88-CV-4059, 4/20/89--- §§202.03, 205.1, 210.2**

***Moore v. DER*, 90-0142-PC, 1/24/91 --- §403.12(2)**

***Moore v. DNR & DER*, 92-0761-PC, 5/2/94 --- §403.12(2), (4)(b)**

***Moran & Kaeske v. DER*, 90-0372, 0382-PC, 1/11/94 --- §§403.12(2), (4)(b), (4)(f)**

***Moreau v. DMRS*, 93-0043-PC, 8/11/93 --- §§403.04(1), .07**

***Morgan v. DER*, 96-0137-PC, 8/13/97 --- §403.12(2), (4)(b)**

***Morgan v. DHSS*, 93-0089-PC, 9/24/93 --- §615.5(9)**

***Morgan v. DNR & DP*, 83-0028-PC, 11/23/83 --- §403.12(2)**

***Morgan v. Knoll*, 75-204, 5/25/76 --- §101.05, 102.01(3), .02(3), .05(6)**

***Moritz v. DHSS & DER*, 92-0039-PC, 3/10/93 --- §403.12(2)**

Mork*, see *Heath & Mork v. DOC & DER

***Morkin v. UW-Madison*, 85-0084-PC-ER, 8/1/85 --- §702.90**

***Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88; rehearing denied, 12/29/88; affirmed by Dane County Circuit Court, *Morkin v. Wis. Pers. Comm.*, 89-CV-0423, 9/27/89 --- §§722, 792.03(2), .04**

***Morkin v. UW-Madison*, 85-0137-PC-ER, 12/29/88; affirmed by Dane County Circuit Court, *Morkin v. Wis. Pers. Comm.*, 89-CV-0423, 9/27/89 --- §738.1**

***Morris v. DMRS & DOT*, 90-0232-PC, 11/16/90 --- §§102.13, 103.18**

***Morris v. DP*, 81-0088-PC, 5/29/86 --- §403.12(2)**

***Morrissey et al. v. DER*, 92-0525, 0559-PC, 5/2/94 --- §§403.12(2), (4)(b)**

***Morrissey v. DER*, 95-0097-PC, 9/14/95 --- §103.03**

***Morschauser v. DOC*, 98-0175-PC, 3/10/99 ---§§103.01, 511.01, .02, .08**

***Mortensen v. DER*, 94-0276-PC, 12/7/95 --- §403.12(2), (4)(f)**

***Morvak v. DOT & DMRS*, 97-0020-PC, 6/19/97 --- §§103.20, 502.75, 615.2**

***Mosby v. WGC*, 91-0033-PC-ER, 1/11/94 --- §§788.03(2), 796.25**

***Mosley v. DILHR*, 93-0035-PC, etc., 1/25/94 --- §§506.03, 724**

***Mosley v. DILHR*, 93-0035-PC, etc., 4/19/94 --- §§506.04, 724**

***Mosley v. DILHR*, 93-0035-PC, etc., 6/21/94 --- §§506.04, 724**

***Mosley v. DWD*, 97-0119-PC-ER, 9/24/97 --- §702.01**

***Moss v. DER*, 97-0062-PC, 2/11/98 --- §§103.03, .18**

***Moss v. DMRS*, 87-0015-PC, 10/7/87 --- §403.07**

***Moss v. DNR*, 87-0028-PC-ER, 1/13/88 --- §738.01**

***Mott v. DOA*, 89-0119-PC, 12/13/90 --- §615.2**

***Moy v. DPI & DP*, 79-135-PC, & 79-PC-ER-167, 8/21/81 --- §§403.12(2), 784.03(2), 796.40**

***Mueller et al. v. DHSS*, 81-92, etc.-PC, 12/16/81 --- §103.21(l)**

***Mueller v. DOC*, 97-0010-PC, 6/19/97 --- §§511.20, 515.2**

***Mueller v. DOT & DER*, 93-0030-PC, 6/23/93 --- §§102.05(10), .08**

***Mueller v. DOT & DER*, 93-0109-PC, 2/27/97 --- §§403.12(2), (4)(d), (4)(h), (4)(j), (4)(s), (4)(x), 510.50 512.03**

***Mueller v. DOT & DER*, 94-0567-PC, 11/14/95 --- §403.12(2)**

***Mugan v. DNR & DER*, 84-0236-PC, 10/15/85 --- §403.12(2)**

***Mugerauer v. DHSS*, 87-0122-PC, 9/10/87 --- §103.05**

***Mukamal v. WERC*, 79-126-PC, 10/2/81 --- §302.13**

***Mund v. DILHR & DER*, 84-0213-PC, 11/7/85 --- §§403.12(13), 522.05(2)**

***Murchison v. DOJ*, 89-0093-PC-ER, 10/4/89 --- §702.01**

***Murphy v. DOC*, 02-0006-PC, 4/17/02 ---**

***Murphy v. DHFS & DER*, 98-0013-PC, 3/24/99 (appeal pending) --- §403.12(2), (10), (11)**

***Murray v. DER*, 91-0105-PC, 4/6/95; affirmed by Dane County Circuit Court, *Murray v. Wis. Pers. Comm.*, 95-CV-0988, 12/15/95--- §521.2, .7(1)**

***Murray v. Wis. Pers. Comm.*, Dane County Circuit Court, 93-CV-2661, 4/29/94 --- §§403.12(2), .12(4)(w)**

N

***Nagorsen & Boehrig v. DOC & DER*, 92-0158, 0165-PC, 12/17/92 --- §403.12(2), (8), (11)**

***Namenwirth v. UW-Madison*, 79-PC-ER-93, 2/13/86 --- §717.03**

***Nash v. DNR & DMRS*, 88-0117-PC, 10/5/88 --- §513**

***Nash v. DNR & DMRS*, 88-0117-PC, 11/18/88 --- §403.04(2)**

***Nash v. DRL & DER*, 90-0107-PC-ER, 12/23/91 --- §§712.5, 717.1**

Nash*, see *Harden & Nash v. DRL & DER

***Neal v. DOC*, 94-0019-PC-ER, 6/2/94 --- §505.50**

***Neher v. DATCP & DP*, 80-190-PC, 7/8/82 --- §403.12(2)**

***Nehls v. DHSS*, 92-0844-PC, 6/25/93 --- §102.05(6)**

***Nehls v. DP*, 82-169-PC, 10/31/83 --- §403.12(2)**

***Nehring et al. v. UW & DER*, 89-0066-PC, etc., 11/16/90 --- §403.12(2)**

***Neitzel v. Carballo*, 73-32, 8/23/76 --- §103.08(1)**

***Neldaughter v. DHSS*, 96-0054-PC, 2/14/97 --- §§502.75, 615.2, .5(6)**

***Nell v. DP*, 78-224-PC, 6/29/79 --- §403.12(2)**

***Nelson v. DER*, 92-0310-PC, 9/17/96 --- §§403.12(4)(x), (15)(a), (15)(m)**

***Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98 --- §§706.01, .05**

***Nelson v. DOT & DER*, 98-0176-PC, 8/27/99 ---**

***Nelson v. SHS*, 00-0026-PC, 5/31/00 ---**

***Nelson v. SPD & DP*, 79-27-PC, 11/19/81 --- §§403.04(l.5), 403.07**

***Nelson v. UW*, 94-0282-PC, 10/24/94 --- §103.21(1)**

***Nelson v. UW-Madison*, 97-0020-PC-ER, 11/20/97 --- §724**

***Nelson v. UW-Madison*, 97-0020-PC-ER, 5/20/98 --- §§506.03, 724**

Nelson*, see *Conroy & Nelson v. DER

***Nesse & Cleary-Hinz v. UW & DER*, 90-0126, 0127-PC, 10/4/90 --- §403.12(13)**

***Nessler & Heineman v. DHSS & DER*, 93-0004-PC, 10/20/93 --- §403.12(2)**

***Nestigen & Alfano v. DP*, 80-369, 371-PC, 3/19/82 --- §403.12(2)**

***Nettleton v. State Personnel Board*, Dane County Circuit Court, 159-201, 8/13/79 --- §774.03(2)**

***Neumaier v. DHFS*, 98-0180-PC-ER, 11/4/98 --- §§732, 736**

***Neuman v. DP*, 79-373-PC, 6/3/81 --- §403.12(2)**

***Newberry & Eft v. DHSS*, 82-98, 100-PC, 8/17/83 --- §§301.02, 302.12, 302.13, 501.02(2)**

***Newberry v. UW & DER*, 87-0066-PC, 9/10/87 --- §102.05(13)**

***Newbold v. SPD*, 96-0053, 0095-PC-ER, 12/13/00 ---**

***Newbold v. SPD*, 96-0053, 0095-PC-ER, 2/29/00 ---**

***Newbury v. DHSS & DP*, 83-0018-PC, 1/6/84 --- §403.12(2)**

***Newbury v. DILHR*, 80-50-PC, 9/23/80 --- §102.10**

***Newton v. DHSS & DP*, 79-42-PC, 12/4/79 --- §403.12(2)**

***Nichols v. DER*, 83-0099-PC, 9/16/83 --- §§502.75, 503.50**

***Nichols v. UW-Madison*, 96-0084-PC-ER, 3/12/97 --- §702.50**

***Nickel & Standish v. DP*, 79-PC-CS-774 and 629, 2/17/81 --- §403.12(2)**

***Nigbor v. DVA*, 79-125-PC, 12/4/79 --- §522.01(3)**

***Nikolai v. DOR*, 80-319-PC, 12/17/80 --- §103.08(5)**

***Niroomand-Rad v. Medical College of Wisconsin, Inc.*, 88-0044-PC-ER, 5/5/88 --- §702.01**

***Nitschke v. DP & DHSS*, 80-293-PC, 9/23/82 --- §403.12(2)**

***Nolen v. DILHR [DOCom]*, 95-0163-PC-ER, 12/17/97 --- §§719, 732**

***Nolen v. DILHR*, 95-0163-PC-ER, 12/17/97 --- §§719, 732**

***Noltemeyer v. DILHR & DP*, 78-14-PC, 78-28-1, 12/20/78 --- §103.15**

***Nordstrom v. DER*, 95-0061-PC, 2/10/97 --- §403.12(2)**

***Norwood v. UW-Parkside*, 78-PC-ER-62, 5/13/82 --- §§784.03(2), 796.60**

***Novak et al. v. Supreme Court et al.*, 90-0111-PC-ER, 2/7/91 --- §702.01**

***Novak v. DER*, 83-0104-PC, 1/17/85 --- §§403.12(2), 517.55**

***Novak v. DER*, 83-0104-PC, 2/29/84 --- §502.75**

***Nunnelee v. State Pers. Bd.*, Dane County Ciruit Court, 158-464, 9/14/78 --- §130.5(6)**

***Nuter v. DHSS*, 82-148-PC, 7/21/83 – §202.10(2)**

O

***Oakley v. Comm. of Securities*, 78-66-PC, 10/10/78 --- §§522.01(l), (4)**

***Oakley v. Comm. of Securities*, 78-66-PC, 4/19/79 --- §§301.03, 501.02(2)**

***Obenberger v. DOT & DER*, 93-0114-PC, 6/9/95 --- §403.12(2)**

***O'Brien v. DOT & DER*, 91-0221-PC, 6/25/93 --- §403.12(2)**

***O'Brien v. DOT*, 88-0059-PC, 6/14/91; rehearing denied, 7/25/91 --- §§103,08(1), (10)**

***Ochalla et al. v. DMRS*, 90-0011-PC, 5/31/91 --- §403.04(10), .07**

***Ochrymowycz v. UW (Eau Claire)*, 99-0161-PC-ER, 6/7/00 ---**

***Ochs & Jensen v. DILHR*, 93-0185, 0219-PC, 9/9/94 --- §615.2**

***O'Connor v. DHSS & DER*, 90-0381-PC, 2/21/92 --- §712.5**

***O'Connor v. DHSS*, 94-0339, 0497-PC, 3/31/95 --- §§202.10(2), 210.5(5)**

***O'Connor v. DMA & DP*, 82-70-PC, 10/14/82 --- §102.05(10)**

***Oestreich v. DHSS & DMRS*, 87-0038-PC-ER, 2/12/91 --- §§517.01, 774.03(1)**

***Oestreich v. DHSS & DMRS*, 89-0011-PC, 9/8/89 --- §102.14**

***Oestreich v. DHSS*, 87-0038-PC-ER, 6/29/88 --- §§702.18(l), 720**

***Oestreich v. DOT*, 91-0014-PC, 4/5/91 --- §103.08(10)**

***Oestreicher et al. v. DP*, 83-0077-PC, 4/11/84 --- §403.12(2)**

***Oghalai v. DER*, 83-0161-PC, 11/8/84 --- §403.12(2)**

Oinonen*, see *Tuttle, Oinonen & Delaney v. DATCP & DER

***Olbrantz & Harring v. DHSS*, 81-462, 468-PC, 3/4/82 --- §103.21(a)**

***Olbrantz v. DHSS & DER*, 84-0065-PC, 9/12/84 --- §403.12(2)**

***Olbrantz v. Earl*, 75-9, 3/25/75 --- §103.05(1)**

***Olmanson v. DHFS*, 97-0106-PC, 97-0183-PC-ER, 1/19/01 ---**

***Olmanson v. DHFS*, 97-0106-PC, 97-0183-PC-ER, 9/15/99 (ruling by examiner) ---**

***Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98 --- §§732, 774.04, 778.04, 786.04, 788.04**

***Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 2/10/99 --- §732**

***Olson et al. v. DER*, 92-0071-PC, etc., 12/5/94 --- §521.5**

***Olson et al. v. DER*, 92-0071-PC, etc., 9/9/94 --- §§403.12(2), 403.12(4)(c)**

***Olson v. DER*, 87-0169-PC, 3/21/90 --- §§302.11, 403.12(2), (7)**

***Olson v. DER*, 95-0062-PC, 2/10/97 --- §403.12(2)**

***Olson v. DHSS*, 78-11, 8/28/78 --- §§522.05(l)(d), (3)**

***Olson v. DHSS*, 83-0010-PC-ER, 4/27/83 --- §706.05**

***Olson v. DHSS*, 88-0087-PC, 12/5/88 --- §103.21(1)**

***Olson v. DILHR [DWD] & DER*, 96-0015-PC, 10/22/96 --- §§403.12(11), .127**

***Olson v. DNR & DER*, 89-0007-PC, 9/20/89 --- §403.12(2)**

***Olson v. DOA & DER*, 92-0731-PC, 2/3/94 --- §§403.12(2), (4)(f), (4)(k)**

***Olson v. UW & DER*, 90-0114-PC, 1/11/91 --- §403.12(2)**

***Olson v. UW-Stout*, 87-0176-PC-ER, 5/1/91 --- §717.7**

***Olson & Winkelmann v. Schmidt & Wettengel*, 74-130, 11/24/75 --- §102.07(1), (2), (4)**

***O'Meara v. DOT*, 01-0014-PC, 6/13/01 ---**

***Oppermann v. DOC*, 98-0171-PC, 5/7/99 ---**

***Oriedo v. DER & DOT*, 90-0067-PC-ER, 9/5/91 --- §717.3**

***Oriedo v. DOC et al.*, 98-0124-PC-ER, 11/4/98 --- §§702.07, 710**

***Oriedo v. DOC*, 98-0124-PC-ER, 2/11/00 ---**

***Oriedo v. DOC*, 98-0124-PC-ER, 1/19/00 ---**

***Oriedo v. DOC*, 98-0124-PC-ER, 4/21/99 ---**

***Oriedo v. DOC*, 98-0124-PC-ER, 2/2/99 --- §§511.08, .80, 702.005, 732**

***Oriedo v. DOC*, 00-0001-PC-ER, 5/31/01 ---**

***Oriedo v. DOC*, 00-0001-PC-ER, 7/19/00 ---**

***Oriedo v. DPI*, 96-0124-PC-ER, 1/14/98; affirmed by Dane County Circuit Court, *Oriedo v. Wis. Pers. Comm. et al.*, 98-CV-0260, 12/11/98 --- §§513, 515.2, 734, 736**

***Oriedo v. DPI*, 96-0124-PC-ER, 12/3/97 ---**

***Oriedo v. DPI*, 98-0042-PC-ER, 8/28/00 ---**

***Oriedo v. DPI*, 98-0042-PC-ER, 6/2/99 ---**

***Oriedo v. DPI et al.*, 96-0124-PC-ER, 3/12/97 --- §710**

***Oriedo v. DPI et al.*, 98-0042-PC-ER, 8/12/98 --- §§702.01, 710, 732,**

792.04

***Oriedo v. ECB et al.*, 98-0113-PC-ER, 7/20/99 ---**

***Oriedo v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0260, 12/11/98 --- §§511.02, 732, 736**

***Orr v. OCI*, 92-0018-PC, 92-0025-PC-ER, 10/29/92 --- §§615.5(9), 774.03(2), 796.15**

***Orvis v. DOT & DER*, 93-0119-PC, 11/3/94 --- §§403.12(2), (4)(a), .12(12)(c), (x)**

***Ostenso v. DER*, 91-0070-PC, 4/13/94; affirmed by Dane County Circuit Court, *Ostenso v. Wis. Pers. Comm.*, 94-CV-1571, 3/18/96; affirmed by Court of Appeals, *Ostenso v. Wis. Pers. Comm.*, 96-1777, 1/29/98--- §§403.12(2), 510.04, .06**

***Ostenso v. DNR & DER*, 95-0167-PC, 12/16/99 ---**

***Ostenso v. Wis. Pers. Comm.*, 94-CV-1571, Dane County Circuit Court, 3/18/96; affirmed by Court of Appeals, *Ostenso v. Wis. Pers. Comm.*, 96-1777, 1/29/98 --- §403.12(4)(b)**

***Ostrowski v. DER*, 95-0049-PC, 2/10/97 --- §403.12(2)**

***Ostrowski v. DNR*, 99-0111-PC, 9/20/00 ---**

***Otis v. DMRS*, 00-0176-PC, 6/13/01 ---**

***Otis v. DMRS*, 00-0176-PC, 2/23/01 ---**

***Owens v. DOT*, 91-0163-PC-ER, 8/23/93 --- §§770.03(2), 784.03(2), 796.60**

***Owens v. DOT*, 91-0163-PC-ER, 9/18/92 --- §§506.03, 724**

***Ozanne v. DOT*, 87-0107-PC-ER, 1/31/89 --- §§766.02(2), .04, .06, 788.02(2), .04, .06, 796.15**

***Ozanne v. Pers. Comm. & DILHR*, 87-0105, 0108-PC-ER, 12/18/87 --- §702.07**

P

***Pagliano v. DVA*, 82-99-PC, 2/7/83 - §§202.10(2), 210.2**

***Palmeri v. DOC*, 90-0007-PC, 10/4/90 --- §650**

***Pamperin v. DER*, 83-0191-PC, 4/25/85; aff'd by Dane County Circuit**

Court, *Pamperin v. State Pers. Comm.*, 85-CV-2700, 10/30/85 -- §403.12(2)

***Pamperin v. DER*, 90-0321-PC, 7/25/94 --- §§403.12(2), .12(4)(w), 502.75**

***Parisi v. UW*, 80-289-PC, 1/13/81 --- §103.20**

Parrell*, see *Ellsworth & Parrell v. DP

***Parrish v. DHSS*, 87-0098-PC-ER, 10/23/90 --- §702.18(1)**

***Parrish v. UW*, 84-0163-PC, 12/6/84 --- §503.06**

Parrish*, see *Anderson & Parrish v. DER

***Pasqualucci v. DILHR & DP*, 81-237-PC, 4/15/82 --- §403.12(2)**

***Passer v. DHSS*, 90-0003-PC, 5/16/90 --- §103.21(1)**

***Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92 --- §§202.02, 774.03(2), 786.03(2), .05, 796.60, .95**

***Patera v. UW (Stout)*, 00-0146-PC-ER, 11/21/01 (ruling by examiner) ---**

***Patera v. UW (Stout)*, 00-0146-PC-ER, 9/24/01 ---**

***Patterson v. DER*, 87-0212-PC, 5/5/88 --- §403.12(2)**

***Patterson v. DER*, 94-0098-PC, 12/7/95 --- §403.12(2)**

***Paul v. DHSS & DMRS*, 82-156-PC & 82-PC-ER-69, 6/19/86 --- §§403.07, 502.15, 615.2, 615.5(2), 675, 784.02(1)**

***Paul v. DHSS & DMRS*, 82-PC-ER-69, 1/25/95; reversed by Dane County Circuit Court, *Paul v. Wis. Pers. Comm.*, 95-CV-0478, 10/11/95; reversed by Court of Appeals, *Paul v. Wis. Pers. Comm & DHSS*, 95-3308, 12/12/96 [Note: the effect of the decision of the Court of Appeals was to affirm the Commission's decision in all respects] --- §§722, 742**

***Paul v. DHSS & DMRS*, 82-PC-ER-69, 3/30/93 --- §§784.03(1), 796.10, .15**

***Paul v. DHSS & DMRS*, 82-PC-ER-69, 82-156-PC, 10/11/84 --- §103.20**

***Paul v. DHSS*, 81-323-PC, 10/19/83 – §§103.19, 650**

***Paul v. DHSS*, 82-PC-ER-69, 82-156-PC, 10/14/83 --- §§506.03, 506.04**

***Paul v. DHSS*, 87-0147-PC, 1/12/89 --- §205.8(1)**

***Paul v. DHSS*, 87-0147-PC, 4/19/90 --- §§202.10(2), 205.3, .9, 210.5(1), 501.02(1)**

***Paul v. DOC*, 91-0074-PC-ER, 8/23/93 --- §§102.02(1), 706.01**

Paul*, see *McCready/Paul v. DHSS

Paul*, see *Petition for Declaratory Ruling (Ronald L. Paul)

***Paulson v. DP*, 80-257-PC, 8/5/81 – §403.12(2)**

***Pawlak v. DHSS*, 83-0170-PC, 3/14/84 --- §§103.08(l),(3)**

***Payne v. DOC*, 95-0095-PC-ER, 1/9/98 --- §732**

***Payne v. DOC*, 95-0095-PC-ER, 7/31/97 --- §706.07**

***Paynter v. DER*, 93-0120-PC, 12/13/93 --- §103.03**

***Peabody/Disterhaft v. DILHR & DER*, 85-0060, 0114-PC, 4/16/86 --- §503.50**

***Pearson v. UW*, 84-0219-PC, 2/12/97 A --- §§103.21(1), 675.5**

***Pearson v. UW*, 84-0219-PC, 2/12/97 B --- §521.5, .7(8), 522.03**

***Pearson v. UW*, 84-0219-PC, 8/5/96; explained further, 2/12/97 A --- §675.5**

***Pearson v. UW-Madison*, 84-0219-PC, 9/16/85; aff'd by Dane County Circuit Court, Pearson v. *UW & Wis. Pers. Comm.*, 85-CV-5312, 6/25/86; aff'd by Court of Appeals District IV, 86-1449, 3/5/87 --- §§130.5(4), .7(6), 615.2, 675**

***Peck v. DER*, 92-0130-PC, 11/18/93 --- §403.12(2), (4)(u)**

***Peck v. DER*, 92-0130-PC, 9/8/93 --- §517.01**

***Pedersen v. DILHR & DP*, 82-209-PC, 10/28/83 --- §403.12(2)**

***Pedretti v. UW & DER*, 88-0070-PC, 5/3/89 --- §403.12(2)**

***Peil v. DILHR & DER*, 85-0062-PC, 11/7/85 --- §403.12(2)**

***Pelikan v. DNR & DETF*, 87-0043-PC-ER, 6/24/87 --- §706.05**

***Pellitteri v. DOR*, 90-0112-PC-ER, 10/24/94; affirmed by Dane County Circuit Court, *Pellitteri v. Wis. Pers. Comm.*, 94CV3540, 7/19/95 --- §774.05**

***Pellitteri v. DOR*, 90-0112-PC-ER, 9/8/93; affirmed by Dane County Circuit Court, *Pellitteri v. Wis. Pers. Comm.*, 94CV3540, 7/19/95 --- §710**

***Pendell v. UW-Madison*, 01-0114-PC-ER, 1/24/02 ---**

***Pennybacker v. DHSS*, 91-0139-PC-ER, 7/7/94 --- §§788.03(2), 796.15**

***Perea v. DHSS & DER*, 93-0036-PC, 3/29/94 --- §§403.12(2), (11)**

***Pero v. DHSS & DER*, 83-0235-PC, 3/29/84 --- §103.03**

***Pero v. DHSS & DER*, 83-0235-PC, 4/25/85 --- §§401.01, .12(3),**

***Perrien v. DOC*, 95-0031-PC-ER, 7/2/97 --- §§768.03(2), .04, 792.04, 796.95**

***Perry v. UW-Madison*, 87-0036-PC-ER, 5/18/89 --- §§721.12, 768.01, .03(2)**

***Person v. DOCom*, 00-0083-PC-ER, 11/15/00 ---**

***Peters v. DER*, 84-0148-PC., 10/31/85; aff'd by Brown County Circuit Court, *Peters v. PC*, 85-CV-3056, 4/14/86; aff'd by Court of Appeals District 111, 86-166-7, 4/15/87 --- §517.55**

***Peters v. DER*, 92-0159-PC, 2/3/94 --- §403.12(2)**

***Peters v. DHSS*, 80-PC-ER-122, 3/19/82 --- §§768.03(2), 796.60**

***Peters v. UW & DP*, 82-234-PC, 7/7/83 --- §403.12(2)**

***Peterson & Hoel et al. v. DOR*, 78-0178, 0193-PC, 4/19/79---§§103.08(5), 103.11, 103.21**

Peterson*, see *Millard, Eckes & Peterson v. DOT & DER

***Petition for Declaratory Ruling (Ronald L. Paul)*, 84-0158-PC, 10/11/84 -- §523**

***Petrus v. DHSS*, 81-86-PC, 12/3/81 --- §§103.02, 501.02(3)**

***Pettaway v. DPI*, 01-0013-PC, 9/23/01 ---**

***Pettit v. DER*, 92-0145-PC, 10/24/94 --- §§403.12(2), 522.05(2)**

***Pfeffer v. UW (Parkside)*, 96-0109-PC-ER, 3/14/97 --- §§702.30, .50,**

***Pfeifer v. DILHR*, 86-0149-PC-ER, 86-0201-PC, 12/17/87 --- §§103.20, 511.90, 720, 732,**

***Pflug et al. v. DNR & DER*, 90-0414-PC, etc., 11/6/91 --- §403.12(13)**

***Pflugrad v. BVTAE & DP*, 82-207-PC, 3/17/83 --- §§103.21(a), 403.07**

***Pflugrad v. DER, DHSS & BVTAE*, 83-0176-PC, 3/29/84 --- §§102.15, 103.18, .20**

***Pflugrad v. DMRS & DHSS*, 83-0176-PC, 6/6/85 --- §§403.035, 615.2**

***Phelps v. DHSS*, 85-0193-PC, 12/19/85 --- §103.01**

***Phelps v. DOR & DER*, 91-0003-PC, 5/20/93 --- §403.12(2), (8), (11), (13)**

***Phillips v. DETF & DHSS*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; affirmed by Dane County Circuit Court, *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92 --- §§702.01, 704, 710, 732, 778.03(2), 788.03(2), 790.03(2)**

***Phillips v. DILHR*, 82-43-PC, 7/7/83 --- §§522.05(4), 615.5(9)**

***Phillips v. DPI*, 79-59-PC, 8/30/79 --- §103.13**

***Phillips v. Wis. Pers. Comm.*, 167 Wis. 2d 205 (Court of Appeals, 1992) --- §§778.03(2), 790.04**

***Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 10/16/92 --- §§702.50, 792.01**

***Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 2/21/92 --- §§702.005, .50, 710**

***Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER, 9/17/93 A--- §§522.10**

***Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER, 9/17/93 B --- §§710, 712.4, 792.01, .04**

***Pilster-Pearson v. DER*, 84-0078-PC, 12/6/84 --- §403.12(2)**

***Pike v. DOT & DER*, 98-0177-PC, 8/27/99 ---**

***Pinkins v. DOC*, 97-0010-PC-ER, 3/12/97 --- §702.03**

***Piotrowski v. DER*, 84-0010-PC, 12/20/84 --- §403.12(2)**

***Piotrowski v. DER*, 84-0010-PC, 3/16/84 --- §102.05(10)**

***Piotrowski v. DILHR & DER*, 90-0396-PC, 5/1/91 --- §706.03**

***Piotrowski v. DWD*, 00-0137-PC-ER, 3/21/01 ---**

***Pittz v. DHSS & DP*, 79-116-PC, 1/13/81 --- §§403.12(2), 403.12(4)(m), 403. 12 (4) (q)**

***Plasterer v. DOT*, 83-0007-PC, 9/28/83 --- §§201.03(9), 508.2**

***Plummer v. UW-Madison*, 97-0170, 98-0153-PC-ER, 7/30/01 ---**

***Plummer v. UW-Madison*, 97-0170, 98-0153-PC-ER, 3/6/01 ---**

***Pockat v. DER*, 94-0148-PC, 5/18/95 --- §§403.12(2), .12(4)(k), .12(12)**

***Podevels v. UW-Milwaukee*, 84-0204-PC-ER, 3/13/86 --- §§766.02(2), 796.60**

***Pogliano v. DOR*, 81-466-PC, 6/10/82 --- §103.08(10)**

***Polenz et al. v. DP*, 79-377-PC, 11/4/80 --- §403.12(2)**

***Pontes v. DOT*, 99-0086-PC-ER, 10/18/01; rehearing denied, 12/4/01 ---**

***Pontes v. DOT*, 99-0086-PC-ER, 8/24/01 ---**

***Ponto v. DER*, 90-0181-PC, 4/17/92 --- §403.12(4)(h)**

***Poole v. DILHR*, 83-0064-PC-ER, 12/6/85 --- §§702.01, .30, 706.05, 786.02(2), 796.50**

***Poole v. UW*, 99-0026-PC, 3/10/00 ---**

***Poole v. UW*, 99-0026-PC, 11/3/99 ---**

***Poore v. DILHR & DER*, 88-0007-PC, 9/8/88 --- §403.12(2)**

***Pope v. DER*, 92-0131-PC, 8/23/93 --- §§103.03, 403.12(2)**

***Popp v. DER*, 88-0002-PC, 3/8/89 --- §§103.03, 403.12(13)**

***Popp v. DER*, 88-0002-PC, 5/12/88 --- §§102.05(10), 103.05, 420**

***Porter v. DOT*, 78-154-PC, 5/14/79; aff'd by Dane County Circuit Court, *DOT v. Wis. Pers. Comm.*, 79-CV-3420, 3/24/80 --- §522.05(3)**

***Post v. DER*, 83-0213-PC, 5/24/84 --- §403.23(2)**

***Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by**

Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al.*, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98 --- §§508.7, 510.06, 615.2, .5(9), 730, 784.03(2), 788.03(2), 796.15

***Postler v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 95-CV-003178, 10/9/96, affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98 --- §§508.2, 510.06, 615.2**

Potts*, see *DOT (Potts) v. DP

***Powell v. DHFS*, 97-0147-PC-ER, 1/14/98 --- §736**

***Powers v. DP*, 80-270-PC, 9/23/81 --- §403.12(2)**

***Powers v. UW*, 88-0029-PC, 5/10/90; affirmed by Dane County Circuit Court, *Powers v. Wis. Pers. Comm.*, 90 CV 3023, 2/12/91 --- §§201.04, 205.8(1), 210.2**

***Powers v. UW*, 88-0029-PC, 6/27/90 --- §521.7(2)**

***Powers v. UW*, 92-0746-PC, 92-0183-PC-ER, 6/25/93 --- §§103.21(1), 702.005, 717.7**

Pradham*, see *Kumrah & Pradham v. DATCP & DER

***Praninskas v. DP*, 79-PC-CS-653, 4/23/81 --- §403.12(2)**

***Preder v. DER*, 84-0112-PC, 8/21/84 --- §103.04**

***Preller v. UWHCA*, 96-0151-PC-ER, 4/11/97 --- §§732, 773.01**

***Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99--- §§702.17, 773.03(2), .04, 786.03(2), .04, 796.60**

***Prentice v. UW (Superior)*, 99-0180-PC-ER, 12/3/01 ---**

***Preston v. DOT*, 79-374-PC, 3/24/80 --- §103.05**

***Priegel v. DER & DNR*, 90-0135-PC, 11/1/90 --- §403.12(2)**

***Prill v. DETF & DHSS*, 85-0001-PC-ER, 1/23/89, reconsideration denied, 1/30/89 --- §710**

***Prill v. DETF & DHSS*, 85-0001-PC-ER, 12/15/89 --- §§766.02(2), 796.95**

***Prischman v. UW-Milwaukee*, 98-0108-PC-ER, 5/9/01 ---**

***Process v. DOC*, 00-0157-PC-ER, 3/8/01 ---**

***Prochnow v. UW (La Crosse)*, 97-0008-PC-ER, 2/18/00 ---**

***Prochnow v. UW (La Crosse)*, 97-0008-PC-ER, 8/26/98 --- §§702.30, 706.03, .05, 786.04**

***Proft & Grant v. DP*, 78-145, 147-PC, 11/8/79 --- §403.12(2)**

***Prust & Sauer v. Wis. Pers. Comm.*, Dane County Circuit Court, 97-CV-3328, 7/8/98 --- §403.12(2), (4)(d)**

***Pugh v. DNR*, 86-0059-PC-ER, 4/28/88 --- §506.04**

***Pugh v. DNR*, 86-0059-PC-ER, 6/10/88 --- §§706.01, 712.5**

***Pugh v. DNR*, 86-0059-PC-ER, 7/13/88 --- §728.8**

***Pugh v. DNR*, 86-0059-PC-ER, 9/26/88 --- §§732, 734, 768.02(2), 784.02(2), 796.60**

***Pullen v. DILHR & DP*, 79-197-PC, 10/2/81 --- §403.07**

***Pullen v. DILHR*, 79-72-PC, 5/15/80 --- §503.50**

***Pullen-Algee v. DILHR*, 81-84-PC, 5/12/82 --- §403.07**

***Puls v. DHSS*, 90-0172-PC, 5/1/92 --- §615.2**

***Purifoy v. DOC*, 92-0044-PC-ER, 12/22/94 --- §§702.22, 778.03(2)**

Q

R

Rabideaux*, see *Meyett & Rabideaux v. DILHR

Radisch*, see *Bricklayers & Allied Craftsmen Union #8 and Radisch v. DHSS

***Radovich v. DP*, 81-117-PC, 7/6/83 --- §403.12(2)**

***Radtke v. DHFS*, 97-0068-PC-ER, 6/19/97 --- §706.01**

***Radtke v. UW-Madison*, 92-0214-PC-ER, 11/22/94 --- §§782.04, 792.04**

***Raisanen v. DOC*, 98-0052-PC-ER, 1/25/00 ---**

***Ramsden v. DHSS*, 92-0826-PC, 2/25/93 --- §§103.08(8), .21(1)**

***Ramsfield v. DNR*, 78-264-PC, 8/30/79 --- §522.01(4)**

***Randall v. DER*, 92-0084-PC, 8/23/93 --- §403.12(2)**

***Randby et al. v. DER*, 94-0465-PC, etc., 10/16/95 --- §511.08**

***Ransom v. UW*, 87-0125-PC, 7/13/88 --- §103.21(1)**

***Ransom v. UW*, 87-0125-PC, 9/20/89 --- §615.5(2)**

***Ransom v. UW*, 92-0234-PC, 2/9/94 --- §§615.2, .5(4), 625.01**

***Raschick v. UW-Eau Claire*, 81-PC-ER-101, 11/21/84 ; aff'd by Burnett County Circuit Court, *Raschick v. Pers. Comm.*, 85-CV-12, 6/18/86; aff'd by Court of Appeals District III, *Raschick v. DOJ & PC*, 86-1320, 4/21/87 --- §§766.02(2), 796.15**

***Rasman v. DER*, 92-0435-PC, 6/21/94 --- §§403.12(2), (4)(v)**

***Rasman v. DNR & DER*, 85-0002-PC, 8/1/85 --- §§403.12(2), (4)(j), (r), 510.08,**

***Rasmuson v. DHSS*, 85-0124-PC, 10/1/86 --- §667**

***Rasmussen v. DHSS*, 79-353-PC, 8/19/80 --- §103.05**

***Rasmussen v. DHSS*, 81-434-PC, 2/9/82 --- §103.05**

***Rasmussen v. DHSS*, 81-PC-ER-139, 12/29/82 --- §§774.03(2), 796.50**

***Ratchman v. UW-Oshkosh & DER*, 86-0219-PC, 11/18/87 --- §§403.12(2), 501.03, 502.75**

***Ratty v. DOT & DER*, 95-0106-PC, 5/14/96 ---§403.12(2)**

***Rau v. UW-Milwaukee*, 85-0050-PC-ER, 2/5/87 --- §§510.06, 774.03(2), .05, 796.60**

Rau*, see *Danielski et al. v. DER

***Raup v. DOT & DP*, 80-153-PC, 82-0172-PC, 8/4/83 --- §403.12(2)**

***Ray & Gray v. UW-La Crosse*, 84-0073, 0086-PC-ER, 5/9/85 --- §742**

***Ray v. DHSS & Group Insurance Board*, 83-0129-PC-ER, 10/10/84; aff'd by Dane County Circuit Court, *Ray v. Pers. Comm.*, 84-CV-6165, 5/15/85 --- §§702.22, 778.03(2), 796.30**

***Ray v. UW*, 78-129-PC, 3/9/79 --- §§103.17, 510.50**

***Ray v. UW*, 78-129-PC, 8/30/79 --- §103.13**

***Ray v. UW-La Crosse*, 82-PC-ER-13, 7/7/83 --- §742**

***Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98 --- §§506.03, .04, 724**

***Reding v. DER*, 83-0149-PC, 11/9/83 --- §103.21(a)**

***Reed v. DOC*, 00-0098-PC-ER, 11/15/00 ---**

***Regan & Blumer v. DOT & DER*, 92-0211, 0256-PC, 4/23/93 --- §403.12(13)**

***Reif, Russo & Sevener v. DNR*, 85-0005, 0006, 0012-PC, 10/23/85 -- §403.12(2)**

***Reimer v. DOC*, 92-0781-PC, 2/3/94 --- §§202.03, .10(2), 205.8(1), 210.2, .5(1)**

***Reinhold v. DOA et al.*, 95-0086-PC-ER, 11/14/95 --- §§702.005, .01, 710**

***Reinhold v. Office of Columbia County District Attorney & Bennett*, 95-0086-PC-ER, 1/3/96 --- §717.7**

***Reinhold v. Office of the Columbia County District Attorney & Bennett*, 95-0086-PC-ER, 9/16/97 --- §§706.01, .05, 712.5**

***Reinhold v. Office of the Columbia County District Attorney*, 95-0086-PC-ER, 11/7/97; rehearing denied, 12/17/97; affirmed by Dane County Circuit Court, *Reinhold v. Office of the Columbia District Attorney & Wis. Pers. Comm.*, 98-CV-0076, 7/8/98 --- §§706.01, .07**

***Reis v. DOT*, 83-0002, 0003-PC, 9/20/83 --- §§625.02, 667**

***Reissmann v. DILHR*, 78-78-PC, 2/28/79 --- §103.05**

***Reit v. WERC*, 81-128-PC, 6/25/82, 6/29/82; aff'd by Milwaukee County Circuit Court, *Reit v. State Pers. Comm.*, 589-670, 12/15/82 -- §302.04**

***Reithmeyer v. DER*, 92-0136-PC, 12/10/92 --- §403.12(2)**

***Renard v. DHSS & DP*, 80-317-PC, 1/22/81 --- §503.50**

***Rentmeester v. Wis. Lottery*, 91-0243-PC, 7/8/94 --- §270**

***Rentmeester v. Wis. Lottery*, 91-0243-PC, 9/9/94 --- §§521.5, .7(2)**

***Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94 --- §§205.8(1), 702.50, 774.03(2), .04, 786.03(2), .04, 792.04**

***Rentmeester v. Wis. Lottery*, 92-0152, 0166-PC, 1/27/93 ---**

§§103.08(1), (8)

***Renz v. DHSS*, 88-0162-PC-ER, 12/17/92 --- §§702.18(1), 774.03(2), .04**

***Reppen v. DER*, 90-0239-PC, 4/5/91 --- §403.12(2)**

***Request for Declaratory Ruling*, 77-187, 6/l/81 --- §103.13**

***Request for Declaratory Ruling*, 78-37, 8/29/78 --- §§503.50, 523**

***Request of the American Federation*, 75-206, 8/24/76 --- §103.01(7)**

***Rhodes v. DOT & DER*, 96-0024-PC, 8/5/96 --- §§403.12(2), (4)(b)**

***Rich v. State Pers. Board*, Dane County Circuit Court, 159-084, 12/23/80 --- §103.13**

***Richards v. DHSS*, 86-0086-PC-ER, 9/4/86 --- §§702.03, 07**

***Richert v. UW (Green Bay)*, 99-0074-PC-ER, 7/28/99 ---**

***Richter v. DP*, 78-261-PC, 1/30/79 --- §§102.01(l), 102.02(l)**

***Rickard v. DILHR*, 80-382-PC, 12/16/81 --- §103.21(a)**

***Riepl v. DOT & DP*, 78-99-PC, 3/9/79 --- §403.12(2)**

***Riley v. DER*, 92-0097, 0849-PC, 9/9/94 --- §§403.12(2), 510.15, 522.05(2)**

***Ring v. DP*, 79-49-PC, 11/19/81 --- §403.04(8)**

***Ripp v. DER*, 95-0047-PC, 12/7/95 --- §403.12(2)**

***Ripp v. UW & DER*, 91-0057-PC, 11/14/91 --- §§403.12(2), (11)**

***Ripp v. UW-Extension*, 93-0113-PC-ER, 6/21/94 --- §§773.01, .04, 786.01, .04**

***Robbins v. DHSS & DER*, 92-0795–PC, 1/25/94 --- §403.12(2)**

***Roberts & DeLaMater v. DER*, 92-0481, 0638-PC, 3/9/94 --- §§403.12(2), (4)(f)**

***Roberts v. DHSS & DP*, 81-44-PC, 7/27/81 --- §§103.13, .18**

***Roberts v. DHSS*, 80-169-PC, 3/17/83 --- §§202.03, 202.10(2), 205.3, 210.5(5)**

***Roberts v. DHSS*, 80-264-PC, 80-282-PC, 11/4/80 --- §§103.18,**

103.21(a)

***Robinson v. DHSS & DMRS*, 85-0064-PC, 7/17/85 --- §§501.03, 502.75,**

***Roblee v. UW*, 86-0032-PC, 4/15/87 – §303**

***Rodell v. UW*, 78-233-PC, 2/28/79 – §103.12**

***Rodgers v. DOC*, 98-0094-PC, 2/11/00 ---**

***Rodgers v. DOC*, 98-0094-PC, 1/27/99 --- §§101, 103.21(2), 250.1**

***Rogalski v. DHSS*, 93-0125-PC-ER, 6/22/95 --- §774.05**

***Rogers et al. v. DP*, 79-PC-CS-738, 12/17/80 --- §403.12(2)**

***Rogers v. DOA & Ethics Board*, 87-0010-PC-ER, 12/22/89; rehearing denied, 2/12/90 --- §706.50**

***Rogers v. DOA*, 81-PC-ER-111, 82-PC-ER-31, 134, 135, *Rogers v. DOA and Ethics Board*, 83-0076-PC-ER, *Rogers v. DOA and Ethics Board*, 87-0010-PC-ER, 6/11/87 --- §738.02**

***Rohland v. DATCP*, 96-0080-PC-ER, 3/26/97 --- §§768.03(2), 796.60**

***Romaker v. DHSS*, 86-0015-PC, 9/17/86 --- §§615.2, 615.5(4), 615.5(6)**

***Romanski v. DOR*, 78-155-PC, 4/19/79 --- §637**

***Romero v. WSFP*, 90-0075-PC-ER, 6/23/94 --- §§780.03(2), 796.60, .95**

***Ronne v. UW*, 82-160-PC, 11/11/82 --- §615.2**

***Rose v. DHSS & DMRS*, 89-0035-PC, 10/25/89 --- §§403.04(10), 420**

***Rose v. DNR*, 83-0055-PC-ER, 84-0081-PC-ER, 4/15/87 --- §§786.02(2), 788.02(2) 796.15**

***Rose v. DOA*, 85-0169-PC-ER, 7/27/88 --- §§774.02(2), 784.02(2), 786.02(2), 796.50, .60**

***Rose v. DOC*, 93-0180-PC, 11/30/93 --- §§102.05(13), .14**

***Rose v. DOC*, 93-0200-PC-ER, 8/4/95 --- §§774.04, 796.50**

***Rosenbauer v. UW-Milwaukee*, 91-0086-PC, 91-0071-PC-ER, 9/24/93 --- §§615.5(4), (9), 675.5, 788.04, 796.15**

***Ross v. DER*, 94-0412-PC, 2/6/95 --- §515.2**

***Roszak & Gerlat v. DER*, 92-0540, 541-PC, 9/9/94 --- §403.12(2)**

***Rotter v. DP*, 79-PC-CS-749, 4/23/81 --- §403.12(2)**

***Rouf v. UW (Oshkosh)*, 99-0148-PC-ER, 11/8/01 ---**

***Roushar v. DER*, 91-0069-PC, 2/21/92 --- §403.12(2)**

***Rowe v. DER*, 79-202-PC, 6/3/80 --- §§502.75, 506.03, 508.6, 510.08**

***Rowe v. DER*, 79-202-PC, 7/22/81; aff'd by Dane County Circuit Court, *Rowe v. Wis. Pers. Comm.*, 81-CV-4288, 4/13/83 --- §506.04**

***Royston v. DVA & DMRS*, 86-0222-PC, 6/24/87 --- §§102.05(9). 103.14, .18, 503.50**

***Royston v. DVA*, 86-0222-PC, 3/10/88 --- §615.2**

***Rubin v. UW*, 78-PC-ER-32, 2/18/82 --- §§702.30, 786.02(2), 788.02(2), 788.06, 796.15**

***Ruck v. DNR*, 86-0007-PC, 12/29/86 --- §103.20**

***Rudie v. DHSS & DER*, 87-0131-PC-ER, 9/19/90 --- §§706.03, .05**

***Rufener v. DNR*, 93-0074-PC-ER, etc., 8/4/95 --- §§202.04, 205.9, 506.04, 510.09, 773.03(2), 774.04, 796.45, .60**

***Ruff v. Office of the Commissioner of Securities*, 86-0141-PC-ER, 87-0005-PC-ER, 9/26/88 --- §§786.02(1), 788.02(2), .04, 796.35, .45**

***Ruff v. Office of the Commissioner of Securities*, 87-0005-PC-ER, 6/25/90; modifying decision issued 5/16/90 --- §§786.03(2), 796.35**

***Ruff v. State Investment Board*, 78-30-PC, 5/15/79 --- §510.08**

***Ruff v. State Investment Board*, 80-105, 160, 222-PC, 8/6/81; aff'd by Dane County Circuit Court, *Ruff v. PC*, 81-CV-4455, 7/23/82; aff'd by Court of Appeals District IV, 82-1572, 11/8/83 --- §§202.04, 205.1, 501.02(l)**

***Rumpel v. DP*, 81-396-PC, 11/15/82 --- §403.12(13)**

***Runde v. DMRS*, 97-0088-PC, 12/17/97 --- §500.50**

***Runyan v. DER*, 94-0052-PC, 9/21/94 --- §§403.12(2), 403.12(4)(w)**

***Runyan v. DNR & DER*, 90-0234-PC, 12/13/90 --- §403.12(2)**

S

***Sanders & Hubbard v. Wis. Pers. Comm.*, 94-CV-1407, 1408, Dane County Circuit Court, 11/27/96 --- §403.12(4)(b)**

***Sanders v. DER*, 90-0346-PC, 3/29/94; affirmed by Dane County Circuit Court, *Sanders v. Wis. Pers. Comm.*, 94-CV-1407, 11/27/96--- §§403.12(2), 510.04, .06**

***Sanders v. DOR*, 89-0076-PC, 11/16/90; affirmed by Chippewa County Circuit Court, *Sanders v. Wis. Pers. Comm.*, 90 CV 433, 9/4/91 --- §§202.10(2), 210.2**

***Sandow v. DER*, 94-0180-PC, 3/8/95 --- §§403.12(2), .12(4)(d)**

***Sanford v. DER*, 99-0057-PC, 3/21/00 ---**

***Sanford v. DOT & DER*, 94-0548-PC, 11/17/95; rehearing denied, 12/20/95 --- §403.12(2)**

***Sannes v. DER*, 92-0085-PC, 8/23/93 --- §§403.12(2), (4)(h), .127**

***Sasso v. UW-Whitewater*, 79-285-PC, 6/27/80 --- §515.02**

Sauer*, see *Prust & Sauer v. Wis. Pers. Comm.

***Saviano v. DP*, 78-49-PC, 6/22/79; aff'd by Dane County Circuit Court, *DER & DP v. PC*, 79-CV-3720, 12/2/81 --- §403.12(2)**

***Saviano v. DP*, 79-PC-CS-335, 4/4/80 --- §506.03**

***Schaefer v. DNR & DER*, 95-0179-PC, 6/3/98 --- §§103.03, 107**

***Schaefer v. DNR & DP*, 83-0025-PC, 8/4/83 --- §403.12(2)**

***Schaeffer et al. v. DOT*, 83-0059-PC, 7/7/83 --- §§103.13, 103.18, 103.21(a)**

***Schaeffer v. DMA*, 82-PC-ER-30, 6/24/87; affirmed by Dane County Circuit Court, *Schaeffer v. State Pers. Comm. & DMA*, 87-CV-7413, 6/22/88; affirmed by Court of Appeals, 150 Wis. 2d 132 (1989) --- §717.3**

***Schaeffer v. DMA*, 82-PC-ER-30, 11/7/84 --- §702.01, .03**

***Schaub v. DMRS*, 90-0095-PC, 10/17/91 --- §§403.04(10), 420, 522.07**

***Schaut v. Schmidt & Wettengel*, 74-67, 11/24/75 --- §102.07(1), (2), (3)**

***Schein v. DHSS*, 79-370-PC, 5/15/80 --- §102.13**

***Schermerhorn v. DP*, 79-PC-CS-778, 11/24/80 --- §403.12(2)**

***Schermetzler v. DER*, 94-0342-PC, 4/17/95 --- §§403.12(2), .12(4)(j)**

***Schiffer v. DOT & DP*, 81-4, 342-PC, 2/18/82 --- §§103.03, 103.11, 403.12(10)**

***Schiffer v. DOT & DP*, 81-342-PC, 7/21/83 --- §403.12(2)**

***Schilling v. UW-Madison*, 90-0064-PC-ER, 9/19/90 --- §102.09**

***Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 10/1/92 --- §§521.5, 742**

***Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 11/6/91 --- §§210.2, 702.01, 774.03(1), .05, 790.04, 796.60**

***Schimmel v. DOD*, 91-0070-PC-ER, 9/24/93 --- §§774.03(2), 796.15**

***Schleicher v. DILHR & DP*, 79-287-PC, 8/29/80; aff'd by Rock County Circuit Court, *Schleicher v. Wis. Pers. Comm.*, A1926, 1/28/81 --- §§102.05(9), 102.10**

***Schleicher v. DMA*, 87-0019, 0169-PC-ER, 5/18/89 --- §§766.02(2), 796.25**

***Schleicher v. UW*, 80-123-PC, 9/29/80 --- §103.12**

***Schlitz v. DP*, 81-265-PC, 10/14/82 --- §403.12(2)**

***Schmaltz v. DHSS & DER*, 85-0067-PC, 2/6/86 and 7/25/86 --- §§103.05, 103.08(8.5),(9)**

***Schmaltz v. UW-Madison*, 85-0004-PC, 10/29/86 --- §615.5(2)**

***Schmeltzer v. DOR*, 80-275-PC, 12/17/80 --- §103.08(5)**

***Schmid v. UW*, 78-19, 9/5/79 --- §§605.5(2), 630.02, 630.08**

***Schmidt v. DER*, 89-0058-PC, 11/1/90 --- §683**

***Schmidt v. DER*, 89-0058-PC, 2/26/91 --- §103.21(2)**

***Schmidt v. DER*, 90-0246-PC, 3/10/93 --- §403.12(2), (12)**

***Schmidt v. DHSS*, 88-0131-PC, 6/14/89 --- §504**

***Schmidt v. DHSS*, 88-0131-PC, 6/4/93; affirmed by Winnebago County Circuit Court, *Schmidt v. Wis. Pers. Comm.*, 93 CV 654, 4/28/94; affirmed by Court of Appeals, 94-1545, 7/19/95 --- §615.2**

***Schmidt v. DHSS*, 88-0131-PC, 89-0079-PC, 11/15/89 --- §103.20**

***Schmidt v. DHSS*, 89-0079-PC, 4/5/90 --- §103.20**

***Schmidt v. DOC*, 91-0099-PC-ER, 2/3/94 --- §§786.04, 796.60**

***Schmidt v. DOC*, 91-0253-PC, 2/21/92 --- §103.01**

***Schmidt v. Sec. of State & DER*, 89-0129-PC, 1/11/91 --- §§403.12(2), (4)(f), (4)(h), (13)**

***Schmit (Klumpyan) v. DOC*, 90-0028-PC-ER, 91-0024-PC-ER, 9/3/92 --- §§702.17, .30, 726**

***Schmit v. DHSS*, 82-49-PC, 4/2/82 --- §103.21(l)**

***Schmit v. DHSS*, 83-0234-PC, 4/25/84 --- §§103.05, .21**

***Schmitt v. UW-Milwaukee*, 90-0047-PC-ER, 9/24/93 --- §§517.55, 788.03(2), 796.15**

***Schmitz v. DP*, 79-PC-CS-767, 10/2/81 --- §403.12(2)**

***Schneider v. DOC*, 94-0261-PC, 9/9/94 --- §103.08(10)**

***Schneider v. DOC*, 99-0062-PC, 9/8/99 ---**

***Schram et al. v. DOT & DER*, 87-0197-PC, 9/26/88 --- §403.12(16)(m)**

***Schrock et al. v. DHSS & DER*, 88-0146-PC, 1/10/90 --- §403.12(2)**

***Schroeder v. DHSS & DER*, 85-0036-PC-ER, 11/12/86 --- §§511.02, 706.01**

***Schroeder v. DMA*, 86-0148-PC, 8/20/86; aff'd (dictum) by Fond du Lac Circuit Court, *Schroeder v. State Pers. Comm.*, 86-CV-717, 1/21/87 --- §102.01**

***Schroth v. DP*, 79-PC-CS-935, 11/19/81 --- §403.12(2)**

***Schrubey v. DOC*, 96-0048-PC-ER, 1/27/99 --- §§788.02(2), 788.15, 796.95**

***Schuler v. DHSS & DP*, 81-12-PC, 4/2/81 --- §102.05(9)**

Schuler*, see *Zanck & Schuler v. DHSS & DP

***Schultz v. DER*, 83-0119-PC, 84-0252-PC, 85-0029-PC-ER, *Schultz v. DER & DILHR*, 84-0015-PC-ER, 8/5/87 --- §§403.12(2), (4)(u), 786.02(2), 788.02(2), .06, .10, 796.40**

***Schultz v. DOC*, 96-0122-PC-ER, 4/2/97 --- §702.07, 706.01, .05**

***Schuster v. DER*, 94-0479-PC, 1/20/95 --- §502.02**

***Schutz v. DHSS & DER*, 93-0188-PC, 6/21/94 --- §403.12(2)**

***Schwartz v. UW*, 78-PC-ER-20, 10/2/79 --- §717.02**

***Scurlock v. DILHR*, 79-44-PC, 6/12/79 --- §103.08(10)**

***Scurlock v. DOJ & DILHR*, 82-8-PC, 7/26/82 --- §103.20**

***Seay v. DER & UW-Madison*, 89-0082-PC-ER, 11/19/92; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247 and 94-CV-1238, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96--- §§101, 103.18, .20, 702.50**

***Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247 and 94-CV-1238, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96--- §§702.50, 792.03(2), .04, 796.39**

***Seay v. DER & UW-Madison*, 89-0082-PC-ER, 92-0855-PC, 3/10/93 --- §§102.05(6), .09**

***Seay v. DER*, 89-0117-PC, 1/24/91 --- §§403.12(2), (4)(h), (13), 502.75**

***Seefeldt v. DOR & DER*, 87-0143-PC, 12/17/87 --- §103.03**

Seemann*, see *Bong & Seemann v. DILHR & DP

***Seep v. DHSS*, 83-0032-PC, 7/7/83 --- §§103.05, 103.21(b)**

***Seep v. DHSS*, 83-0032-PC, 83-0017-PC-ER, 10/10/84; affirmed in part, reversed in part by Racine Circuit Court, *Seep v. State Pers. Comm.*, 84-CV-1705, 84-CV-1920, 6/20/85; supplemental findings were issued by the Commission on 2/2/87; affirmed in part, reversed in part by Court of Appeals District 11, 140 Wis 2d 32, 5/6/87; [Note: the effect of the Court of Appeals decision was to affirm the Commission's decision in all respects] --- §§103.202 508.2, 667, 675, 766.03(2), 796.15**

***Seep v. State Pers. Comm.*, Court of Appeals District 11, 140 Wis. 2d 32, 5/6/87; affirming in all respects *Seep v. DHSS*, 83-0032-PC, 83-0017-PC-ER, 10/10/84 --- §130.7(6)**

***Seibert v. DHFS*, 01-0035-PC-ER, 7/11/01 (ruling by examiner) ---**

***Seidel v. DER*, 95-0081-PC, 7/23/96 --- §§403.12(2), (4)(f)**

***Seitter v. DOT & DMRS*, 94-0021-PC, 3/9/95 --- §§403.04(10), 420,**

615.5(2)

***Sersch v. DILHR & DER*, 86-0075-PC, 4/1/87 --- §403.12(2)**

Sevener*, see *Reif, Russo & Sevener v. DNR

***Severtson v. DNR & DER*, 95-0052-PC, 10/16/95 --- §403.12(2)**

***Shade v. DOR & DP*, 79-111-PC, 11/4/80 --- §102.05(10)**

***Shaffer v. UW & DER*, 88-0106-PC, 1/12/89 --- §403.12(2)**

***Sharpe v. DOA & DP*, 82-117-PC, 7/26/82 --- §522.05(3)**

***Sheda v. State-(Pers. Bd.)*, Dane County Circuit Court, 158-117, 11/16/78 --- §§302.11, 403.16(l)**

Sheldon*, see *Pierce & Sheldon v. Wis. Lottery & DER

***Shelton v. DNR & WCC*, 85-0123-PC-ER, 7/13/88 --- §706.50**

***Shepard et al. v. DP*, 80-234, 237, 239-PC, 6/3/81 --- §§403.12(2)2, 403.12(4)(g), 403.12(4)(r), 403.12(14)**

***Sheridan v. UW-Madison*, 86-0103-PC-ER, 87-0141-PC-ER, 2/22/89 --- §§721.28, 782.02(2), 784.02(2), .25, 786.02(2), 796.39, .50**

***Sheskey v. DER*, 98-0054-PC-ER, 6/3/98; rehearing denied 7/22/98; affirmed by Dane County Circuit Court, *Sheskey v. Wis. Pers. Comm. & DER*, 98-CV-2196, 4/27/99 --- §706.03**

***Sheskey v. DER*, 98-0054-PC-ER, 7/22/98; affirmed by Dane County Circuit Court, *Sheskey v. Wis. Pers. Comm. & DER*, 98-CV-2196, 4/27/99 --- §§706.05**

***Sheskey v. DER*, 98-0063-PC-ER, 5/31/00 ---**

***Sheskey v. DER*, 98-0063-PC-ER, 5/24/99 ---**

***Sheskey v. DER*, 98-0063-PC-ER, 8/26/98--- §§702.50, 732, 774.04, 792.04**

***Sheskey v. DER*, 98-0225-PC-ER, 5/5/99; rehearing denied, 6/3/99 ---**

***Sheskey v. DETF & DER*, 98-0106-PC-ER, 5/31/00 ---**

***Sheskey v. DETF & DER*, 98-0106-PC-ER, 5/25/99 ---**

***Sheskey v. DETF & DER*, 99-0076-PC-ER, 5/31/00 ---**

***Sheskey v. Pers. Comm.*, 99-0075-PC-ER, 5/24/99 ---**

***Sheskey v. Pers. Comm.*, 99-0085-PC-ER, 5/24/99 ---**

***Sheskey v. Wis. Pers. Comm. & DER*, Dane County Circuit Court, 98-CV-2196, 4/27/99 --- §706.03**

***Shevlin v. Office of Public Defender*, 87-0101-PC-ER, 4/17/90 --- §§774.02(2), .04, 796.60**

***Shew v. DHSS*, 92-0506-PC, 11/29/93 --- §650**

***Shew v. DHSS*, 92-0506-PC, 3/29/94 --- §521.5**

***Shew v. DHSS*, 95-0091-PC, 4/16/96 --- §202.10(2)**

***Shilts v. DHSS*, 81-PC-ER-16, 2/9/83 --- §§784.02(2), 788.02(2), 796.60**

***Shimkus v. DOC*, 99-0166-PC-ER, 2/11/00 ---**

***Shorey v. DILHR & DER*, 87-0070-PC, 2/1/88 --- §§403.12(2), (4)(d), (11), 420**

***Showers v. DP*, 79-PC-CS-699, 9/23/82 --- §403.12(2)**

***Showsh v. DATCP*, 87-0201-PC, 11/28/88; rehearing denied, 3/14/89; reversed by Brown County Circuit Court, *Showsh v. Wis. Pers. Comm.*, 89-CV-445, 6/29/90; affirmed by Court of Appeals, 90-1985, 4/2/91 --- §§103.21(2), 202.03, 205.8(1), 510.08**

***Showsh v. DATCP*, 87-0201-PC, 3/14/89; reversed by Brown County Circuit Court, *Showsh v. Wis. Pers. Comm.*, 89-CV-445, 6/29/90; affirmed by Court of Appeals, 90-1985, 4/2/91 --- §§519, 521.5**

***Showsh v. DATCP*, 87-0201-PC, 9/5/91 --- §521.7(2)**

***Showsh v. DATCP*, 89-0043-PC, 12/23/91 --- §517.55**

***Showsh v. DATCP*, 89-0043-PC, 4/17/90 --- §§202.10(2), 205.7, 210.2**

***Showsh v. DATCP*, 89-0043-PC, 7/2/90; affirmed by Brown County Circuit Court, *Showsh v. Wis. Pers. Comm.*, 90 CV 1001, 7/25/90 --- §521.7(2)**

***Showsh v. Wis. Pers. Comm. & DATCP*, Court of Appeals, 90-1985, 4/2/91 --- §205.8(1)**

***Showsh v. Wis. Pers. Comm.*, Brown County Circuit Court, 89-CV-445, 6/29/90 affirmed by Court of Appeals, 90-1985, 4/2/91 --- §205.8(1)**

***Showsh v. Wis. Pers. Comm.*, Brown County Circuit Court, 90 CV**

1001, 7/25/90 --- §521.2

***Shultis v. DHSS & DP*, 81-79-PC, 3/17/83 --- §§513, 515.02**

***Sias v. DOC*, 98-0005-PC-ER, 1/25/00 ---**

***Siebers v. DHSS*, 87-0028-PC, 6/15/90 --- §521.7(8)**

***Siebers v. DHSS*, 87-0028-PC, 9/10/87 --- §103.20**

***Siebers v. Wis. Pers. Comm.*, Outagamie County Circuit Court, 89 CV 00578, 11/9/89 --- §§522.05(3), 615.5(9)**

***Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W. 2d 220, (Court of Appeals, 1994) --- 706.01, 773.01, .03(2), 796.30, .35, .37, .50, .55, .95**

***Sieger v. DHSS*, 90-0085-PC-ER, 2/6/95 --- §724**

***Sieger v. DHSS*, 90-0085-PC-ER, 5/14/96; affirmed by Lincoln County Circuit Court, *Sieger v. Wis. DHSS & Wis. Pers. Comm.*, 96-CV-120, 4/4/97; affirmed by Court of Appeals, *Sieger v. Wis. Pers. Comm. & DHSS*, 97-1538, 12/2/97 --- §§721.17, 773.01, .03(2)**

***Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W. 2d 220, (Court of Appeals, 1994) --- §§721.17, 722, 773.01**

***Siegler v. DNR & DP*, 82-206-PC, 12/7/83 --- §§403.12(2), 506.03**

Siehoff*, see *Danielski et al. v. DER

***Sielaff v. DP*, 78-2-PC, 9/5/79 --- §403.12(2)**

***Sielaff v. DP*, 78-2-PC, 11/22/78 --- §503.50**

***Siewert v. DER*, 91-0235-PC, 9/18/92 --- §403.12(2), (4)(s)**

***Siewert v. DOT*, 98-0220-PC-ER; 6/30/99 ---**

***Siewert v. DOT*, 98-0220-PC-ER, 3/12/99 --- §§736.5, 738.1**

***Sime v. DOA*, 00-0108-PC-ER, 2/26/01 ---**

***Sindorf v. UW-Stevens Point*, 92-0105-PC-ER, 4/23/93 --- §§706.01, .05**

***Skaife v. DHSS*, 91-0133-PC, 12/3/91 --- §§522.05(2), 615.5(6)**

***Skeway v. DPI*, 80-83-PC, 2/9/82 --- §403.12(2)**

***Skibba v. DP*, 79-242-PC, 7/28/80 --- §403.12(2)**

***Skille v. DER*, 86-0093-PC, 3/18/87 --- §403.12(2)**

***Sleik v. DOCom*, 97-0145-PC-ER, 2/18/00 ---**

***Sleik v. DOCom*, 97-0145-PC-ER, 12/3/99 ---**

***Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99 --- §§714.1, 736**

***Smalley v. UW-Eau Claire*, 86-0128-PC, 4/29/87 --- §303**

***Smart v. UW & DER*, 87-0215-PC, 5/12/88 --- §403.12(13)**

***Smart v. UW-Platteville & DER*, 87-0002-PC, 11/4/87 --- §403.12(2)**

***Smerz v. UW*, 00-0095-PC, 3/21/01 ---**

***Smetana et al. v. DER*, 84-0099, etc.-PC, 8/31/84 --- §103.04**

***Smetana v. DNR & DER*, 89-0055-PC, 2/12/90 --- §§403.12(2), (4)(w)**

***Smith & Berry v. DILHR & DP*, 81-412, 415-PC, 8/5/82 --- §§103.03, .18, .21 (1), 503.50**

***Smith & Berry v. DILHR & DP*, 81-412, 415-PC, 9/23/82 --- §§102.05(10), 103.12**

***Smith v. DER*, 91-0162-PC, 11/29/93 --- §403.12(2), (4)(b)**

***Smith v. DHSS*, 88-0063-PC, 2/7/90 --- §103.21(2)**

***Smith v. DHSS*, 88-0063-PC, 2/9/89 --- §§102.05(1), 103.02, 205.8(1), 303, 501.02(3)**

***Smith v. DHSS*, 88-0063-PC, 3/19/92 --- §310**

***Smith v. DHSS*, 88-0063-PC, 5/1/91 --- §506.03**

***Smith v. DILHR & DP*, 81-412-PC, 83-0001-PC, 6/9/83 --- §§103.18, 517.55**

***Smith v. DMRS*, 90-0032-PC, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96 --- §§517.55, 521.7(8), 522.20**

***Smith v. DMRS*, 90-0032-PC, 8/3/95; explained further in ruling on request for reconsideration, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96 --- §403.04(1.5), (3), (8), 420, 522.20**

***Smith v. DOA*, 80-42-PC, 9/26/80**

***Smith v. DOC*, 95-0134, 0169-PC-ER, 11/14/96 --- §§508.2, 728.9, 734, 736**

***Smith v. DP*, 83-0001-PC, 12/22/83; appeal dismissed by Outagamie County Circuit Court, *Smith v. Bellman et al.*, 84 CV 800, 4/2/90--- §403.005**

***Smith v. UW & DER*, 85-0090-PC, 11/7/85 --- §403.12(2)**

***Smith v. UW*, 79-PC-ER-95, 6/25/82 --- §§760.2, 786.01, 786.03(2), 786.04, 796.15**

***Smith v. UW*, 84-0101, 0108-PC, 5/9/85; clarified on 8/5/85 --- §§202.03, 210.2**

***Smith v. UW*, 84-0101, 0108-PC, 8/5/85; clarifying 5/9/85 decision --- §250.3**

***Smith v. UW-Madison*, 90-0033-PC-ER, 7/30/93 --- §§734, 738.1, 774;.03(2), 796.10, .15**

***Smith v. UW-Madison*, 01-0041-PC-ER, 1/24/02 ---**

***Smith v. UW-Manitowoc County*, 93-0173-PC-ER, 4/17/95 --- §§766.04, 788.04, .25, 796.60**

Snart*, see *Gums & Snart v. DP

***Snee v. DHSS*, 92-0030-PC-ER, 4/17/95 --- §§766.03(2), 788.03(2), 796.60**

***Snider v. DP & DOT*, 81-254-PC, 3/8/82 --- §403.12(4)(m)**

***Snider Allen v. DER*, 98-0178-PC, 6/30/99 ---**

***Snow v. DHSS*, 86-0051-PC-ER, 4/11/89 --- §§768.03(1), 796.60**

***Snow v. DHSS*, 86-0051-PC-ER, 6/20/88 --- §§521.5, 742, 768.02(l), 796.60**

***Snyder v. DHSS*, 79-139-PC, 11/8/79 --- §522.05(l)(e)**

***Snyder v. Schmidt*, 74-119, 3/24/75 --- §103.06**

***Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner) --- §§506.04, 714.9, 717.1, 724, 734**

***Sonnenberg v. Lottery Board*, 89-0036, 0069-PC, 4/19/90 --- §615.2**

***Sonnleitner v. DHSS*, 94-1055, 96-0010-PC, 4/19/00 ---**

***Sonnleitner v. DHSS*, 94-1055, 96-0010-PC, 2/18/00 ---**

***Sopa v. DILHR*, 79-36-PC, 2/15/80 --- §103.05**

***Sopher v. UW & DER*, 89-0112-PC, 5/4/90 --- §403.12(2)**

***Sorge v. DNR*, 85-0159-PC-ER, 11/23/88 --- §717.3**

***Soulier v. DILHR & DER*, 88-0051-PC, 1/25/89 --- §403.12(17)(m)**

***Soulier v. DILHR & DER*, 89-0137-PC, 8/8/90 --- §403.12(17)(m)**

***Southwick v. DHSS*, 85-0151-PC, 2/13/87 --- §506.04**

***Southwick v. DHSS*, 85-0151-PC, 4/16/86 --- §506.03**

***Southwick v. DHSS*, 85-0151-PC, 8/6/86 --- §§511.02, .08, 522.15, 686**

***Sowle v. DP*, 79-118-PC, 11/7/80 --- §403.12(2)**

***Spaith v. DMRS*, 89-0089-PC, 4/19/90 --- §§403.04(1), 522.08**

***Spilde v. DER*, 86-0040-PC, 1/8/87 --- §§103.18, 502.75, 517.01(l)**

***Spilde v. DER*, 86-0040-PC, 10/9/86 --- §§102.05(10), 403.12(e), (5), (13)**

***Spilde v. DOA & DER*, 92-0155-PC, 7/22/93 --- §403.12(2)**

***Spink v. DHSS*, 78-9-PC, 2/9/79 --- §615.2**

***Spraggins v. DER*, 90-0390-PC, 9/22/92 --- §403.12(2)**

***Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 1/24/86 --- §§102.01, 706.01, .03, 796.55**

***Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 12/30/86 --- §§706.01, .03, 766.03(2)**

***Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 6/18/86 --- §706.03**

***Stacy v. DOC*, 97-0098-PC, 2/19/98; affirmed by Pierce County Circuit Court, *Stacy v. Wis. Pers. Comm.*, 98-CV-0053, 7/9/98 --- §§103.21(1), 240.1**

***Stacy v. DOC*, 98-0039-PC, 8/26/98 --- §§103.08(10), 103.13**

***Stacy v. DOC*, 99-0024-PC, 8/25/99; rehearing denied, 10/6/99 ---**

***Stacy v. DOC*, 99-0054-PC-ER, etc., 12/21/01 ---**

Standish*, see *Nickel & Standish v. DP

***Stanley v. DOC*, 97-0189-PC-ER, etc., 8/25/99 ---**

***Stanlick v. DER*, 94-0157-PC, 10/16/95 --- §403.12(2)**

***Staples v. SPD*, 95-0189-PC-ER, 11/3/99 ---**

***Staples v. SPD*, 95-0189-PC-ER, 9/22/99 ---**

***Staples v. SPD*, 95-0189-PC-ER, 1/30/97 --- §712.5**

***Staples v. SPD*, 95-0189-PC-ER, 8/11/98 (ruling by examiner) --- §§721.12, 722, 768.01**

***Stapleton v. Wettengel*, 428, 10/22/71 --- §103.04**

***Staral v. UW*, 82-146-PC, 9/30/82 --- §103.21(a)**

***Starck v. DOC*, 98-0056-PC, 4/21/99 ---**

***Starck v. DHFS*, 98-0053-PC, 6/2/99 ---**

***Starck v. UW*, 99-0033-PC, 10/6/99 ---**

***Starck v. UW*, 99-0033-PC, 8/25/99 ---**

***Starck v. UW (Oshkosh)*, 97-0057-PC-ER, 11/7/97 --- §§732, 766.04**

***Starck v. UWHCB*, 99-0054, 0064-PC, 4/7/00 ---**

***Starczynski & Mayfield v. DOA*, 81-275, 276-PC, 12/3/81 --- §§102.16, 103.01, 103.20**

***Stark v. DILHR*, 90-0143-PC-ER, 5/7/93 (ruling by examiner) --- §§506.03, 724**

***Stark v. DILHR*, 90-0143-PC-ER, 9/9/94 --- §§702.005, .18(1), 721.01, 774.01, .03(2), 792.03(2), 796.39, .60**

***Stasny v. DOT & DP*, 79-192-PC, etc., 1/12/81 --- §§403.16(l), 622.01, 635, 660, 774.02(2), 786.02(2), 796.60**

***Stasny v. DOT*, 78-158-PC, 10/12/79; aff'd by Dane County Circuit Court, *DOT v. Pers. Comm. (Stasny)*, 79-CV-6102, 6130, 2/27/81 -- §§403.16, 502.75, 522.01(3), 622.02, 622.04 [Also see entries under *DOT v. Pers. Comm. (Stasny)*]**

***Stasny v. DOT*, 79-192, 253, 259-PC, 1/14/80 --- §103.08(9)**

***State of Wisconsin ex. rel. DOA et al. v. Pers. Bd. et al.*, 149-295, 1976 --- §102.01(1)**

***Stauffacher v. DILHR*, 81-403-PC, 12/16/81 --- §103.02**

***Steber v. DHSS & DER*, 96-0002-PC, 6/25/96 --- §§103.18, .21(1), 403.12(13)**

***Stein v. DER*, 92-0474-PC, 8/18/94 --- §403.12(2)**

***Stein v. DHSS*, 85-0152-PC-ER, 8/20/86 --- §706.09**

***Steinhauer et al. v. DER*, 90-0216-PC, 3/30/93 --- §403.12(2), (4)(b)**

***Steinicke v. UW & DP*, 82-76-PC, 9/23/82 --- §103.18**

***Steinke v. DER*, 92-0322-PC, 7/22/93 --- §403.12(2)**

***Stellick v. DOR & DP*, 79-211-PC, 4/10/81 --- §§102.05(13), 103.05**

***Stellick v. Pers. Comm.*, Dane County Circuit Court, 81-CV-4398, 1/28/82 -- §403.15(8)**

***Stellings v. DOC*, 98-0130-PC, 6/21/99 ---**

***Stellings v. DOC*, 99-0031-PC, 11/19/99 ---**

***Stemrich v. DER*, 91-0058-PC, 6/4/93 --- §403.12(2), (4)(x)**

***Stensberg et al. v. DER*, 92-0325-PC, etc., 2/20/95 --- §§403.12(2), (4)(f), (4)(a), (4)(s)**

***Stern v. DMRS*, 89-0144-PC, 8/8/90 --- §403.04(1)**

***Stevens v. DNR*, 92-0691-PC, 5/27/94 --- §§103.01, .21(2), 630.09**

***Stewart v. DOR*, 92-0003-PC, 8/18/94 --- §615.2**

***Stewart v. DOR*, 92-0062-PC-ER, 3/10/93 --- §§517.55, 738.1**

***Stichert v. UW-Oshkosh*, 86-0197-PC, 6/11/87 --- §§615.2, 615.5(2), 615.5(4)**

***Stitt v. DOD*, 88-0090-PC, 6/19/89 --- §§205.1, 210.2**

***Stockli v. DMRS*, 91-0189-PC, 11/14/91 --- §§102.02(1), .05(10)**

***Stoikes v. DNR & DER*, 87-0075-PC, 1/13/88 --- §403.12(2)**

***Stone v. DHSS*, 92-0789-PC, 12/29/92 --- §102.10**

***Stone v. UW (Extension)*, 00-0173-PC-ER, 1/25/02 ---**

***Stoner v. DATCP*, 92-0041-PC, 1/27/93 --- §513**

***Stonewall v. DILHR*, 79-PC-ER-19, 5/30/80 --- §§761.01, 784.03(2), 786.03(2), 788.03(2), 796.60**

***Story et al. v. DER*, 92-0811-PC, etc., 10/24/94 --- §403.12(2)**

***Stratil v. DILHR & DER*, 87-0210-PC, 2/24/88 --- §§103.03, 420, 502.75**

***Strey v. DER*, 94-0150-PC, 5/18/95 --- §§403.12(2), .12(4)(k), .12(12)**

***Stricker v. DOC*, 92-0058-PC-ER, 92-0201-PC-ER, 3/31/94 --- §§786.03(2), 788.03(2), .04, .25, 796.35, .45**

***Stroede v. DER*, 94-0403-PC, 8/17/95 --- §511.08**

***Stronach v. DOT & DER*, 95-0177-PC, 12/7/95 --- §102.01**

***Stroud v. DOR*, 82-PC-ER-97, 3/27/85 --- §505.50**

***Stroud v. DOR*, 82-PC-ER-97, 9/26/85 --- §§788.03(2), 796.15**

***Strupp v. UW-Whitewater*, 85-0110-PC-ER, 7/24/86; aff'd by Milwaukee Circuit Court, *Strupp v. PC*, 715-622, 1/28/87 --- §§721.26, 782.03(2), 796.60**

***Stygar v. DHSS*, 89-0033-PC-ER, etc., 2/21/95 --- §736.5**

***Stygar v. DHSS*, 89-0033-PC-ER, etc., 2/8/95 --- §734**

***Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95 --- §§786.01, .03(2), .04, 788.01, .03(2), .04, 796.35, .39, .95**

***Sundling v. UW*, 93-0049-PC, 11/23/93 --- §§103.18, 511.02**

***Sunstad v. DER*, 94-0472-PC, 5/28/96 --- §§403.12(2), (4)(b), (4)(j)**

***Sutcliffe v. UW-Madison*, 99-0160-PC-ER, 11/19/99 ---**

***Sutton et al. v. DER*, 94-0556-PC, etc., 11/14/95 --- §402.12(2)**

***Sutton v. DOC & DMRS*, 96-0155-PC, 6/4/97 --- §§403.04(8), 511.03**

***Sutton v. DP*, 79-175-PC, 2/17/80 --- §403.12(2)**

***Svensson v. DER*, 86-0136-PC, 7/22/87 --- §§403.12(2), 502.07**

***Swallow (Thompson) v. DOC*, 97-0125-PC, 98-0074-PC-ER, 6/30/99**

***Swenby v. UWHCB*, 98-0012-PC-ER, 5/20/98 --- §§102.01, 706.01**

***Swenson v. DATCP*, 83-0152-PC, 1/4/84; petition for rehearing denied, 2/17/84 --- §§103.05, 103.08(8)**

***Swim & Wilkinson v. DER*, 92-0576, 0613-PC, 1/16/97 --- §§103.18, 403.12(2), (4)(b), (4)(f)**

***Swim & Wilkinson v. DER*, 92-0576, 0613-PC, 5/15/95 --- §511.08**

T

***Taddey v. DHSS*, 86-0156-PC, 5/5/88 --- §§522.05(2), 615.5(9)**

***Taddey v. DHSS*, 86-0156-PC, 6/11/87 --- §§103.05, .20**

***Tafelski v. UW (Superior)*, 95-0127-PC-ER, 3/22/96 --- §§706.01, .03, .05, 712.5**

***Tafelski v. UW (Superior)*, 95-0127-PC-ER, 6/4/97 --- §706.01**

***Taylor & Edge v. DER*, 92-0070-PC, 4/30/93 --- §403.12(2)**

***Taylor v. DER*, 91-0232-PC, 2/8/93 --- §403.12(2)**

***Taylor v. DMRS & DPI*, 90-0279-PC, 12/11/90 --- §506.50**

***Taylor v. DMRS & DPI*, 90-0279-PC, 9/19/91 --- §403.04(2)**

***Taylor v. DMRS*, 90-0279-PC, 11/1/90 --- §503.50**

***Taylor v. DOR & DER*, 90-0387-PC, 6/27/91 --- §403.12(2)**

***Taylor v. SFP*, 02-0001-PC, 4/17/02 ---**

***Taylor v. State Public Defender*, 79-PC-ER-136, 8/5/82 --- §§784.02(2), 786.02(2), 788.03(2), 796.15, .35**

***Te Beest v. DHSS*, 88-0086-PC, 5/16/90 --- §§522.05(2), 683**

***Tedford v. DHSS*, 81-455-PC, 3/4/82 --- §103.05**

***Teggatz v. DHSS*, 79-73-PC, 12/13/79 --- §103.08(8), 103.13**

***Teggatz v. State (Pers. Comm.)*, Winnebago County Circuit Court, 80-CV-1092, 1/8/82 --- §103.13**

***Teikari v. UW-Green Bay*, 87-0001-PC-ER, 4/29/87 --- §704**

***Tessman v. DOC*, 98-0205-PC-ER, 8/11/99 ---**

***Tetzner v. SPD*, 94-0182-PC-ER, 4/29/98 --- §§515.2, 732, 736**

***Tews v. PSC*, 89-0150-PC, 89-0141-PC-ER, 12/14/89 --- §513**

***Tews v. PSC*, 89-0150-PC, 89-0141-PC-ER, 6/29/90 --- §§202.10(2), 210.5(1), 702.18(1), 774.05**

***Thalhofer v. UW-Oshkosh*, 79-PC-ER-22, 9/23/81, aff'd by DILHR, *Thalhofer v. Pers. Comm.*, 79-PC-ER-22, 11/7/83; aff'd by LIRC, 2/16/84 --- §§766.02(2), 786.02(2), 788.02(2), 796.15**

***Theel v. DOT & DER*, 84-0074-PC, 11/8/84 --- §403.12(2)**

***Theiler v. DHSS*, 87-0031-PC-ER, 10/18/90 --- §717.3**

***Theobald v. DP*, 78-82-PC, 1/8/82 --- §§403.12(2), 403.12(4)(n)**

***Thom v. DOR*, 81-335-PC, 3/8/82 --- §515.02**

***Thomas v. DER*, 94-0070-PC, 12/22/94 --- §§403.12(2), 510.90**

***Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93 --- §§721.12, 760.2, 768.01, .03(2), 796.15**

***Thomas v. DILHR & DP*, 80-298-PC, 10/29/81 --- §403.07**

***Thomas v. DILHR*, 78-143-PC, 1/8/79 --- §717.1**

***Thomas v. DILHR*, 92-0066-PC-ER, 6/23/94 --- §717.3**

***Thomas v. DOC*, 91-0161-PC-ER, 4/30/93 --- §§721.18, 730, 742, 760.2, 768.03(2), 774.03(2), .05, 796.60**

***Thomas v. Madison Area Technical College*, 95-0065-PC-ER, 8/4/95 --- §702.005, .01**

***Thomas v. UW & DP*, 81-410-PC, 4/2/82 --- §403.12(2)**

***Thomas v. UW*, 81-332-PC, 3/25/82 --- §§103.15, 302.13, 310**

***Thomas v. UW*, 89-0126-PC, 8/22/90 --- §667**

***Thompson v. DOC*, 00-0122-PC-ER, 5/9/01 ---**

***Thompson v. DER*, 86-0138-PC, 12/23/87 --- §403.12(2)**

***Thompson v. DHSS*, 79-98-PC, 6/12/79 --- §522.05(l)(e)**

***Thompson v. DMRS & DNR*, 87-0204-PC, 4/28/89 --- §403.04(10)**

***Thompson v. DMRS & DNR*, 87-0204-PC, 6/29/88 --- §§102.04, 103.11, 511.08**

***Thompson v. DOT & DER*, 88-0037-PC, 11/23/88 --- §403.12(13)**

***Thompson v. DOT & DER*, 88-0037-PC, 6/29/88 -- §§102.05(10), 103.03, 503.50**

***Thompson v. UW*, 88-0058, 0103-PC, 10/31/88 --- §§505.01, 518.02**

Thompson*, see *Coffaro & Thompson v. DER

***Thomsen et al. v. DER*, 84-0202-PC, 6/18/85 --- §403.12(2)**

***Thoresen & Behm v. UW*, 93-0202, 0212-PC, 1/6/94 --- §505.02(2)**

***Thorn v. DHSS*, 81-401-PC, 12/18/81 --- §§103.21(a), 505.01, 717.01**

***Thorn v. DHSS*, 81-459-PC, 6/9/83 --- §103.21(a)**

***Thornton v. DNR*, 88-0012-PC, 1/12/89 --- §615.2**

***Thornton v. DNR*, 88-0089-PC, 1/12/89 --- §102.05(6)**

***Thornton v. DNR*, 88-0089-PC, 11/15/89 --- §§615.2, 675.5**

***Thorpe v. DOJ & DER*, 93-0093-PC-ER, 7/25/94 --- §§774.03(2), 796.25**

***Thostenson v. DHSS*, 85-0229-PC, 4/16/86 --- §§201.03(0.5), (1),(4),M, (7)**

***Thunder v. DNR*, 93-0035-PC-ER, 5/2/94 --- §§770.03(2), 780.03(2), .06, 784.03(2), .06, 796.15**

***Thyrion v. DHFS*, 96-0081-PC-ER, 7/15/98 --- §736**

***Tiedeman & Marx v. DHSS & DER*, 96-0073, 0085-PC, 4/24/97 --- §§403.12(2), (4)(b), (4)(f), 510.08, .90**

***Tiffany et al. v. DHSS & DER*, 83-0225-PC, 7/6/84 --- §§102.05(10), 403.12(13), 420**

***Tilley v. DER*, 90-0334-PC, 1/8/93 --- §403.12(2)**

***Tiser v. DER*, 84-0160-PC, 9/28/84 --- §§103.06, .21(a)**

***Tiser v. DNR & DER*, 83-0217-PC, 10/10/84 --- §§403.12(2), (4)(d), 502.07**

***Toborg v. DOC*, 00-0151-PC-ER, 6/28/01 ---**

***Toigo et al. v. UW & DP*, 80-206-PC, 6/3/81 --- §615.5(2)**

***Tolley v. Office of the Commissioner of Transportation*, 93-0086-PC-ER, 2/22/95 --- §§717.7, 734**

***Tomaszewski v. DOC & DMRS*, 01-0010-PC, 7/3/01 (ruling by examiner) ---**

***Toth v. DILHR & DER*, 84-0009-PC, 2/29/84 --- §§102.10, 522.05(3)**

***Trapp v. DNR & DER*, 87-0196-PC, 6/8/88 --- §403.12(2)**

***Trimble v. UW-Madison*, 92-0160-PC-ER, 11/29/93 --- §§766.03(2), 796.15**

***Trochta et al., v. DER*, 92-0616, etc.-PC, 5/2/94 ---§403.12(2)**

***Truesdell v. DHSS*, 88-0026-PC, 7/27/88 --- §§103.08(1), (3)**

***Tukiendorf v. DATCP & DER*, 96-0165-PC, 2/12/97 --- §102.02(1)**

***Tupper v. DMRS & DOC*, 91-0009-PC, 4/18/91 --- §102.05(10)**

***Turner-Strickland v. DER*, 88-0042-PC, 3/24/89 --- §403.12(15)(m)**

***Tuttle, Oinonen & Delaney v. DATCP & DER*, 85-0153, 0154, 0158-PC, 5/14/86 --- §§403.12(2), (10)**

***Tyus v. DER et al.*, 97-0078-PC, etc., 1/27/99 --- §§513, 717.2, 734**

U

***Ulanski et al. v. DHSS & DP*, 82-2, 6, 7, 9-PC, 9/7/82 – §403.12(13)**

***Urbain v. DOT & DER*, 96-0156-PC, 1/28/98 --- §403.12(2)**

***Usabel v. DER*, 84-0005-PC, 12/6/84 – §§403.12(l)(d), (2), (11),**

***Utynek v. DP*, 81-83-PC, 1/7/83 --- §403.12(2)**

V

***Vakharia v. DNR & DER*, 95-0178-PC, 12/20/96 --- §§403.12(2), (4)(b), 510.90**

***Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87 --- §§722.01, (1), 774.05, 786.02(l), 788.02(2), 796.30, .60**

***Van Beek v. DER*, 96-0072-PC, 6/25/96 --- §500.50**

***Van Beek v. DOT & DER*, 97-0102-PC, 8/31/99 ---**

***Van Blaricom v. DHSS*, 93-0033-PC-ER, 5/2/96 --- §§774.03(2), .05, 796.60**

***Van Laanen v. Wettengel & Schmidt*, 74-17, 2/21/75 --- §102.02(3)**

***Van Laanen v. Wettengel & Schmidt*, 74-17, 1/2/75 --- §101.01, .02, .04, 102.01(2), (3), 102.02(1), (2)**

***Van Rooy v. DILHR & DER*, 87-0117-PC, 87-0134-PC-ER, 10/1/87 --- §§130.5(8), 702.005, 713.3, .9, 742**

***Van Rooy v. DMRS & DILHR*, 84-0062-PC, 7/19/84 --- §102.02(l)**

***Van Rooy v. DILHR*, 84-0253-PC, 4/12/85 --- §102.09**

***Van Susteren v. Voigt*, 74-105, 12/4/75 --- §102.03**

***Van Wyhe & WCC v. DOA & DER*, 91-0195, 0196-PC, 9/22/92 --- §403.12(2)**

***Van Zutphen v. DOT*, 90-0141-PC-ER, 12/20/96 --- §§510.90, 730, 774.03(2), .04**

***Van Zutphen v. DOT*, 90-0141-PC-ER, 5/1/92 --- §717.7**

***Vande Zande v. UW-Extension*, 89-0119-PC-ER, 9/30/93 --- §736.5**

***Vanden Wymelenberg/DOJ v. DER*, 85-0099, 0100-PC, 3/13/86 --- §403.12(2)**

***Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88; affirmed by Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 89-1355, 1/10/90 --- §§706.05, 792.04**

***Vander Zanden v. DILHR*, 84-0069-PC-ER, 9/12/84 --- §702.50**

***Vander Zanden v. DILHR*, 87-0063-PC-ER, 1/11/91; rehearing denied, 2/26/91 --- §§706.01, .03**

***Vander Zanden v. DILHR*, 87-0063-PC-ER, 2/28/89 --- §§706.05, 712.5**

***Vander Zanden v. DILHR*, Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 89-1355, 1/10/90 --- §792.04**

***Vang v. DWD*, 97-0174-PC-ER, 2/28/00 ---**

***Vanover v. DILHR & DER*, 89-0128-PC, 11/16/90 --- §§403.12(17)(a), (17)(m), 502.75**

***Varney v. DOA*, 94-0283-PC, 12/22/94 --- §§102.01, .05(6)**

***Varriale v. DOJ*, 85-0056-PC, 4/11/86; aff'd by Waukesha County Circuit Court, *Varriale v. State Pers. Comm.*, 86-CV-1324, 6/18/87 --- §667**

***Vaughan v. UW-Madison*, 98-0211-PC-ER, 9/7/00 ---**

***Vennie v. DER*, 92-0624-PC, 5/27/94 --- §403.12(2)**

***Verhaagh v. DOT*, 99-0127-PC-ER, 4/7/00 ---**

***Vervoort v. UW-Madison*, 93-0059, 0132-PC-ER, 11/22/96 --- §715.9**

***Vesperman et al. v. DOT & DER*, 93-0101-PC, etc., 2/15/94 --- §§102.05(10), .13, 103.03**

***Vesperman v. DOT & DER*, 93-0101-PC, 12/7/95 --- §403.12(2)**

***Vesperman v. UW*, 81-PC-ER-66, 6/4/82 --- §706.50**

***Vesperman v. UW-Madison*, 81-232-PC, 81-PC-ER-66, 3/31/83 --- §§615.2, 774.03(2), 796.15**

***Vest v. UW (Green Bay)*, 97-0042-PC-ER, 3/20/98 --- §736**

***Vest v. UW (Green Bay)*, 97-0042-PC-ER, 9/10/97 --- §724**

***Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93 --- §§766.02(2), .04, 780.02(2), .04, 784.02(2), .04, 796.15, .37, .60**

***Vines v. UW (Parkside)*, 99-0044-PC-ER, 9/5/01 ---**

***Vogen v. DER*, 92-0601-PC, 6/23/94 --- §403.12(2), (4)(f)**

***Voigt v. DER*, 84-0113-PC, 6/6/85 --- §403.12(2)**

Volden*, see *Benish & Volden v. DILHR & DP

***Vollmer v. UW & DER*, 89-0056-PC, 3/19/93 --- §403.12(13)**

***Vollmer v. UW & DER*, 89-0056-PC, 4/12/90 --- §§102.05(10), 103.03**

***Vollmer v. UW & DER*, 89-0056-PC, 8/24/89 --- §506.50**

***Volovsek v. DATCP*, 95-0072-PC-ER, 8/27/99 ---**

***Volovsek v. DATCP & DER*, 93-0098-PC-ER, 12/28/93 --- §724**

***Volovsek v. DATCP & DER*, 93-0098-PC-ER, 3/1/94 (ruling by examiner) --- §§722, 724**

***Volovsek v. DATCP & DER*, 93-0098-PC-ER, 4/16/96 --- §726**

***Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98 --- §§766.02(2), .03(2), 788.02(2), .03(2), 796.15, .35, .40**

***Voltz v. DP*, 82-171-PC, 1/18/84 --- §403.12(2)**

***Von Ruden et al. v. DER*, 91-0149-PC, etc., 11/17/95 --- §521.7(1)**

***Von Ruden et al. v. DER*, 91-0149-PC, etc., 7/8/92 --- §403.12(2), (4)(w)**

***Von Ruden et al. v. DER*, 91-0149-PC, etc., 8/31/95 --- §§403.12(2), (4)(w), 506.03, 510.90**

***Vranes v. DER*, 83-0122-PC, 7/19/84 --- §§403.12(2), (4)(u), 502.07**

***Vyas et al. v. DILHR & DER*, 94-0241-PC, 2/6/95 --- §403.12(2)**

W

***Wachtel v. DOC*, 99-0037-PC, 11/19/99 ---**

***Wacker v. DOT & DER*, 92-0251-PC, 12/17/92 --- §403.12(2), (8), (11)**

***Wagener v. DOC*, 00-0161-PC, 11/15/00 ---**

***Wager v. DP*, 81-0134-PC, 6/18/86 --- §§403.12(2), .12(4)(v)**

***Wakely & Johnson v. DER*, 94-0153, 0163-PC, 2/20/95 --- §505.02(2)**

***Walbridge v. DER*, 88-0062-PC, 5/18/89 --- §403.12(2)**

***Wales v. DOC*, 98-0020-PC, 4/23/98 --- §103.01**

***Wali v. PSC*, 87-0081-PC, 87-0080-PC-ER, 4/7/89 -- §§615.2, 780.03(2), .06, 796.15**

***Walker v. DER*, 85-0020-PC, 11/25/85 --- §403.12(2)**

***Walsh v. UW*, 80-109-PC, 7/28/80 --- §103.05**

***Wambold v. DILHR & DP*, 82-161-PC, 1/20/83 --- §§403.12(2), 403.12(12)**

Wanta*, see *Doll & Wanta v. DOA

***Warda v. UW-Milwaukee & DER*, 87-0071-PC, 11/4/87 --- §§102.05(10), 103.03**

***Warda v. UW-Milwaukee & DER*, 87-0071-PC, 6/2/88 --- §§403.12(13), 522.05(3)**

***Warren v. DHFS*, 98-0146-PC, 98-0164-PC-ER, 2/9/01 ---**

***Warren v. DHFS & DMRS*, 00-0147-PC, 11/12/01 ---**

***Warren v. DHSS [DHFS]*, 92-0750-PC, 92-0234-PC-ER, 10/2/96 --- §742**

***Warren v. DHSS*, 92-0750-PC, 92-0234-PC-ER, 5/14/96 --- §§270, 742**

***Wasick v. DP*, 81-125-PC, 10/14/82 --- §403.12(2)**

***Watkins v. DHSS*, 89-0073-PC-ER, 4/17/92 --- §§784.04, 796.60**

***Way v. UW*, 78-122-PC, 79-PC-ER-4, 3/8/82 --- §§774.02(2), 786.02(2)**

***Way v. UW*, 78-PC-ER-52, 3/8/82 --- §§774.04, 786.04, 796.60**

***Weatherall v. DHSS*, 84-0047-PC-ER, 10/7/87; affirmed by Ozaukee County Circuit Court, *Weatherall v. Pers. Comm.*, 87-CV-481-B1, 9/15/88--- §717.3**

***Weaver v. UW-Madison*, 93-0022-PC-ER, 11/3/94 --- §§770.03(2), 784.03(2), 786.03(2), 796.15**

***Weaver v. UW-Madison*, 93-0022-PC-ER, 12/8/93 (ruling by examiner) --- §730**

***Weber v. DER*, 94-0066-PC, 11/22/94 --- §§403.12(2), 403.12(4)(d), (s)**

***Weber v. DOCom & DER*, 95-0168-PC, 4/24/97 --- §§403.12(2), (13)**

***Weber v. DOCom & DER*, 98-0157-PC, 10/4/00 ---**

***Weber v. DOT & DP*, 81-499-PC, 6/10/82 --- §403.12(2)**

***Weber v. UW (Stevens Point)*, 00-0159-PC-ER, 5/25/01 ---**

***Wech v. DHSS*, 79-310-PC, 1/14/80 --- §522.01(3)**

***Wedekind v. DOC*, 98-0091-PC, 2/24/99 --- §615.2, 667**

***Wedul v. DOT & DER*, 85-0118-PC, 2/6/86 --- §§403.12(2), (4)(r)**

***Weeks v. UW-Stevens Point*, 92-0036-PC-ER, 4/30/93 --- §§712.4, 788.25**

***Wegner v. UW*, 79-14-PC, 9/14/79 --- §630.03**

***Wehrle v. DER*, 91-0170-PC, 6/24/92 ---- §403.12(2)**

***Weimer v. DOT & DER*, 84-0064-PC, 12/6/84 --- §403.12(2)**

***Weister v. DNR & DER*, 85-0075-PC, 6/12/86 --- §403.12(2)**

***Welch v. DER*, 92-0630-PC, 5/16/94 --- §§403.12(2), 506.03, 510.09**

***Welch v. DHSS*, 81-272-PC, 10/30/81 --- §103.05**

***Welch v. UW-Oshkosh*, 82-PC-ER-44 and 82-122-PC, 4/5/84 --- §§784.02(l), 796.15**

***Welch v. UW-Oshkosh*, 82-PC-ER-44, 10/3/84 --- §721.01**

***Welke v. UW-Milwaukee*, 81-51-PC, 12/22/83 --- §§202.02(2), 202.04**

***Wells-Patterson v. Sec. of State*, 83-0049-PC-ER, 5/3/84 --- §736**

***Welniak v. UW*, 81-126-PC, 6/3/81 --- §103.21(a)**

***Welter v. DHSS*, 88-0004-PC-ER, 2/22/89 --- §706.03**

***Wendt v. DHSS*, 81-110-PC, 12/3/81 --- §§103.05, 103.21(a)**

***Wentworth v. DP*, 81-0178-PC, 9/4/86 --- §403.12(2)**

***Wentz v. DER*, 84-0068-PC, 1/17/85; petition for rehearing denied 3/5/85 -- §§403.12(13), 502.75, 517.55**

***Wentz v. DOT*, 94-0056-PC-ER, 10/24/94 --- §§714.1, 724**

***Wenzel v. DOR & DER*, 96-0037-PC, 11/14/96 --- §403.12(2), (4)(s)**

***Wermuth v. DATCP*, 82-PC-ER-47, 1/31/89 --- §515.2**

***Wermuth v. DATCP*, 82-PC-ER-47, 6/24/87 --- §§513, 515.02**

Wermuth*, see *Lawrence & Wermuth v. DER

***Werth v. DP*, 81-130-PC, 8/5/81 --- §§403.12(4)(a), (d), 501.03, 502.75**

***West v. UWHCB*, 00-0032-PC-ER, 5/3/00 ---**

***WFT v. DMRS*, 84-0085-PC, 10/10/84 --- §103.18**

***WFT v. DMRS*, 84-0154-PC, 8/l/85; rehearing denied, 8/30/85 --- §403.1015**

***WFT v. DP*, 79-306-PC, 4/2/82 --- §§103.04, .18, 702.01, 706.05, 719, 720**

***Whaley v. DOC*, 96-0157-PC-ER, 3/12/97; reviewed in *Whaley v. Wis. Pers. Comm.*, 97 CV 462, Brown County Circuit Court, 5/13/97 --- §702.03**

***Whaley v. Wis. Pers. Comm.*, 97 CV 462, Brown County Circuit Court, 5/13/97 --- §702.03**

***White v. DER*, 92-0371-PC, 8/11/93 --- §403.12(2)**

***White v. DOT*, 79-112-PC, 1/15/80 --- §103.21(a)**

***Whiting v. DHSS & DER*, 90-0066-PC, 1/24/92 --- §403.12(2)**

***Whitley v. DOC*, 92-0080-PC-ER, 7/9/93 --- §§717.3, 730**

***Whitley v. DOC*, 92-0080-PC-ER, 9/9/94 --- §§768.01, .03(2), 784.03(2), 796.60**

***Whitmore v. DP*, 82-10, 188-PC, 3/31/83 --- §403.12(2)**

***Wiars v. DMRS*, 86-0209-PC, 3/4/87 --- §§103.18, 503.50**

***Wickman et al. v. DP*, 79-302-PC, 3/24/80 --- §§102.05(13), .14**

***Wiggins v. DOD*, 82-246-PC, 7/21/83 --- §302.15**

***Wigglesworth v. DER*, 92-0150-PC, 8/23/93 --- §403.12(2)**

***Wilczewski v. DOR*, 86-0113-PC-ER, 7/27/88 --- §§780.02(2), 780.04, 796.60**

***Wilkinson v. DER*, 92-0613-PC, 1/31/96 --- §403.12(7)**

Wilkinson*, see *Swim & Wilkinson v. DER

***Willadsen v. UW-Madison*, 01-0078-PC-ER, 1/10/02 ---**

***Wille v. DOC*, 96-0086-PC-ER, 1/13/99 (appeal pending) --- §§721.18, 774.01, .03(2), .05, 796.60**

***Williams v. DOC*, 97-0086-PC-ER, 11/3/99 ---**

***Williams v. DOC*, 97-0086-PC-ER, 3/24/99 --- §§502.75, 517.01, 519, 702.07, 726, 740, 796.95**

***Williams v. DOC & DER*, 99-0092-PC, 8/28/00 ---**

***Williams v. UW-Madison*, 93-0213-PC-ER, 9/17/96; affirmed by Dane County Circuit Court, *Williams v. Wis. Pers. Comm.*, 96 CV 2353, 11/19/97 --- §§702.50, 792.01**

***Williams v. UW-Madison*, 97-0161-PC-ER, 5/12/99 ---**

Williams*, see *Billingsley & Williams et al. v. DP

Williams*, see *McNown [Williams] v. DILHR & DER

***Williamson et al. v. DP*, 79-PC-CS-888, 669 and 670, 12/3/81 --- §403.12(2)**

***Williamson v. DOR*, 80-303-PC, 12/17/80 --- §103.08(10)**

***Willis v. DHFS & DER*, 98-0064-PC, 6/3/99 ---**

***Wilson v. DHSS*, 95-0043-PC-ER, 5/28/96 --- §724**

***Wilson v. DOC*, 94-0065-PC, 7/7/94 --- §103.01**

***Wilterdink v. DOR*, 85-0072-PC, 2/6/86 --- §615.2**

***Wing v. DER*, 84-0084-PC, 4/3/85 --- §§103.18, .20**

***Wing v. DILHR & DP*, 80-65-PC, 4/5/83; explained further, 8/4/83 --- §667**

***Wing v. DMRS & DPI*, 85-0013-PC, 9/23/87 --- §§403.07, 615.5(2)**

***Wing v. DHSS & DMRS*, 85-0232-PC, 3/9/87 --- §102.05(10)**

***Wing v. DP*, 77-63, 6/11/81 --- §403.12(2)**

***Wing v. DPI & DER*, 85-0013-PC, 9/20/85 --- §§103.18, .20**

***Wing v. UW & DP*, 79-148, 173-PC, 10/4/82 --- §§103.18, 503.06,**

***Wing v. UW System*, 85-0007-PC, 5/22/85 --- §§103.08(8),(10)**

***Wing v. UW System*, 85-0007-PC, 9/20/85 --- §§103.08(l), (8)**

***Wing v. UW System*, 85-0077-PC, 85-0104-PC-ER, 2/6/86 --- §506.03**

***Wing v. UW System*, 85-0112-PC, 9/20/85 --- §§103.08(3), (8),(10)**

***Wing v. UW System*, 85-0122, 0173-PC, 2/6/86 --- §§103.08(8), (10)**

***Wing v. UW*, 78-137-PC, 4/19/79 --- §§103.08(1), 103.08(10)**

***Wing v. UW*, 78-159, 79-240-PC, 9/23/81 --- §103.08(8)**

***Wing v. UW*, 78-159-PC, 4/19/79 --- §§102.05(4)(a), 103.08(8), 522.05(3)**

***Wing v. UW*, 79-20-PC, 7/5/79 --- §103.08(10)**

***Wing v. UW*, 80-256-PC, 4/1/81 --- §§103.08(8), 103.08(10)**

***Wing v. UW*, 80-274-PC, 4/1/81 --- §103.08(10)**

***Wing v. UW*, 81-328, 420-PC, 6/25/82 --- §§103.08(2)(a), 103.08(10)**

***Wing v. UW*, 81-328-PC, 2/7/83 --- §680**

***Wing v. UW*, 82-75-PC, 9/30/82 --- §103.08(8)**

***Wing v. UW*, 85-0065-PC, 2/12/86 --- §§103.08(10), 403.057, 680**

***Wing v. UW-Stout*, 85-0104-PC-ER, 1/9/89 --- §724**

***Wing v. UW*, 78-203-PC, 4/19/79 --- §103.12**

***Winter v. DOC*, 97-0149-PC-ER, 3/11/98 --- §§506.03, 724**

***Winter v. DOC*, 97-0149-PC-ER, 5/6/98 --- §§732, 788.25, 796.39**

***Winterhack v. DHSS*, 82-PC-ER-89, 8/31/84 --- §§760.02, 784.03(l), 788.03(2), 796.60**

***Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86 --- §§517.55, 522.11, 721.01, 784.01, .02(l), (2), .06, .07, 786.02(2), 796.15, .60**

***Winters v. DOT*, 84-0003-PC-ER, 7/8/88 --- §§721.01, 784.03(2), .04**

***Wipperfurth v. DER*, 92-0135-PC, 11/13/92 --- §§515.5, 517.01**

***Witt v. DOA*, 97-0139-PC-ER, 7/20/99 ---**

***Witt v. DILHR & DER*, 85-0015-PC, 9/26/85 --- §§103.13, .18, .21(a), (b), 503.50**

***Witt v. DOT & DER*, 93-0093-PC, 11/14/95 --- §§511.20, 515.2**

***Wojciechowski v. DP*, 79-PC-CS-907, 10/14/82 --- §403.12(2)**

***Wojtalewicz v. DNR*, 90-0153-PC-ER, 12/17/92 --- §§766.03(22), 796.15**

***Wolfe v. UW System (Stevens Point)*, 85-0049-PC, 9/26/85 --- §103.05**

***Wolfe v. UW-Stevens Point*, 84-0021-PC-ER, 10/22/86 --- §§510.06,**

742, 788.030), .04, 796.15, .60

***Womack v. UW-Madison*, 94-0009-PC-ER, 7/25/94 --- §§706.01, .05**

***Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98 --- §§702.01, 719, 722**

***Wood v. DER & DNR*, 85-0008-PC-ER, 7/11/86**

***Wood v. DNR*, 86-0002-PC-ER, 2/19/88 --- §§774.02(2), 796.10**

***Wood v. DNR*, 86-0002-PC-ER, 4/15/87; affirmed by Waushara County Circuit Court, *Wood v. State Pers. Comm.*, 87-CV-80, 5/3/88 --- §720**

***Wood v. DNR*, 88-0019-PC-ER, 5/18/89 --- §702.18(1)**

***Wood v. DOT*, 86-0037-PC-ER, 5/5/88; affirmed by Milwaukee County Circuit Court, *Wood v. Wis. Pers. Comm. & DOT*, 88-CV-09-178, 5/10/89; affirmed by Court of Appeals, 009-178, 11/22/89--- §§517.01, 774.03(2), 796.05**

***Woods v. UW-Madison*, 98-0224-PC-ER, 5/5/99; rehearing denied, 6/28/99 ---**

***WPEC v. DMRS*, 95-0107-PC, 4/4/96; rehearing denied, 5/14/96 --- §§403.035, 502.06**

***WPEC v. DMRS*, 95-0107-PC, 5/14/96 --- §§502.01(2), .06**

***WPEC v. DMRS*, 95-0107-PC, 9/29/95 --- §§103.05, .18**

***Wright v. DOT*, 90-0012-PC-ER, 2/25/93 --- §706.10**

***WSEU v. UW*, 74-100, 2/15/80 --- §§103.08(10), 610.2**

***WSEU v. UW*, 80-149-PC, 8/19/80 --- §103.12**

***WSEU v. UW*, 84-0019-PC, 4/25/84 --- §103.12**

***Wyman v. UW-Madison*, 99-0078-PC-ER, 1/25/00 ---**

X

Y

***Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90 --- §§770.02(2), 784.02(2), 796.35, .50, .60**

***Yasick et al. v. DOT & DMRS*, 89-0087-PC, 10/25/89 --- §102.05(9)**

***Yelton (Janecke) v. DOC*, 98-0227-PC-ER, 7/26/01 ---**

***Yerges v. DMRS*, 99-0042-PC, 8/11/99 ---**

***York v. DP*, 78-42-PC, 7/18/80 --- §§403.04(2), 403.04(8)**

***Young v. DNR & DER*, 84-0251-PC, 11/21/85 --- §403.12(2)**

***Young v. DOT*, 00-0025-PC-ER, 2/23/01 ---**

***Young v. DOT*, 00-0025, 0123-PC-ER, 12/6/01 (ruling by examiner) ---**

***Young v. DOT*, 00-0123, 01-0007-PC-ER, 5/17/01 ---**

***Young v. DOT*, 00-0129-PC-ER, 10/27/00 ---**

***Young v. DP*, 81-7-PC, 12/16/81 --- §403.12(2)**

***Young v. DP*, 81-7-PC, 6/3/81 --- §102.02(2)**

***Young v. DP*, 81-7-PC, 8/26/81 --- §§511.50, 513**

***Yttri v. DER*, 92-0261-PC, 3/9/94 --- §403.12(2)**

Z

***Zabel v. DOT*, 82-137-PC, 11/30/83 --- §202.10(2)**

***Zabel v. DOT*, 82-137-PC, 7/26/82 --- §522.05(3)**

***Zahn v. DHSS & DER*, 85-0040-PC, 7/17/85 --- §102.05(10)**

***Zanck & Schuler v. DHSS & DP*, 80-380-PC and 81-12-PC, 12/3/81 --- §§103.15, 403.04(8), 420**

***Zanck et al. v. Schmidt*, 441, 12/17/71 --- §103.07**

***Zank v. UW (Stout)*, 97-0049-PC-ER, 7/20/99 ---**

***Zastrow v. DER*, 90-0208-PC, 5/29/91 --- §403.12(2)**

***Zebell v. DILHR*, 90-0017-PC, 10/4/90 --- §§615.2, 675.5**

***Zechnich v. DHSS & DP*, 79-4-PC, 9/29/80; aff'd by Dane County Circuit Court, *Zechnich v. PC*, 80-CV-6092, 2/27/81 --- §§103.21(b), 403.15(7)**

***Zehner v. State (Pers. Bd.)*, aff'd by Dane County Circuit Court, 156-399, 2/20/78 --- §§201.03(0.5), 205.3, .5, 210.5(5)**

***Zeicu v. DHSS [DHFS]*, 96-0043-PC-ER, 1/16/97 --- §§780.03(2), 786.03(2),796.15, .50**

Sections 100 through 102.05(13)

[Next material]

---

100 JURISDICTION [APPEALS]

101 General

It is not dispositive for appeal purposes whether a personnel transaction fits or does not fit within the definition of a particular type of transaction. The Commission must examine the practical effect the transaction has on the employe's employment status, in the context of the employer's intention in effecting the transaction, and the policy factors which underlie the statutory framework of the civil service, to determine whether the transaction partakes more of the nominal category of personnel transaction, e.g., a reprimand, or more of the more serious category, e.g., a suspension. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

Implied powers may be found only if they are clearly necessary for the implementation of a statute. *Seay v. Wis. Pers. Comm.*, Dane County Circuit Court, 93-CV-1247, 3/3/95; aff'd Ct. of App., 95-0747, 2-29-96.

Whether there *should* be statutory protections is a legislative, not a judicial determination. *Seay v. Wis. Pers. Comm.*, Dane County Circuit Court, 93-CV-1247, 3/3/95; aff'd Ct. of App., 95-0747, 2-29-96.

An appellant is not barred from proceeding with an appeal before the Commission because of a potentially inconsistent legal assertion made to the employer and not before this Commission. *Krasny v. DOC*, 94-0036-PC, 11/17/95

102.01 General application of time restrictions

Complainant is charged with receipt of a written notice of his discharge when he actually received it, rather than the later date of when he opened the envelope. *Magel v. UW-Madison*, 98-0167-PC-ER, 1/27/99

Filing a claim with another entity, albeit a state or federal agency, does not constitute filing with the Personnel Commission. The Commission declined to recognize complainant's earlier filing with the Equal Rights Division as timely on either the basis of "good faith" or "share agreements," citing *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/97. *Swenby v. UWHCB*, 98-0012-PC-ER, 5/20/98

Untimely filing of an appeal usually deprives the Commission of "competency" to hear the appeal. *Austin-Erickson v. DHFS & DER*, 97-0113-PC, 2/25/98

Under certain circumstances, a failure to comply with §230.44(3) will not be fatal to an employe's ability to pursue an appeal. The most common circumstance leading to this result is when an agency responsible for the personnel transaction in question misleads the employe as to the nature of his or her appeal rights, and the employe, reasonably relying on this information, fails to file a timely appeal. *Austin-Erickson v. DHFS & DER*, 97-0113-PC, 2/25/98

Section 230.44(3), Stats., statutorily limits the jurisdiction of the Commission to hear appeals to those appeals filed within 30 days of the effective date or of the employe's notification, whichever is later. *Byrne v. State Pers. Comm.*, Dane County Circuit Court, 93-CV-3874, 8/15/94

Lack of familiarity with the law does not toll a filing period and the lack of information from an employer does not toll the filing period unless the employer has an affirmative obligation to provide such information. *Hallman v. WCC & DOA*, 96-0146-PC, 2/12/97

While the failure to comply with the time limit in §230.44(3), Stats., does not deprive the Commission of subject matter jurisdiction, but rather its competency to proceed, the time limit is mandatory rather than discretionary. Where appellant failed to comply with the

mandatory timeliness provision, the Commission lacked competency to proceed and the appeal was dismissed *Stronach v. DOT & DER*, 95-0177-PC, 12/7/95

Appellants failed to sustain their burden of proof of establishing that they received notice of a reallocation on or after August 1, when they only made a vague statement to the effect that the notices were mailed to them late in July or early in August. *Lawrence & Wermuth v. DER*, 94-0443-PC, 1/20/95

Effective notice ordinarily can be verbal unless there is a specific requirement in the civil service code for written notice, citing *Kelling v. DHSS*, 87-0047-PC, 3/12/91. *Varney v. DOA*, 94-0283-PC, 12/22/94

An objection to the untimely filing of an appeal cannot be waived by a party, citing PC 1.08(3), Wis. Admin. Code. *Heath & Mork v. DOC & DER*, 93-0143-PC, 6/23/94

Where there was nothing in a document signed by the appellant at the time he submitted his training/experience questionnaire which expressly or impliedly waived his right to challenge the examination process pursuant to §230.44(1)(a), the appellant did not waive his right to appeal the exam. *Chaykowski v. DOD & DMRS*, 91-0136-PC, 10/17/91

The Commission simply had no power to consider appellant's claim that, in a personnel transaction occurring seven years earlier, his constitutional rights were violated. The state statute establishing the time limit for filing does not conflict with a federal constitutional provision merely because appellant has argued that the transaction involved the violation of that constitutional provision. *Schroeder v. DMA*, 86-0148-PC, 8/20/86; affirmed (dictum) by Fond du Lac Circuit Court (dictum), *Schroeder v. State Pers. Comm.*, 86-CV-717, 1/21/87

The phrase "any appeal filed under this section may not be heard" in §230.44(3), Stats., applies only to appeals involving the subject matter set forth in §230.44, Stats., and not to appeals or charges of discrimination filed under §§230.45(l)(b) and 111.375(2), Stats., rather than §230.44, Stats. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 1/24/86

The Commission does not have the discretion to hear an

untimely appeal. The reference to "*may* not be heard" in §230.44(3), Stats., does not grant permissive or discretionary authority. *Acharya v. DHSS*, 81-296-PC, 10/1/81

Time limit for filing appeals set forth in §230.44(3), Stats., is mandatory and not directory and is jurisdictional in nature. *Richter v. DP*, 78-261-PC, 1/30/79

102.02(1) Receipt of letter

Where appellant's appeal was filed late most likely due to a combination of her waiting until close to the end of the appeal period to mail her appeal and of post office delays, and there was no evidence that the DOA mailroom failed to process the mail during the relevant period pursuant to the normal twice daily schedule, her appeal was dismissed as untimely filed, distinguishing *Bouche v. UW & DER*, 96-0095-PC, 10/29/96. *Tukiendorf v. DATCP & DER*, 96-0165-PC, 2/12/97

A complaint was found to have been untimely filed where there was no evidence in the Commission's files of ever having received the complaint around the time it was allegedly filed, complainant alleged he had mailed the complaint to the Commission by registered mail and also delivered it by hand several days later when he had heard nothing from the Commission, but he was unable to produce any of the registered mail receipts from the postal service, and, although he produced his own handwritten note memorializing his alleged personal delivery of a copy of the complaint to the Commission, once it was determined from his work records that he could not have delivered the letter on the date stated in the note, he testified that he actually had delivered the copy of the complaint to the Commission the day after he stated in the note. *Paul v. DOC*, 91-0074-PC-ER, 8/23/93

A letter directed to the Division of Merit Recruitment and Selection which raised a series of questions regarding the respondent's application form and job announcements and asked for a "written, logical explanation to these quirks in the certification process" did not serve as an appeal of a decision not to include the appellant's name on a certification list. Although the Personnel Commission was

listed as one of six persons or agencies being sent copies of the letter to DMRS, there was nothing on the record indicating the Commission had received the letter until more than 2 months later and the letter gave no suggestion that at the time it was written, the appellant sought to commence a formal appeal with the Commission. *Stockli v. DMRS*, 91-0189-PC, 11/14/91

Letter of appeal was not timely received where appellant received civil service examination results on March 24, mailed a certified letter to the Commission at its correct address on April 19, where the postal service erroneously delivered the letter to the Department of Revenue on April 23 and where the letter was not received by the Commission until April 25, after the 30 day appeal period had run. *Van Rooy v. DMRS & DILHR*, 84-0062-PC, 7/19/84

The Commission lacks jurisdiction over appeal mailed to the Commission within 30 day period specified in §230.44(3), Stats., but not received until after 30 days, as term "filed" requires physical receipt by commission. *Richter v. DP*, 78-261-PC, 1/30/79

102.02(2) Time stamp

The appellant failed to sustain her burden of establishing she filed her appeal on August 16th where the appeal bore a date stamp of August 17th and there were defects in appellant's credibility and defects in the scenarios advanced by the appellant. *Black-Radloff v. DER*, 90-0353-PC, 3/25/91

Evidence of subsequent tests involving 35 documents which were mailed from Milwaukee on Friday and were received by the Commission on a Monday was an insufficient basis for concluding that a letter of appeal, which bore a date stamp of Tuesday, August 7th was actually received on Monday, August 6th. *Krahling v. DER*, 90-0315-PC, 2/26/91

Where the appellant merely asserted that it was his "expectation" that his appeal was received on or before August 6th because he had mailed the appeal on August 2nd, there was no basis for a finding that the date stamp of August 7th was erroneous. *Krahling v. DER*, 90-0315-PC,

1/11/91; rehearing denied, 2/26/91

The Commission concluded that an appeal was filed on January 7th even though the letter bore a Commission date-stamp of January 8th, where the appellant testified that she had hand-delivered the letter to the Commission on the 7th. The Commission was impressed by the appellant's testimony that she was well aware of the importance of the 30 day time limit and noted that the Commission's office practice of stamping documents on the date of receipt was not infallible. *Young v. DP*, 81-7-PC, 6/3/81

102.02(3) Mailing date

The language of §801.15(5), Stats., which adds 3 days to a prescribed period for taking some action or initiating some proceedings, is inapplicable to the 30 day period for filing an appeal with the Commission because ch. 801, Stats., only applies to circuit court proceedings. *Krahling v. DER*, 90-0315-PC, 1/11/91; rehearing denied, 2/26/91

The Commission lacks jurisdiction over appeal mailed to the Commission within 30 day period specified in §230.44(3), Stats., but not received until after 30 days, as term "filed" requires physical receipt by commission. *Richter v. DP*, 78-261-PC, 1/30/79

102.02(5) Mistaken appeal to the Administrator/ Secretary (see also 102.10)

Appellant did not meet her burden of proving she filed a timely appeal from the decision to deny her reclassification request where her letter of appeal was received by the Commission 4 days late. The reclassification denial notice had advised appellant that if she wished to "appeal this decision to the Personnel Board, you must do so in writing, within 30 days of your receipt of this memo." A cover letter to the notice suggested that if appellant had any questions, she could contact either of two people, but appellant instead took the suggestion of an unidentified person and wrote a letter of appeal to the Department of Employment Relations, where it was received within the 30 day filing period. DER then wrote the appellant and directed her to

file any appeal with the Personnel Commission. *Casper v. UW & DER*, 96-0013-PC, 6/28/96

Where respondent provided correct appeal information on the notice of reallocation but, due to appellant's confusion as to agency organization, he mistakenly filed a letter of appeal with DER but an appeal did not reach the Commission until after the 30 day time limit, the appeal was untimely. After receiving the misdirected appeal, DER had sent the appellant a second letter which referred him to the information in the original notice. *Ancel v. DER*, 91-0117-PC, 10/17/91

The Commission lacks jurisdiction over an appeal addressed to a DER employe that was received by the Commission outside of the 30 day time limit. The letter had been received by DER within the 30 day period, but the employe to whom the letter was addressed was on vacation. On her return from vacation, the DER employe had hand-delivered the letter to the Commission. *Gensch v. DER*, 87-0072-PC, 7/8/87

102.04 No notice, generally

The respondent agency has no legal requirement to advise an employe as to the proper route for appeal. Equitable estoppel only occurs when the agency provides misinformation that the employe relies on and thereby fails to file a timely appeal. *Austin-Erickson v. DHFS & DER*, 97-0113-PC, 2/25/98

An appellant cannot be charged with the duty to have inquired into the nature of the information provided as part of the certification prior to the time that the appellant knew (via the notice of his nonselection), or apparently had any reason to suspect, an adverse employment action against him. Therefore, an appeal of that point of the certification process that resulted in the appointing authority receiving a random-ordered list of names as a certification (without scores) was timely where it was filed 13 days after appellant received notice of his non-selection. To the extent the appellant sought to appeal the promulgation of the certification policy (i.e. providing the certification list in random order), the appeal was untimely because it was filed more than 2 years after the policy became effective and

there was no indication that appellant was entitled to any special notification of the promulgation of the policy. However, to the extent the policy had an adverse effect on an employe in a specific transaction, each such certification made pursuant to the policy is appealable as a separate transaction. *Thompson v. DMRS & DNR, 87-0204-PC, 6/29/88*

Where respondent had no responsibility of notifying the appellant, a union steward who had no involvement in the transaction, of the reclassification of a position, an appeal filed more than 30 days after the effective date of the transaction was untimely. *Barker v. UW & DER*, 88-0024-PC, 4/20/88

An unsigned carbon copy of a suspension letter provided appellant with "notice" of the suspension as required by §230.34(i)(b), Stats., where there were no circumstances which raised a reasonable question as to whether the unsigned letter was genuine or was final. The 30 day appeal period commenced on the date the appellant received the unsigned letter. *Hansen v. DATCP*, 87-0092-PC, 10/7/87

Where the appellant was never provided written notification of the final decision to reclassify appellant's position to the MIT 3 level, and the personnel rules require written notification of reclassification/reallocation approvals and denials, her appeal of the decision was timely. The letter of appeal was received on April 9, 1985. On February 15, appellant received an initial written notification of the decision to reclassify her position from PA 4 - Confidential to MIT 3 and of the right to appeal to the Commission. Appellant was then notified, in writing, that the payroll processing of the reclassification would be held up until the question of creating a MIT - Confidential series could be explored. The appellant was notified verbally, but not in writing, that the new series would not be created and that payroll processing of her reclassification would proceed. *Kriedeman v. UW & DER*, 85-0048-PC, 10/23/85

Where the subject matter of the appeal involves an alleged omission, or failure to inform, and where there is nothing to suggest that the appellant would or should have had knowledge of the specific omission at the time it occurred, he cannot be charged with "notice" of the omission at the time it occurred. The appeal concerned the alleged failure to have informed the appellant before his appointment that the

training program required exposure to MACE. *Hebert v. DHSS*, 84-0233-PC, 4/12/85

102.05(1) Discharge/termination

The appellant did not engage in some trick or artifice to avoid receipt of a notice of job abandonment where appellant absented herself from her home for a period of 5 weeks, instructed her children to put the mail addressed to the appellant in a drawer during her absence, had no way of knowing during her absence that the subject letter had been sent by the respondent or received at her home, and took possession of the letter almost immediately upon her return home. The appellant did not receive effective notice of the respondent's personnel actions until she took actual possession of the letter. *Smith v. DHSS*, 88-0063-PC, 2/9/89

Notice of appellant's termination was not effective until appellant actually received it two days after appellant's daughter had signed the receipt for delivery of the termination letter. *Goers v. DOR*, 82-101-PC, 7/8/82

102.05(3) Layoff

Nothing in the statutes or administrative rules requires that the written layoff notice set forth appeal rights. *Blomquist v. DATCP*, 94-1032-PC, 5/26/95

102.05(4) Grievance matters (see also 102.13)

A grievance arising from the alleged failure of respondent to grant appellant premium pay for overtime hours he worked in a certain capacity during the period from 1985 to 1991 was timely only with respect to the single instance during which he worked in that capacity within the 30 days prior to filing his grievance. Each of the instances in which appellant was not granted premium pay for working overtime hours represented a discrete and separable transaction, so a continuing violation theory was

inapplicable. The Commission went on to dismiss the timely claim because pay issues are non-grievable. *Bornick v. DOC*, 91-0084-PC, 4/1/92

The 30 day time limit set forth in §46.06(1), Wis. Adm. Code, for filing a first step grievance is not jurisdictional but is in the nature of a statute of limitations that is subject to waiver. *Flannery v. DOC*, 91-0047-PC, 2/21/92

Respondent's failure to have raised a timeliness defense at any of the first three steps in the grievance procedure acted as a waiver of the defense where the appellant's counsel had served as the appellant's representative at all four steps of the process and it was reasonable to conclude that the appellant had incurred expense at each step because of this representation. *Flannery v. DOC*, 91-0047-PC, 2/21/92

The 30 day time limit in §ER 46.07(2), Wis. Adm. Code, for filing fourth step grievances with the Commission is akin to a statue of limitations and is subject to waiver by the respondent or to equitable tolling. *Masear v. DILHR*, 89-0065-PC, 11/1/89

The language of §ER 46.06(4), Wis. Adm. Code, which permits reliance on the date of postmark for determining the timeliness of a grievance is inapplicable to the fourth step in the non-contractual grievance process. The time limit for filing at the fourth step is governed by §ER 46.07, Wis. Adm. Code. *Masear v. DILHR*, 89-0065-PC, 11/1/89

Where the appellant's attorney did not draft the fourth step grievance or mail it until the 30th day after service of the decision at the third step and did not anticipate that the fourth step grievance would arrive at the Commission until after the 30th day had passed, there was no basis for tolling the 30 day time limit and the grievance was dismissed as untimely filed. *Masear v. DILHR*, 89-0065-PC, 11/1/89

An appeal under §230.45(l)(c), Stats. is untimely where appellant failed to comply with the 15 day time requirement established by the agency's grievance procedure. *Lyons v. DHSS*, 79-81-PC, 7/23/80; affirmed by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm.*, 80-CV-4948, 7/14/81

The time limit for filing appeals of non-contractual grievances pursuant to §230.45(l)(c), Stats., is, in the absence of the promulgation of rules by the Secretary,

DER, as set forth in the individual agency grievance procedures. However, these time limits are not jurisdictional in nature and the DOT time limit here was held not to require dismissal where the circumstances were such as to give rise to understandable confusion as to what time limit applied. *Bartol v. DOT*, 79-309-PC, 4/25/80

Time limits expressed in agency non-contractual grievance procedures are directory and not mandatory and are non-jurisdictional and can be waived. *Wing v. UW*, 78-159-PC, 4/19/79

102.05(6) Post-certification action related to hiring process -- §230.44(1)(d), Stats.

If a person is denied a promotion, the "action" appealed from is the denial, not a later event stemming from it. *Cozzens-Ellis v. Wis. Pers. Comm.*, 155 Wis. 2d 271, 455 N.W. 2d 246, (Court of Appeals, 1990)

Nothing in the civil service code requires written notice of nonselection. *Varney v. DOA*, 94-0283-PC, 12/22/94

Appellant's appeal of a decision by respondent that appellant's purported permanent appointment was actually a limited term appointment was untimely, where she did not appeal within 30 days of receipt of correspondence advising her of management's decision, which was effectuated retroactively. Appellant contended that she did not have effective notice of the decision because after she received the notice she "notified her superior of her belief that she was a full time, permanent employe," and refused to sign an "attached Limited [Term] Employment Request/Report." Appellant's refusal to accede to respondent's decision did not negate her notice of it. *Nehls v. DHSS*, 92-0844-PC, 6/25/93

Appellant's appeal of an August, 1990 negative employment reference was untimely filed where it was not filed within 30 days of the date of the reference and the claim did not arise out of the same occurrence or transaction set forth in a discrimination complaint appellant had filed in 1989. The negative reference was a discrete action which, in order to be cognizable under §230.44(1)(d), was required to have been the subject of a specific filing with the Commission,

either as an original complaint, as an amendment to an original complaint, or as a separate appeal within 30 days of its occurrence. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 92-0855-PC, 3/10/93

Because §ER-Pers 12.08 requires a letter of appointment that sets forth an employe's starting salary, if the employer changes the starting salary, this also must be in writing. *Kelling v. DHSS*, 87-0047-PC, 3/12/91

Where respondent failed to render a decision on appellant's add-on pay prior to or at the time of appellant's appointment despite appellant having raised the issue with respondent at that time, an appeal filed within 30 days of when the respondent's decision relating to add-on pay was communicated to the appellant was timely filed. *Coulter v. DOC*, 90-0355-PC, 1/24/91

Where appellant, after having gone through the interview process, was notified on July 3rd that he had not been selected for a vacancy and he subsequently learned that the position may have been filled by a transfer candidate not on the certification list, his August 14th appeal to the Commission was untimely, citing *Cozzens-Ellis v. Pers. Comm.*, 155 Wis. 2d 271, 455 N.W. 2d 246, (Court of Appeals, 1990). *Marquardt v. DPI*, 90-0349-PC, 1/11/91

In order to be sufficient, notice must be "clear, definite, explicit and unambiguous," citing 58 Am.Jur. 2d *Notice* 32. In an appeal from a decision not to reinstate, the appellant did not have notice of the action where a letter to the appellant was consistent with the notion that her application was on file, that respondent had taken no action on it and that reemployment was conceivable should respondent decide at some point to exercise its discretion to that end. *DuPuis v. DHSS*, 90-0219-PC, 10/18/90

In an appeal of the starting rate of pay, the appellant did not have notice of the action for purposes of §230.44(3), Stats., until he received a letter from the business administrator setting forth the basis for the salary rate change. Earlier notices simply notified the appellant that his salary rate would be different than he had been advised initially by respondent. Based on those notices, appellant had no way of knowing whether that change was attributable to a clerical error or to some other reason that would not need to, or could not, be appealed to the Commission. The

Commission's decision in *Bachman v. UW*, 85-0111-PC, 11/7/85, was distinguished. *Kelling v. DHSS*, 87-0047-PC, 5/30/90

The subject matter of an appeal under §230.44(1)(d), Stats., was the decision not to promote the appellant rather than the decision to promote someone else. Therefore, in determining the timeliness of an appeal, the effective date of the decision is the date of the failure or refusal to promote the appellant. *Cozzens-Ellis v. UW*, 87-0085-PC, 9/26/88; affirmed by Dane County Circuit Court, *Cozzens-Ellis v. Wis. Pers. Comm.*, 88 CV 5743, 4/17/89; affirmed, 155 Wis. 2d 271, 455 N.W. 2d 246, (Court of Appeals, 1990)

In dicta, the Commission noted that the appellant would not have effective notice of a second appointment decision if his information was based only on rumor or office gossip and where the respondent had sent the appellant written notice of his nonselection for an immediately preceding nonselection decision. *Thornton v. DNR*, 88-0089-PC, 1/12/89

In an appeal of the examination and selection process for a vacant position, the appellant was the party asserting jurisdiction and seeking relief and, therefore, had the burden of establishing the Commission's jurisdiction over the matter. The Commission found the more credible evidence favored the conclusion that the appellant had failed to file his appeal within 30 days after he received notice of his nonselection. *Allen v. DHSS & DMRS*, 87-0148-PC, 8/10/88

Where appellant contended that on September 16th she learned that disparaging remarks were made about her by a member of the interview panel for a vacant position, appellant's appeal of the decision of the panel not to select her for the vacancy was timely because she learned of her non-selection on October 16th and filed an appeal on November 5th. The alleged negative remarks were considered to be a part of the selection process (leading up to the non-selection decision) that cannot and does not need to be separately appealed but could constitute a part of appellant's case seeking to show that the non-selection decision was illegal or an abuse of discretion. *Darnill v. DHSS & DMRS*, 87-0194-PC, 5/5/88

To the extent the appellant sought to challenge exam content

and administration *per se* pursuant to §230.44(l)(a), Stats., his appeal was untimely where it was filed more than 30 days after the appellant received notice of the exam results. However, to the extent that the appellant contends that the exam process facilitated the certification and ultimate appointment of an allegedly pre-selected candidate, evidence relating to that contention would arguably be relevant in a non-selection appeal under §230.44(l)(d), Stats., and the operative date for purposes of such an appeal would be the date the appellant received notice of his non-selection. *Allen v. DHSS & DMRS*, 87-0148-PC, 2/12/88

Appeal of reduction in starting pay from the rate announced in the Current Opportunities Bulletin was untimely where it was filed more than 30 days after the appellant was notified of both his appointment and the new rate of pay and more than 30 days after the appellant's appointment to the position was effective. *Newberry v. UW & DER*, 87-0066-PC, 9/10/87

Respondent failed to meet its burden of proof of showing that complainant was notified of the non-selection decision before September 23, 1984, where respondent established that, on September 10, a secretary typed and mailed a notification letter but the complainant denies having received the letter and averred that he first became aware of the decision via a September 27th telephone call. *Ames v. UW-Milwaukee*, 85-0113-PC-ER, 9/17/86

Appellant, who was asthmatic, had sufficient information to have put him on notice as to respondent's chemical exposure training requirement when in an orientation speech, the training center director informed the trainees about the chemical exposure and cautioned them not to wear contact lenses. Therefore, appellant's appeal filed more than 30 days later and alleging an abuse of discretion related to the hiring process due to a failure to inform him, at the time of hire, of the chemical exposure requirement was untimely. *Hebert v. DHSS*, 84-0233-PC & 84-0193-PC-ER, 10/1/86

The appeal of a non-selection decision was untimely where it was filed on June 18, the date of notification was April 8, nothing in the record suggested that the effective date was on or after May 19 and the appellant had sought an explanation of the decision from the person who made the

decision but had not sought reconsideration by someone with the authority to overturn the selection decision, distinguishing *Adams v. DHSS*, 83-0050-PC, 8/17/83. *Bachman v. UW-Madison*, 85-0111-PC, 11/7/85

Where the subject matter of the appeal involves an alleged omission, or failure to inform, and where there is nothing to suggest that the appellant would or should have had knowledge of the specific omission at the time it occurred, he cannot be charged with "notice" of the omission at the time it occurred. The appeal concerned the alleged failure to have informed the appellant before his appointment that the training program required exposure to MACE. *Hebert v. DHSS*, 84-0233-PC, 4/12/85

An appeal was held to be timely filed where it was submitted within 30 days of a letter from respondent secretary to the appellant stating that her review of a non-selection decision indicated the institution had not acted improperly, even though the institution's personnel director had some 45 days before the appeal was filed, advised appellant in writing that he had not been selected. The Commission's decision in *Junceau v. DOR & DP*, 82-112-PC, 10/14/82 was distinguished. *Adams v. DHSS*, 83-0050-PC, 8/17/83

Where following notice of her nonappointment, the appellant wrote the respondent requesting directions for appealing the method used to interview her, and the respondent's agent replied in a letter that was not inconsistent with the possibility that the matter was still pending until a future discussion between the parties, the time for appeal did not start to run until the date of that meeting. *Schein v. DHSS*, 79-370-PC, 5/15/80

Where the appellant, a certified applicant, was informed in May, 1979, that the position in question had been filled and that he no longer was being considered for the position, and then the appointee withdrew, the selection process was reactivated, and on August 2, 1979, another notice was sent to those certified, including the appellant, to the effect that another candidate

had been appointed, the appellant's appeal filed on August 10, 1979, was held to have been timely filed. *McLlquham v. UW*, 79-207-PC, 4/25/80

102.05(7) Suspension

An unsigned carbon copy of a suspension letter provided appellant with "notice" of the suspension as required by §230.34(l)(b), Stats., where there were no circumstances which raised a reasonable question as to whether the unsigned letter was genuine or was final. The 30 day appeal period commenced on the date the appellant received the unsigned letter. *Hansen v. DATCP*, 87-0092-PC, 10/7/87

The "effective date" of a multiple-day suspension is the first day on which the suspension became operative or valid rather than on the last day of the suspension period. Disregarding the date of notice, the appellant could have filed his appeal on the first day of the suspension period and it would not have been premature. *Hansen v. DATCP*, 87-0092-PC, 10/7/87

102.05(9) Exam

Where appellant did not file his appeal until more than 30 days after he was informed, verbally, that he had been eliminated from further competition as a result of a resume screen, his appeal was dismissed. There is no requirement that notice of exam results be in writing. *LaRose v. UW & DMRS*, 92-0229-PC, 8/26/92

The general rule is that the time for filing an appeal with respect to an examination process does not begin to run until the examinee receives notice of the results of the process because the examinee normally does not know if an exam question or other device will have an adverse effect on his or her interests until after he or she has received the exam score and/or ranking. *Chaykowski v. DOD & DMRS*, 91-0136-PC, 10/17/91

Applicants are not required to be given notice of either the procedure or the standards used to score a written examination. The 30 day appeal period in which to obtain review of the scores, the methods used to develop the scores and the "application" of the scores to the applicants commenced at the time the appellants received their exam results rather than at some later time. *Yasick et al. v. DOT*

***& DMRS*, 89-0087-PC, 10/25/89**

An appeal, filed on March 4 and relating to the examination process which resulted in the certification of eligibles for a promotional opportunity, was untimely where the appellant took the exam on January 7 & 8, was aware of the results by January 13, and by January 21 had concluded that one of the certified eligibles lacked the specific minimum training, experience and job knowledge. *Holt v. DOT & DMRS*, 88-0022-PC, 5/18/88

An appeal of the examination process was untimely where notice of the exam results was mailed on November 17, 1986, in order for the appeal be timely, the notice would have to have been received after November 29th and appellant did not contest respondent's assertion that appellant must have received the notice before November 29th. *Royston v. DVA & DMRS*, 86-0222-PC, 6/24/87

Where unsuccessful examinees filed an appeal of the classification level which had been determined for the positions in question, the time for their appeal pursuant to §230.44(3), Stats., began to run when they first learned of said classification level, as opposed to their contention that it did not begin to run until after they received notice that they had failed the examination. *Smith & Berry v. DILHR & DP*, 81-412, 415-PC, 9/23/82

The time for appealing examination content does not begin to run until the score is received by the examinee. *Schuler v. DHSS & DP*, 81-12-PC, 4/2/81

When the appellant received a notice of exam results which included the information that he had not been certified and that he was not eligible for further consideration, this was adequate notice to trigger the 30 day time limit for appeal set forth in §230.44(3), Stats., as against the appellant's arguments that the notice was ambiguous because the form stated that he was not eligible for further consideration because ten other candidates received higher scores, yet his rank was given as tenth, and that the notice allegedly did not contain adequate information for "rational decision-making" about his "vital interests, rights and guarantees. *Schleicher v. DILHR & DP*, 79-287-PC, 8/29/80

As to an appeal of a decision to hold an exam on an open-competitive basis, the time for appeal under

§230.44(3), Stats., started to run when the appellant saw it posted on an open-competitive basis. *Bresler v. UW & DP*, 79-27-PC, 8/30/79

102.05(10) Actions of the Administrator/Secretary

Appellant did not meet her burden of proving she filed a timely appeal from the decision to deny her reclassification request where her letter of appeal was received by the Commission 4 days late. The reclassification denial notice had advised appellant that if she wished to "appeal this decision to the Personnel Board, you must do so in writing, within 30 days of your receipt of this memo." A cover letter to the notice suggested that if appellant had any questions, she could contact either of two people, but appellant instead took the suggestion of an unidentified person and wrote a letter of appeal to the Department of Employment Relations, where it was received within the 30 day filing period. DER then wrote the appellant and directed her to file any appeal with the Personnel Commission. *Casper v. UW & DER*, 96-0013-PC, 6/28/96

A timely appeal from a 1994 decision granting reclassification of appellant's position does not provide a basis for reviewing a 1990 reallocation decision that was the subject of a re-review in 1992. *Milchesky v. DOT & DER*, 94-0546-PC, 5/15/95

The appellant did not sustain her burden of proof that she filed her appeal within 30 days of when she received notice of a reallocation decision where the file did not contain a copy of an appeal filed within the 30 day period and appellant did not provide any other evidence of the Commission having received the appeal. The complainant stated that she had mailed her appeal within the 30 days and claimed that the Commission's recordkeeping was not infallible. *Jackson-Ward v. DER*, 95-0021-PC, 4/28/95

The time period for filing an appeal of a reclassification did not start until the appellant had received written notice of the decision. The Commission accepted the appellant's testimony that she had a clear recollection as to when she received the notice, this recollection was consistent with the work unit's policy and no other witnesses had a clear recollection of the events. *Carlin v. DHSS & DER*,

94-0207-PC, 12/22/94

Section ER 3.04, Wis. Admin. Code, requires that approvals or denials of reclassification requests shall be communicated to the employe in writing. The 30-day time limit, therefore, does not begin to run until the employe received written notice. This is true even if oral notice of the decision, as well as the effective date of the decision, occurred more than 30 days before the appeal was filed. *Heath & Mork v. DOC & DER*, 93-0143-PC, 6/23/94

Since notice of changes in assigned duties and responsibilities which could affect the classification of a position is required by §230.09(2)(c), Stats., to be provided in writing to the affected employe, the date from which the 30-day time limit for appeal of such new assignments should be measured is the date such written notice is received. Such notice is required for the limitations period to start in a claim of constructive demotion. *Davis v. ECB*, 91-0214-PC, 6/21/94

Respondents' 1993 letters to appellants, which 1) were written decisions issued in response to requests by the appellants, 2) reviewed the classification levels of the appellants' positions, and 3) affirmed the correctness of the original reallocation decisions that had been made effective in 1990 were appealable pursuant to §230.44(1)(b), Stats. The fact that appellants had failed to timely appeal the reallocation decisions in 1990 did not prohibit them from filing timely appeals from the 1993 letters. *Vesperman et al. v. DOT & DER*, 93-0101-PC, etc., 2/15/94

An appeal filed within 30 days of respondents' decision to "correct an error" in the classification previously assigned to a position, was timely. *Holton v. DER & DILHR*, 92-0717-PC, 11/29/93

Appellant failed to file any appeal of a reallocation following a survey, but subsequently requested a review of the classification level of his position. Respondent DOT replied that it would review the class level of his position in the context of reviewing a number of positions in the aftermath of the survey. Approximately two years after filing his request, respondent DOT had made no decision thereon and appellant filed an appeal withe the Commission. This appeal was untimely, because it was more than 30 days after the reallocation, and respondent DOT had not yet

rendered an appealable decision on his request for classification review. While appellant could attempt to appeal a decision on that request, the current appeal must be dismissed. *Mueller v. DOT & DER*, 93-0030-PC, 6/23/93

The time limit for filing an appeal of a reallocation or reclassification decision does not commence until the employe has received written notice of the decision, citing *Piotrowski v. DER*, 84-0010-PC, 3/16/84. *Lange et al. v. DOT & DER*, 90-0118-PC, etc., 6/11/92

Verbal notice, provided by a co-worker, of a reclassification denial did not commence the 30 day period for filing an appeal with the Commission. *Kaeske v. DER*, 90-0382-PC, 11/14/91

Even though the written notice of respondent's reclassification denial was received at the appellant's place of work on September 5th, evidence showed that he did not actually receive the notice until September 21st, making his appeal filed on October 15th timely. *Kaeske v. DER*, 90-0382-PC, 11/14/91

Where the appellant sought to appeal a decision not to include his name on an original certification list, his letter of appeal, filed more than 30 days after he was notified of the original certification, was untimely. The appellant had been told that if there were cancellations by candidates on the original list, he would be interviewed for the position, but there was no indication that there were any cancellations or that a supplemental certification was requested. Therefore, the only personnel action placed in issue by the letter of appeal was the original certification. *Stockli v. DMRS*, 91-0189-PC, 11/14/91

Where the appellants received notice in approximately July of 1990 of the decisions to reallocate their positions effective June 17, 1990, they had to file any appeals within 30 days of the date of notification in order to be considered timely. The appellants also failed to pursue an opportunity to take an informal appeal to DER and the fact that a co-worker of the appellants pursued that route and subsequently received a (second) decision from DER which he timely appealed to the Commission did not permit the appellants to then file appeals relating to their own positions within 30 days of when their co-worker received the second decision. *Eckdale et al. v. DER*, 91-0093-PC, etc., 10/3/91

For an appeal of a decision to use a second register to fill a vacancy rather than to extend an expired register which contained the appellant's name, the effective date of the decision preceded the date the appellant was notified of the decision. The effective date was not the date the second register was actually used to fill the vacancy. In determining the effective date, it is appropriate to focus on the effect of the appealed matter on the appellant, citing *Cozzens-Ellis v. Personnel Commission*, 155 Wis. 2d 271, 455 N.W. 2d 246 (Ct. App., 1990). *Tupper v. DMRS & DOC*, 91-0009-PC, 4/18/91

Where a DOJ employe submitted an affidavit that he informed the appellant prior to July 18th of respondents' classification decision and the appellant stated in his brief that he "differed" with the affiant's view, the appellant failed to provide sufficient evidence to overcome the affidavit and sustain his burden of proof. *Jellings v. DOJ & DER*, 90-0369-PC, 1/24/91

Whether or not there was an insufficient request for reclassification made in 1987 as argued by DOR, the appeal was untimely filed where it was undisputed that appellant received a memo dated February 1, 1988, from DOR's Bureau of Human Resources advising him that his position was correctly classified and he did not file an appeal within 30 days after having received that memo. *Lovell v. DER & DOR*, 90-0240-PC, 12/13/90

An appeal of a scope of competition decision was timely, even though it was filed more than one year after the appellant was initially notified of that decision, because an appeal filed within 30 days of the date of notification would have been subject to dismissal for lack of standing in light of the fact that the decision had the effect of including rather than excluding the appellant, who at the time was an employe of DHSS. It wasn't until 1) the appellant transferred to another facility which became part of a different agency upon the subsequent creation of the Department of Corrections as a separate agency and 2) the decision to use the previously established register to fill DOC vacancies that the appellant became adversely affected by the underlying scope of competition decision. The appeal was filed within 30 days of when the appellant was notified of this injury. *Augustin v. DMRS & DOC*, 90-0254-PC, 11/28/90

In an effective date appeal, the Commission is not restricted to analyzing the 30 days preceding the effective date established by the respondents. Where the appellant contended that prior to filing a formal request for reclassification in 1988, she had, since 1979, frequently requested and discussed reclassification with her superiors, the scope of the effective date appeal was only limited by the the existence of a 1981 reclassification appeal, filed by the appellant, which had been dismissed by the Commission at the appellant's request. The appellant was precluded from seeking an effective date earlier than July 27, 1981, which was the date of the decision which served as the basis for the 1981 appeal. *Vollmer v. UW & DER*, 89-0056-PC, 4/12/90

An appeal filed on May 2, 1989 was timely where appellants were notified on or about February 9, 1989 that they would not receive reclassification to the Correctional Officer 2 level until they completed their permissive probation, i.e., May 6, 1989. The appeal was filed not more than 30 days after the effective date of the action. *Larson & Timm v. DHSS & DER*, 89-0046-PC, 9/8/89

Where the appellant stated that he did not know the exact date he had received a reclassification denial letter but that it was received "on or after" October 27th, the appellant did not offer any evidence that the letter was received on or after October 29th, and in order to have been timely, the letter could not have been received any earlier than October 29th, the appellant failed to sustain his burden of proof and the appeal was untimely. *Look v. UW & DER*, 88-0140-PC, 2/22/89

Where appellant participated in a successful group appeal of a reallocation, and then retired after the entry of the Commission decision but before the Commission's decision ultimately was upheld in judicial review proceedings and effectuated, and respondent failed to include him in the group of employes who received reallocations as a result of the ultimate implementation of the Commission's decision, and where appellant heard from third parties of the reallocation of the other employes, and of the resolution of further litigation concerning the effective date of that transaction, only several months after both events, and he then made inquiries which lead respondent DOT to advise him what had happened, it was held that there was no notification under §230.44(3), Stats., so as to start the

running of the 30 days appeal period, until he received said information from respondent DOT. *Thompson v. DOT & DER*, 88-0037-PC, 6/29/88

An appellant cannot be charged with the duty to have inquired into the nature of the information provided as part of the certification prior to the time that the appellant knew (via the notice of his non-selection), or apparently had any reason to suspect, an adverse employment action against him. Therefore, an appeal of that part of the certification process that resulted in the appointing authority receiving a random-ordered list of names as a certification (without scores) was timely where it was filed 13 days after appellant received notice of his non-selection. To the extent the appellant sought to appeal the promulgation of the certification policy (i.e., providing the certification list in random order), the appeal was untimely because it was filed more than 2 years after the policy became effective and there was no indication that appellant was entitled to any special notification of the promulgation of the policy. However, to the extent the policy had an adverse effect on an employe in a specific transaction, each such certification made pursuant to the policy is appealable as a separate transaction. *Thompson v. DMRS & DNR*, 87-0204-PC, 6/29/88

An appeal filed within 30 days of a 1987 decision reallocating the appellant's position from Program Assistant 2 to 3 and setting May 10, 1987 as the effective date was timely filed irrespective of the fact that the appellant had not appealed a 1985 decision reclassifying her position from Fiscal Clerk 2 to Program Assistant 2 (rather than PA 3) effective August 18, 1985. The 1987 appeal sought an effective date of 1985. *Popp v. DER*, 88-0002-PC, 5/12/88

Where respondent had no responsibility of notifying the appellant, a union steward who had no involvement in the transaction, of the reclassification of a position, an appeal filed more than 30 days after the effective date of the transaction was untimely. *Barker v. UW & DER*, 88-0024-PC, 4/20/88

To the extent the appellant sought to challenge exam content and administration *per se* pursuant to §230.44(l)(a), Stats., his appeal was untimely where it was filed more than 30 days after the appellant received notice of the exam results. However, to the extent that the appellant contends that the

exam process facilitated the certification and ultimate appointment of an allegedly pre-selected candidate, evidence relating to that contention would arguably be relevant in a non-selection appeal under §230.44(l)(d), Stats., and the operative date for purposes of such an appeal would be the date the appellant received notice of his non-selection. *Allen v. DHSS & DMRS*, 87-0148-PC, 2/12/88

An appeal of decisions regarding the relative qualifications of the candidates prior to certification and the decision not to certify the appellant for the position was held to be untimely where appellant was notified in April of 1987 that he was not certified and filed his appeal in September of 1987. The Commission declined to accept appellant's argument that he filed his appeal within 30 days of when he learned which candidates were certified for the position. *Girens v. DMRS & DHSS*, 87-0167-PC, 2/1/88

An appeal of a reclassification date was properly before the Commission where it was timely as to respondent UW-M's April 10, 1987 decision and the requested date of July 1, 1985 did not precede the date that UW-M became responsible, as the appointing authority, for appellant's position. The fact that the appellant sought an effective date in 1985 did not make the appeal of the 1987 decision untimely. *Warda v. UW-Milwaukee & DER*, 87-0071-PC, 11/4/87

In an appeal of the administrator's refusal to certify or removal from a register, appellant's "cause of action" accrues at the time the appellant receives notice of the decision. *Desrosiers v. DMRS*, 87-0078-PC, 8/5/87; motion for reconsideration denied, 9/10/87

An appeal of the respondent administrator's alleged failure to forward appellant's reinstatement request to appointing authorities, filed with the Commission on November 29, 1985, was untimely where in a June 10, 1985, memo, appellant stated that he believed respondent's failure to forward his applicant materials was an effort to impede his rights. *Wing v. DHSS & DMRS*, 85-0232-PC, 3/9/87

Where appellant submitted a written reclassification request in 1981 and received a verbal denial without any information as to how to appeal, requested a review of the matter in 1985 and received a written denial, as required by

§ER-Pers 3.02(3), Wis. Adm. Code, in February 1986, her appeal within 30 days thereafter was timely filed. *Spilde v. DER*, 86-0040-PC, 10/9/86

Respondent had effective receipt of appellant's reclassification request where appellant submitted written request for same, notwithstanding it was submitted to her supervisor as opposed to the personnel office and did not have attached to it all the desired supporting documentation, where she was not told that she had to do anything else, and there is nothing in the civil service code or even in written agency policy requiring same. *Spilde v. DER*, 86-0040-PC, 10/9/86

Where appellant requested reclassification of her position in 1981 and left the position in 1983 prior to any action on her request or the establishment of an effective date for reclassification, the transaction was not rendered moot by the operation of §ER-Pers 3.03(4), Wis. Adm. Code, since this only operates if an employe leaves the position prior to the effective date of the transaction. *Spilde v. DER*, 86-0040-PC, 10/9/86

The reclassification appeal was untimely filed where appellant was denied her Officer 2 rating by memo dated June 7, 1984, she was promoted to Officer 3 on July 22, 1984, she learned in October of 1985 that she might have been eligible to receive her Officer 2 rating on July 18, 1984, four days before she started at the Officer 3 level, and after she was informed by respondent DHSS on November 22, 1985 that her reclass request to Officer 2 was untimely, the appellant filed an appeal with the Commission on December 9, 1985. The adverse decision appellant sought to appeal was the 1984 decision rather than the November 22, 1985 "decision." Although appellant had essentially asked the respondent in October or November of 1985 to reconsider its position on reclassifying the appellant to Officer 2 and to correct its past error, the respondent, on November 22,1985, refused to do so because the time had run for appeal of the earlier decision. *LaRoche v. DHSS & DER*, 85-0227-PC, 4/30/86

Where appellant initially requested reclassification in early 1983, did not receive a final decision granting the request until July of 1984, asked in August of 1984 that the reclassification be made retroactive to June of 1983 and received a denial of the request on February 21, 1985 which

specifically indicated that the decision could be appealed to the Commission, appellant had 30 days from receipt of the February 21st letter to file an appeal of the effective date of her reclassification. *Zahn v. DHSS & DER*, 85-0040-PC, 7/17/85

Where a few days after she was notified that her position was being reclassified from Program Assistant 4 - Confidential to Management Information Technician 3, appellant was informed that her reclassification was not going to be processed until DER had a chance to consider a request to create a Management Information Technician -Confidential series, the 30 days to file an appeal did not commence until the appellant was notified that respondents had lifted the hold on the preliminary decision to process her reclassification. *Kriedeman v. UW & DER*, 85-0048-PC, 6/18/85

An appeal as to the proper effective date of certain reclassification decisions was timely where on November 10, 1983, appellants had filed an appeal alleging that respondent's delays in processing their reclassification requests constituted effective denial of their requests but appellants did not file a separate appeal from a January 3. 1984 notice that their positions were reclassified effective May 10, 1983. Appellants' failure to act within 30 days after the January 3rd notice amounted to a procedural failure to amend their original appeal and any such procedural failure was cured at a subsequent prehearing conference where the parties agreed that the issue for hearing was the correctness of the effective dates. Appellants were not represented by counsel. *Tiffany et al. v. DHSS & DER*, 83-0225-PC, 7/6/84

Pursuant to §ER-Pers 3.04, Wis. Adm. Code, the time limit for filing an appeal of a reallocation or reclassification decision does not commence until the appellant has received written notice of the decision. *Piotrowski v. DER*, 84-0010-PC, 3/16/84

Appeal of effective date of reclassification held to be timely where it was filed within 30 days of receipt of notice of reclassification setting May 1, 1983, as the effective date even though approximately two years earlier respondent had advised the appellant that he would not have the minimum of two years experience as an Officer I until a date in 1982. *Conley v. DHSS & DP*, 83-0075-PC, 9/28/83

Where the appellant failed to appeal within 30 days after he was advised by an employe in the Division of Personnel that the agency would not submit, pursuant to §Pers 12.12(3), Wis. Adm. Code, his name as a transfer applicant, along with the certification for the position in question, his appeal was untimely. *O'Connor v. DMA & DP*, 82-70-PC, 10/14/82

Where the appellant asked the administrator to reconsider an earlier decision, and the administrator refused because of the expiration of the time for appeal, an appeal of that refusal was not timely with respect to the earlier decision. *Junceau v. DOR & DP*, 82-112-PC, 10/14/82

Where unsuccessful examinees filed an appeal of the classification level which had been determined for the positions in question, the time for their appeal pursuant to §230.44(3), Stats., began to run when they first learned of said classification level, as opposed to their contention that it did not begin to run until after they received notice that they had failed the examination. *Smith & Berry v. DILHR & DP*, 81-412, 415-PC, 9/23/82

The time for appeal began to run when the appellant was told that her position would not be reclassified but that a new position would be created for which she would have to compete. *Casper v. DHSS*, 80-320-PC, 6/3/81

Where the appellant submitted a reclassification request and it was withdrawn by the agency without notice to her when she accepted a transfer, neither the withdrawal of the request nor the act of appellant leaving the position started the time for appeal to run. *Shade v. DOR & DP*, 79-111-PC, 11/4/80

Where the appellant's position was reclassified effective July 15, 1979, the relevant collective bargaining agreement was ratified effective November 9, 1979, with a retroactive wage adjustment calculated on the basis of his base pay on July 1, 1979, and the first pay check reflecting the new rate of pay was paid on November 29, 1979, for the pay period beginning November 4, 1979, it was held that an appeal of the effective date of the reclassification which was filed December 7, 1979, was timely, inasmuch as the reclassification was not fully effective until the appellant realized the full pay for the pay range to which his position was reclassified, and there was no way he could have

known on July 15th the complete salary implications of the reclassification transaction. *Marx v. DILHR & DP*, 79-345-PC, 4/28/80

Where the administrator reviewed a transaction at the request of the appellant and determined that DHSS had acted properly, the time for appeal pursuant to §230.44(3), Stats., is computed with respect to the date of the administrator's decision and not with respect to the date of the agency action to be reviewed. *Kaeske v. DHSS & DP*, 78-18-PC, 11/22/79

102.05(13) Other subject matters

Since notice of changes in assigned duties and responsibilities which could affect the classification of a position is required by §230.09(2)(c), Stats., to be provided in writing to the affected employe, the date from which the 30-day time limit for appeal of such new assignments should be measured is the date such written notice is received. Such notice is required for the limitations period to start in a claim of constructive demotion. *Davis v. ECB*, 91-0214-PC, 6/21/94

The time limit for filing an application for benefits under §230.36, Stats., for a hazardous employment injury, is 14 days from the date of the injury, §ER 28.04(1), Wis. Adm. Code. This time limit is in the nature of a statute of limitations rather than a jurisdictional requirement, and does not begin to run until the employe discovers, or should have discovered under an objective standard, the relationship between the injury and his employment. Where the complainant alleges he did not become aware of a possible link between his lung disease and a source of infection among inmates with whom he worked until several months after he became aware of his diagnosis, respondent's motion to dismiss on the ground of untimely filing was denied. *Rose v. DOC*, 93-0180-PC, 11/30/93

Where the appellant was on a one year medical leave of absence, he commenced a disability retirement, subsequently requested return to employment status, and was informed by the respondent in July, 1976, that his employment had been considered terminated as a result of the aforesaid retirement, and that therefore reinstatement

rights did not apply, and no appeal was taken, it was held that the Commission lacked the authority to review the legality of the decision to treat the disability retirement as a termination of state employment, and therefore, the appellant could not attack the legality of that separation through an appeal in 1979 of the denial in that year of a request for reinstatement. (Note: this case addresses, as dictum, the question of whether acceptance of a disability annuity operates to terminate state employment, and suggests that it does not.) *Chapman v. DILHR*, 79-247-PC, 8/19/80; affirmed by Dane County Circuit Court *Chapman v. State Pers. Comm.*, 80-CV-5422, 9/8/81)

Where the appellants filed an appeal in 1979 with respect to a failure to pay overtime in 1977, and were met with a motion to dismiss for untimely filing, one of their alternative arguments was that their appeal ran not to the 1977 failure to pay overtime but to the decision of the administrator in 1979 to pay overtime to certain other employes in compromise and settlement of an appeal that they had timely filed in 1977. The Commission held that this decision was not in effect a decision not to pay the appellants and that since they were not parties to the other appeal, the decision did not affect adversely their substantial interests and they lacked standing to appeal it. *Wickman v. DP*, 79-302-PC, 3/24/80

[Personnel Commission homepage] [PC Digest Introduction]

[Next material]

Section 103.08

[Previous material] [Next material]

103.08(1) Allegations necessary

In an appeal of the denial of a non-contractual grievance, the Commission has the authority to hear the case, in the absence of the promulgation of rules by the Secretary of DER pursuant to §230.45(l)(c), Stats., regarding the grievance procedure, but pursuant to the pre-existing APM, the decision of the employer must be upheld unless it is concluded that the decision violated the rules of the director or the provisions of Subch. II of Ch. 230. *DOT v. Pers. Comm. (Kennel, Brauer & Murphy)*, Dane County Circuit Court, 79-CV-1312, 7/21/80

Where respondent's non-contractual grievance procedure limited fourth step grievances to those alleging violations of statutory or administrative code provisions, the agency's procedure was more restrictive in this regard than the provisions in Ch. ER 46, Wis. Adm. Code, which provided for fourth step grievances for allegations of agency abuse of discretion in applying the civil service statutes or rules, or written agency rules, policies or procedures. Since the DER rules in Ch. ER 46 govern the "scope and minimum requirements," §230.04(14), Stats., of the noncontractual grievance procedure, the provisions of Ch. ER 46 superseded more restrictive provisions in the employing agency's own grievance procedure. *Rentmeester v. Wis. Lottery*, 92-0152, 0166-PC, 1/27/93

Where respondent's second step grievance answer clearly referenced an issue not identified on the first step grievance form, where respondent denied the grievance at the second step and where the third step grievance described itself as an appeal from the second step decision, the respondent effectively waived any objection to the appellant's failure to have identified the issue on the face of the grievance as being a subject of the grievance. *Flannery v. DOC*, 91-0047-PC, 2/21/92

Where the appellant alleged that respondent's conduct during the third step grievance hearing constituted an abuse of discretion but failed to indicate how she felt the identified conduct involved the application of civil service statutes or rules or written agency rules, policies or procedures, the grievance was dismissed for lack of jurisdiction. *O'Brien v. DOT*, 88-0059-PC, 6/14/91; rehearing denied, 7/25/91

The clear intent of §ER 46.07(1), Wis. Adm. Code, is to require an allegation of an abuse of discretion with respect to the application of some *written* standard or policy. *O'Brien v. DOT*, 88-0059-PC, 6/14/91; rehearing denied, 7/25/91

The Commission dismissed a fourth step grievance premised on appellant's memo to his superior which took issue with a previous memo from the superior but which did not use a grievance form, was not designated as a grievance, was not filed with the appropriate person to receive a first step grievance and was not filed within the 30 day period for filing a first step grievance. The Commission concluded that neither the respondent nor the Commission was required to process the memo as a grievance. *Truesdell v. DHSS*, 88-0026-PC, 7/27/88

Matters that fall within the exceptions found in H ER 46.03(2) and 46.07(l), Wis. Adm. Code, do not become grievable simply because the appellant has alleged that "coercion or retaliation has been practiced" as provided in § ER 46.03, Wis. Adm. Code. *Wing v. UW System*, 85-0007-PC, 9/20/85

The Commission lacks jurisdiction over an appeal of a reprimand under §230.45(l)(c), Stats., where there is no allegation that the employing agency violated a civil service rule or statute. Jurisdiction over such an appeal is not conferred by 1) a statement in the agency's supervisory

manual that states that grievances "may be further appealed" to the Commission; 2) the rights conferred by the Wisconsin Constitution to petition the government and for a prompt remedy for injuries or wrongs; or 3) the right to hearing conferred in §227.064, Stats. (1984). *Pawlak v. DHSS*, 83-0170-PC, 3/14/84

The Commission lacks jurisdiction over an appeal of a non-contractual grievance inasmuch as it failed to allege any violations of the civil service code with respect to alleged supervisory inaction on a reclassification request, inadequate notice of a transfer, not explaining the method for review of a transfer, and the transfer itself. *Ford v. DHSS & DP*, 82-243-PC, 83-0011-PC, 83-0020-PC, 6/9/83

On a motion to dismiss for lack of subject matter jurisdiction, the Commission rejected the respondent's argument that the appeal should be dismissed because it failed to allege even a colorable claim of a violation of the civil service code, because the Commission could not conclude at that stage of the proceeding that the appellant's claim of civil service violations was not at least arguable. *Harley v. DOT & DP*, 80-77-PC, 5/15/80

In order for the Commission to have jurisdiction over an appeal of the denial of a non-contractual grievance, it must involve either a function of the administrator or an allegation of violation of civil service statutes or rules, and, if the latter, the allegation must be at least arguable. *Wing v. UW*, 78-137-PC, 4/19/79

The Commission lacks jurisdiction over an appeal of a denial of non-contract grievance where the only allegation of violation of the civil service law or rules was that the appointing authority had committed an illegal act or abuse of discretion, since §Pers 26.02(8), Wis. Adm. Code, which provided that these matters were appealable, was superseded by Chapter 196, Laws of 1977, which repealed §16.03(4)(a), Stats., (1975), which provided for such appeals to the director. *Wing v. UW*, 78-137-PC, 4/19/79

103.08(2)(a) Exhaustion of grievance remedies

Where appellant's grievance was not accepted at the 1st, 2nd or 3rd steps due to various alleged procedural

deficiencies within the grievance document itself, the Commission is precluded from reaching the merits of appellant's allegations but retains the power to review respondent's decision not to accept the grievance as long as the grievant alleges that the procedural decision constitutes a violation of the grievance procedure set out in the APM or other rules of the administrator. *Wing v. UW*, 81-328, 420-PC, 6/25/82

103.08(3) Letter of reprimand

Written reprimands may not be grieved to the fourth step. *Iwanski v. DHSS*, 88-0124-PC, etc., 6/21/89

Even though it was not designated as such, the memo serving as the basis for the grievance was clearly a written reprimand and, therefore, was not grievable to the 4th step. Appellant's contention that he was actually grieving respondent's failure to discuss the substance of the memo before issuing it was not compelling and the grievance was dismissed. *Truesdell v. DHSS*, 88-0026-PC, 7/27/88

The Commission lacks jurisdiction over a grievance arising from oral and written reprimands. HER 46.03(2) and 46.07(l)(a), Wis. Adm. Code. *Wing v. UW System*, 85-0112-PC, 9/20/85

The Commission lacks jurisdiction over an appeal of a reprimand under §230.45(l)(c), Stats., where there is no allegation that the employing agency violated a civil service rule or statute. Jurisdiction over such an appeal is not conferred by 1) a statement in the agency's supervisory manual that states that grievances "may be further appealed" to the Commission; 2) the rights conferred by the Wisconsin Constitution to petition the government and for a prompt remedy for injuries or wrongs; or 3) the right to hearing conferred in §227.064, Stats (1984). *Pawlak v. DHSS*, 83-0170-PC, 3/14/84

In appeals of non-contractual grievances regarding reprimands, a prerequisite to subject matter jurisdiction is an allegation of a violation of the civil service code. These appeals could not be heard on theory that they constituted discipline without just cause, because the just cause requirement applies only to transactions enumerated in

§230.34, Stats. However, the employe was able to allege a violation of §Pers. 24.04(2)(c), Wis. Adm. Code, and thus the jurisdictional prerequisite was present. *Briggs v. DILHR*, 81-172, 445, 330, 352-PC, 1/8/82

A reprimand is appealable under §230.45(l)(c), Stats., although the particular reprimand involved was not appealed in a timely fashion. *Lyons v. DHSS*, 79-81-PC, 7/23/80; affirmed by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm. (Lyons)*, 80-CV-4948, 7/14/81

103.08(5) Merit increase

The Commission lacks jurisdiction over an appeal of the denial of a discretionary performance award (DPA) which was based on a policy to deny DPA's to positions assigned to a certain classification, citing *Nikolai v. DOR*, 80-0319-PC, 12/17/80 *Mack & Bugge v. DER*, 87-0182, 0183-PC, 6/2/88

Pursuant to §§230.12(5)(e) and 230.45(2), Stats., the Commission lacks jurisdiction over an appeal of the denial of a Discretionary Performance Award (DPA) which had been based on an agency policy denying DPA's to employes who were expected to receive salary increases for other reasons, inasmuch as the aforesaid statutory prohibition on appeals was not limited to DPA denials based on performance evaluations. *Nikolai v. DOR*, 80-319-PC, 12/17/80

Section 230.12(5)(e), Stats., precludes the Commission from hearing an appeal of the denial of a non-contractual grievance relating to a discretionary performance award, notwithstanding Art. I, Sec. 9, of the Wisconsin Constitution, which provides that for every wrong there is a remedy, because this section is primarily addressed to the right of persons to have access to the courts and to obtain justice on the basis of the law as it in fact exists, and does not create any independent legal rights. *Schmeltzer v. DOR*, 80-275-PC, 12/17/80

The Commission's subject matter jurisdiction over a noncontractual grievance derives from §230.45(1)(c), not §230.44(1)(b), Stats., since it does not involve the type of decision which the administrator of DMRS has the authority

to render. *Peterson & Hoel et al. v. DOT*, 78-178, 193-PC, 4/19/79

103.08(6) Erroneous grievance route

The Commission cannot have jurisdiction over a grievance without there ever having been a grievance presented to the agency prior to the fourth step. *Meredith v. DHSS*, 79-172-PC, 3/24/80

103.08(7) Existence of rules regarding procedure

In an appeal of the denial of a non-contractual grievance, the Commission has the authority to hear the case, in the absence of the promulgation of rules by the Secretary of DER pursuant to §230.45(l)(c), Stats., regarding the grievance procedure, but pursuant to the preexisting APM, the decision of the employer must be upheld unless it is concluded that it violated the rules of the director or the provisions of subch. 11 of ch. 230, Stats. *DOT v. Pers. Comm. (Kennel, Brauer & Murphy)*, Dane County Circuit Court, 79-CV-1312, 7/21/80

The absence of promulgation of rules by the DER Secretary under §230.45(l)(c), Stats., is not fatal to Commission jurisdiction over an appeal of a grievance denial; pursuant to the transitional provisions of Chapter 196, Laws of 1977, §129 (4q), the rules of the director and the current grievance procedure continue in force. *Lustig et al. v. DILHR et al.*, 78-277-PC, etc., 1/12/81. *Gohl v. DOR*, 78-67-PC, 11/22/79

The fact that the Secretary of DER had not promulgated rules for a non-contractual grievance procedure pursuant to §230.45(l)(c), Stats., did not operate as a bar to Commission jurisdiction over an appeal of a non-contractual grievance, because a transitional provision of Chapter 196, Laws of 1977 -- §129(4q) -- provides for the continuation of the rules of the director until modified, and §Pers 25.01, Wis. Adm. Code, and the derivative APM and departmental procedures remain in effect. The fact that the APM was not published as a rule does not render it ineffective as the

legislature provided for the continuation in effect of §Pers 25.01, Wis. Adm. Code, pending the promulgation of new rules, despite the fact that §Pers 25.01, Wis. Adm. Code, on its face contemplates governance of the field by unpublished regulations. *Harley v. DOT & DP*, 80-77-PC, 5/15/80

103.08(8) Conditions of employment/management rights

A supervisor's grievance which dealt with the fact that his job required him to carry a pager and to remain on call outside of regular working hours throughout the entire year, even though he alleged he was not informed of this job requirement until two months after he was hired, constituted a condition of employment and was grievable. However, that aspect of the grievance which alleged that others who had been given similar responsibilities involving carrying a pager and being on call received additional compensation was clearly related to wages and the Commission lacked jurisdiction to consider this as a remedy. *Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 505 N.W.2d 462 (Court of Appeals, 1993)

The Commission lacks jurisdiction over an appeal relating to hiring above the minimum (HAM) because this does not involve a "condition of employment" cognizable pursuant to §230.45(i)(c), Stats. *DHSS v. Pers. Comm. (Hovel)*, Dane County Circuit Court, 79-CV-5630, 1/29/81

Respondent's reassignment/transfer of appellant constituted a management right pursuant to §ER 46.04(2), Wis. Adm. Code, and hence was non-grievable under the noncontractual grievance procedure. However, since appellant alleged that respondent improperly failed to handle the transaction in the context of a layoff, this provided a basis for jurisdiction under §230.44(1)(c), Stats. *Ramsden v. DHSS*, 92-0826-PC, 2/25/93

The decision to give appellant a particular route assignment is not grievable under the noncontractual grievance procedure because it constitutes a management right pursuant to §ER 46.04(2), Wis. Adm. Code. Certain comments made by appellant's supervisor may also contain elements of management rights, but this cannot be determined on a motion to dismiss. *Rentmeester v. WGC*,

92-0152, 0166-PC, 1/27/93

The Commission lacks jurisdiction to hear a noncontractual grievance arising from appellant's claim that he was entitled to sick leave benefits for periods of overtime, because it relates to fringe benefits which are not grievable pursuant to §ER 46.03(2)(k), Wis. Admin. Code. *Knueppel v. DOT*, 92-0194-PC, 7/22/92

An alleged spontaneous admonition from a supervisor that he felt the grievant was lying was not an "oral reprimand," so it could be grieved to the fourth step. An alleged directive from a supervisor to get back to work and to file a grievance when the grievant had time constituted "managing and directing" agency employes and fell within the "management rights" exception to the grievance procedure. However, the grievant's allegation that the directive was made in a threatening and hostile manner so as to violate respondent's work rules could be grieved. *Gallenbeck v. Wis. Lottery*, 92-0116, 0119-PC, 6/24/92

The power to transfer is a management right so the appointing authority's role in the transfer process is non-grievable. *Brockington v. DOT & DMRS*, 91-0031-PC, 5/29/91

Respondent's decision not to allow the appellant to participate in its work-at-home program fits within the scope of management rights. *Jordan v. DNR*, 90-0386-PC, 1/11/91

Management rights include the decision to assign an employe to a different level of supervision. *Iwanski v. DHSS*, 88-0124-PC, etc., 6/21/89

Management rights include the assignment of duties and the removal of duties from a position. *Miller v. DHSS*, 87-0209-PC, 2/8/89

Compensation for overtime hours is a "condition of employment" within the meaning of §230.45(l)(c), Stats., and the Commission has jurisdiction over a grievance filed over the decision to grant compensatory time rather than overtime pay to the appellant. *Corcoran v. DHSS*, 86-0175-PC, 2/5/87

Vacation, holidays and length of service benefits are conditions of employment. *Maher (Eisely) v. DHSS &*

***DER*, 85-0215-PC, 7/24/86**

The management rights exception to the grievance procedure does not cover decisions relating to the issuance of building keys nor decisions relating to the recording of paid time off granted for interviewing for other employment in state government. *Wing v. UW System*, 85-0122 & 0173-PC, 2/6/86

Management's decision not to include a separate time code for reporting time spent by an employe in filling out a survey falls within the definition of "management rights" and is not grievable. *Holmblad v. DILHR*, 85-0159-PC, 10/9/85

Alleged statements made by management at a second step grievance hearing that appellant argues constitute retaliation for prior disclosures and/or grievances and thereby violate, *inter alia* §ERPers 24.04(2)(c), and §ER 46.10, Wis. Adm. Code, do not fall within the scope of management rights and are within the Commission's jurisdiction. *Wing v. UW System*, 85-0007-PC, 9/20/85

An allegation that respondent denied appellant's request for "four hours paid release time" for the purpose of conducting an investigation related to a second grievance falls within the specific language of §ER 46.09(2), Wis. Adm. Code which lets the employer decide the reasonableness of the time spent for investigating, preparing or presenting a grievance and the more specific provision prevents the application of the more general management rights provisions. *Wing v. UW System*, 85-0058-PC, 9/20/85

The denial to appellant of access to certain data bases falls within the listing of management rights and therefore, may not be grieved to the Commission. *Wing v. UW System*, 85-0007-PC, 9/20/85

The Commission lacks jurisdiction over a grievance based on allegations of 1) a refusal to provide appellant information necessary to perform his work assignments and 2) a refusal to permit the appellant to use a tape recorder in day-to-day work assignments because both allegations fall within the scope of management rights. *Wing v. UW System*, 85-0112-PC, 9/20/85

A matter filed with the Commission as the final step in the

noncontractual grievance was dismissed because respondent's action of reassigning the grievant to another shift upon returning from vacation fell within the scope of management rights. Grievant was granted 15 days to file a whistleblower complaint. *Henderson v. DHSS,* 85-0045-PC, 8/15/85

A determination by management concerning the information to be made available to an employe for the performance of his duties falls within the definition of management rights and, therefore, may not be grieved. *Wing v. UW System*, 85-0007-PC, 5/22/85

Respondent's decision not to grant the appellant an add-on pay adjustment relates to "wages" rather than "conditions of employment" and the appellant's grievance must be dismissed accordingly. *Bloom v. DHSS*, 85-0026-PC, 4/12/85

Respondent's objection to subject matter jurisdiction was overruled, without prejudice to a reassertion of the objection if evidence at hearing should warrant it where the grievance arose from respondent's decision not to approve reimbursement of appellant's expenses for attending an out-of-state workshop. The Commission found that given the information before it, it could not find that the grievance involved a "management right" rather than a condition of employment. §§ER 46.03(2)(j) and 46.04(2), Wis. Adm. Code. *Johnson v. DNR*, 84-0250-PC, 4/12/85

The Commission, as the final step in the non-contract grievance procedure, lacks jurisdiction over an appeal regarding an involuntary demotion where the appellant was at all times a represented employe, citing *Teggatz v. DHSS*, 79-73-PC, 12/13/79. *Swenson v. DATCP*, 83-0152-PC, 2/17/84

The Commission lacks jurisdiction under §230.45(l)(c), Stats., over a non-contractual grievance where the subject matter was the termination by the department of the arrangement by which the appellant worked 8 months each year and had 4 months off, inasmuch as this subject matter involves "hours" rather than "conditions of employment," which is a jurisdictional prerequisite under §230.45(l)(c), Stats. *Miller v. DOR*, 82-196-PC, 3/17/83

The Commission lacks jurisdiction pursuant to §230.45(l)(c), Stats., over a non-contractual grievance

concerning a denial of compensation for claimed overtime hours worked, inasmuch as this involves "wages" as opposed to "conditions of employment." That the appellant alleges that there were rule violations is immaterial to the question of jurisdiction, since a prerequisite to jurisdiction under §230.45(i)(c), Stats., is that the subject matter of the grievance concerns "conditions of employment." *Luchsinger v. PSC*, 82-233-PC, 1/31/83

The Commission lacks jurisdiction over an appeal of a non-contractual grievance alleging improper interference with the appellant's attempts to secure employment at a different UW campus, as this subject is not a "condition of employment" cognizable pursuant to §230.45(l)(c), Stats. *Wing v. UW*, 82-75-PC, 9/30/82

An appeal of a non-contractual grievance relating to a decision by the employer that the appellant could no longer work certain hours because of the absence of a supervisor does not relate to a "condition of employment" pursuant to §230.45(l)(c), Stats., and the Commission lacks jurisdiction. *Johnson v. DHSS*, 81-450-PC, 6/10/82

The employe grieved his supervisor's use of abusive language and management indicated at the third step that the supervisor had been counseled. In his appeal to the Commission, the grievant requested stronger action against the supervisor. The Commission concluded that it lacked jurisdiction because the decision as to how to deal with the supervisor constituted a management right under §111.90(2), Stats., and hence was not a condition of employment under §230.45(l)(c), Stats. Furthermore, there was no provision of the civil service code which arguably had been violated by the respondent. *Fox v. DNR*, 81-381-PC, 2/9/82

The Commission lacks jurisdiction over an appeal of a non-contractual grievance relating to the denial of an exceptional performance award (EPA), because the EPA subject matter relates to 11wages" and not "conditions of employment" as set forth in §230.45(l)(c), Stats. (To same effect, see *Wing v. UW*, 78-159-PC, 79-240-PC, 9/23/81) *Wing v. UW*, 80-256-PC, 4/1/81

The Commission lacks jurisdiction at the final step in the non-contractual grievance procedure over matters that are non-bargainable and, therefore, not "conditions of

employment" and therefore lacks jurisdiction over an appeal of a grievance involving a question as to the structure of the attorney regrade part of the pay plan. *Lustig et al. v. DILHR et al.*, 78-277-PC, etc., 1/12/81

The Commission lacks jurisdiction under §230.45(l)(c), Stats., of an appeal by a represented employe of the denial of non-contract grievance relating to the assignment of duties because §230.45(l)(c), Stats., limits jurisdiction to appeals of non-contract grievances "relating to conditions of employment" and, as to represented employes, §111.91(3) supersedes the Commission's jurisdiction as to "conditions of employment." *Teggatz v. DHSS*, 79-73-PC, 12/13/79

103.08(8.5) Matters "subject to the control of the employer"

Length of service pay, 1% retirement pick-up and limitation of salary increases for non-represented employes at the maximum of the pay range to across-the-board increases were within the terms of the 1985-87 Compensation Plan adopted by DER pursuant to §230.12, Stats., and, therefore, were not subject to the control of the grievant's employing agency, DHSS. *Frisch et al. v. DHSS & DER*, 86-0191-PC, 3/18/87

In a grievance relating to the fringe benefits to be awarded to the appellant as a consequence of her employment in a position authorized as a half-time position but in which appellant allegedly worked 1500 hours and 1850 hours in consecutive years, the appellants request for prorated fringe benefits involves a matter that is subject to the control of the employer agency under under §ER 46.02(4), Wis. Adm. Code. However, to the extent the appellant seeks a change in the status of her position from half-time FTE to something more than that, the employer lacks control and the Commission lacks jurisdiction. *Maher (Eisely) v. DHSS & DER*, 85-0215-PC, 7/24/86

Appellant's employer, DHSS, did not have control over the decision not to restore fringe benefits to the appellant as a result of a legislatively mandated layoff. That control rested with DER. As a result, the matter does not qualify as a grievance under §ER 46.02(4), Wis. Adm. Code. *Schmaltz v. DHSS & DER*, 85-0067-PC, 7/25/86

The Commission lacks subject matter jurisdiction under §230.45(l)(c), Stats., over an appeal of a non-contractual grievance concerning certain temporary layoffs and the decision not to restore certain fringe benefits lost as a result of the layoffs to employes who, like appellant, were represented at the time of the layoffs but nonrepresented at the time the fringe benefits were restored. While the Commission held the subject matter was included within the meaning of the term "condition of employment" as used in §230.45(i)(c), Stats., reads in connection with §ER 46.030), Wis. Adm. Code, it held that the subject matter of the grievance was not within the control of the employing agency (DHSS) as defined in §ER 46.02(3), Wis. Adm. Code, since authority for the decision was vested in DER. *Schmaltz v. DHSS & DER*, 85-0067-PC, 2/6/86 and 7/25/86

103.08(9) Employment or bargaining unit status of grievant as affecting jurisdiction

DER was not a proper party to a grievance where all of the grievants were employes of DHSS. Therefore, DHSS was the "employer" for purposes of §ER 46.02(3), Stats. *Frisch et al. v. DHSS & DER*, 86-0191-PC, 3/18/87

Where the appellant is covered by a collective bargaining agreement, the Commission may not act as the final step review for the appellant's grievance. *Kerr v. DOT*, 85-0042-PC, 7/3/85

The Commission lacked jurisdiction over a grievance filed by an employe whose position was within a bargaining unit and who sought to grieve the reduction of his wage level caused by a classification survey. *Cohen v. DP*, 81-208-PC, 1/28/82

Where the appellant resigned prior to submitting her non-contractual grievance at the second step, and the APM issued pursuant to §Pers 25.01, Wis. Adm. Code, provides the framework for the grievance procedure in the absence of promulgation of rules by the Secretary of DER pursuant to §230.45(l)(c), Stats., and the APM states that voluntary termination of employment leads to immediate withdrawal of the grievance, then the respondent's refusal to process

the grievance past the first step must be affirmed. *Minor v. WCCJ*, 80-329-PC, 3/2/81

The non-contractual grievance procedure is interpreted as not unavailable to an employe who is involuntarily terminated after the transactions grieved but before the grievances were filed; therefore, the Commission has jurisdiction over appeals of the denials of the grievances. *Stasny v. DOT*, 79-192, 253, 259-PC, 1/14/80

103.08(10) Particular matters grieved/appealed

Under certain circumstances, a nominally temporary assignment in the classified civil service may become permanent after the passage of a significant amount of time. In a case involving an issue of constructive discipline, "temporary" reassignment lasting less than a year did not become constructively permanent due to the passage of time. Appellant's non-contractual grievance relating to his reassignment from his position as superintendent of a correctional center to a community corrections office pending an investigation of appellant's conduct at the correctional center was dismissed for lack of subject matter jurisdiction. *Stacy v. DOC*, 98-0039-PC, 8/26/98

A supervisor's grievance which dealt with the fact that his job required him to carry a pager and to remain on call outside of regular working hours throughout the entire year, even though he alleged he was not informed of this job requirement until two months after he was hired, constituted a condition of employment and was grievable. However, that aspect of the grievance which alleged that others who had been given similar responsibilities involving carrying a pager and being on call received additional compensation was clearly related to wages and the Commission lacked jurisdiction to consider this as a remedy. *Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 505 N.W.2d 462 (Court of Appeals, 1993)

The Commission lacks jurisdiction over an appeal relating to hiring above the minimum (HAM) because this does not involve a "condition of employment" cognizable pursuant to §230.45(i)(c), Stats. *DHSS v. Pers. Comm. (Hovel)*, Dane County Circuit Court, 79-CV-5630, 1/29/81

The Commission lacks jurisdiction to hear an appeal relating to a letter placing appellant "on notice that any reoccurrence of . . . problematic behavior will result in the implementation of progressive discipline" where there was no "demotion, layoff, suspension, discharge or reduction in base pay" pursuant to §230.44(1)(c), Stats., nor did appellant proceed through the first three steps of the non-contractual grievance procedure, distinguishing *Basinas v. State*, 104 Wis. 2d 539, 312 N.W.2d 483 (1981). *Klemmer v. DHFS*, 97-0034-PC, 7/2/97

In dicta, the Commission held it lacked the authority to hear a fourth step grievance to the extent the appellant identified his requested relief as earning compensatory time for the time he was required to carry a pager outside his scheduled hours, interpreting *Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 505 N.W.2d 462 (Ct. App., 1993). Such relief related to compensation (wages) and hours, thereby falling within the exclusion found in §ER 46.03(2)(k), Wis. Adm. Code. *Loomis v. UW*, 92-0035-PC, 2/15/96

In dicta, the Commission held it lacked the authority to hear a fourth step grievance relating to the job requirement that appellant carry a pager, interpreting *Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 505 N.W.2d 462 (Ct. App., 1993). Such a condition of employment is a right of the employer as provided in §ER 46.04(2), Wis. Adm. Code. *Loomis v. UW*, 92-0035-PC, 2/15/96

The Commission has jurisdiction over a fourth step non-contractual grievance in which the appellant contested the respondent's decision to require her to pay respondent $240 she had received from an airline after she was bumped from an employment-related commercial flight where appellant alleged that the decision was contrary to department policy. The grievance did not contest the underlying written policy but alleged respondent had abused its discretion in applying that policy to a set of facts. *Larson v. DOR*, 94-0114-PC, 12/22/94

The Commission lacked jurisdiction over a claim that respondent did not abide by the guidelines established in the compensation plan and, as a consequence, did not pay appellant at the rate of time-and-a-half for the hours he spent supervising staff training. *Schneider v. DOC*, 94-0261-PC, 9/9/94

An alleged spontaneous admonition from a supervisor that he felt the grievant was lying was not an "oral reprimand," so it could be grieved to the fourth step. An alleged directive from a supervisor to get back to work and to file a grievance when the grievant had time constituted "managing and directing" agency employes and fell within the "management rights" exception to the grievance procedure. However, the grievant's allegation that the directive was made in a threatening and hostile manner so as to violate respondent's work rules could be grieved. *Gallenbeck v. Wis. Lottery*, 92-0116, 0119-PC, 6/24/92

The Commission lacks jurisdiction over a grievance arising from the alleged failure of respondent to grant appellant premium pay for overtime hours he worked in a certain capacity. *Bornick v. DOC*, 91-0084-PC, 4/1/92

The Commission lacks subject matter jurisdiction over a grievance arising from a nonselection decision. *O'Brien v. DOT*, 88-0059-PC, 6/14/91; rehearing denied, 7/25/91

Any action by DMRS in failing to approve appellant's transfer is excluded from the grievance procedure because it is directly appealable to the Commission pursuant to §230.44(1)(a). *Brockington v. DOT & DMRS*, 91-0031-PC, 5/29/91

The Commission lacks jurisdiction over a grievance relating to the appellant's eligibility for a lump sum wage adjustment arising from his employment by the respondent in a represented position. *Oestreich v. DOT*, 91-0014-PC, 4/5/91

The Commission lacks subject matter jurisdiction over a grievance arising from the decision denying the appellant's request to be compensated at a higher pay rate for a certain period and to adjust his base pay rate. *Cestkowski v. DOC*, 90-0403-PC, 2/8/91

A grievance arising from the respondent's decision not to allow the appellant to participate in its work-at-home program is not reviewable by the Commission at the fourth step of the non-contractual grievance procedure. *Jordan v. DNR*, 90-0386-PC, 1/11/91

A grievance relating to the procedure followed by the respondent in processing a grievance falls within the Commission's jurisdiction at the fourth step. *Masear v.*

***DILHR*, 89-0065-PC, 11/1/89**

The Commission lacks jurisdiction to hear grievances relating to the methodology used by appellant's supervisor in completing a performance evaluation, as well as allegations of actual or constructive demotion. Alleged comments to the effect that the appellant's sick leave use was excessive were not grievable decisions. *Miller v. DHSS*, 87-0209-PC, 2/8/89

The Commission has jurisdiction to consider whether respondent violated §ER 46.01(2), Wis. Adm. Code, in a third-step grievance hearing, with respect to certain comments by respondent's representative which allegedly had the effect of denying the appellant an opportunity to be heard. *Wing v. UW System*, 85-0065-PC, 2/12/86

The Commission lacks jurisdiction to hear a grievance arising from a decision relating to the issuance of building keys where the respondent's third step response showed that respondent effectively reversed its original decision soon after it was issued. *Wing v. UW System*, 85-0122, 0173-PC, 2/6/86

The Commission has jurisdiction to hear a grievance arising from a failure of appellant's supervisors to conduct a second step hearing on another grievance within the established time limits. *Wing v. UW System*, 85-0122, 0173-PC, 2/6/86

The Commission lacks jurisdiction over a grievance arising from oral and written reprimands. H ER 46.03(2) and 46.07(l)(a), Wis. Adm. Code. *Wing v. UW System*, 85-0112-PC, 9/20/85

An allegation that respondent violated the grievance procedure by refusing to allow the appellant to tape record the first step meeting is grievable to the Commission. *Wing v. UW System*, 85-0007-PC, 5/22/85

Because the standard definition of the term "evaluation" includes both the act and result of evaluating, the Commission is precluded by §ER 46.070) from hearing grievances arising from the methodology used in preparing performance evaluations. *Holmblad v. DILHR*, 84-0091-PC, 8/31/84

The Commission lacks jurisdiction over an appeal of a

noncontractual grievance inasmuch as it failed to allege any violations of the civil service code with respect to alleged supervisory inaction on a reclassification request, inadequate notice of a transfer, not explaining the method for review of a transfer, and the transfer itself. *Ford v. DHSS & DP*, 82-243-PC, 83-0011-PC, 83-0020-PC, 6/9/83

The Commission has jurisdiction pursuant to §230.45(l)(c), Stats., over a non-contractual grievance concerning a reprimand, where the employe alleged that the respondent's action in imposing the reprimand violated the state Code of Ethics, ch. Pers 24, Wis. Adm. Code. The Commission rejected the respondent's argument that there could not possibly be a violation of the rules, because the alleged "disclosure" by the employe under §Pers 24.04(2)(c)2, Wis. Adm. Code, was not made to the "public" but rather was made to higher officials within the employing agency, holding that such a disclosure was covered by the rule. *Luchsinger v. PSC*, 82-192-PC, 1/31/83

Where appellant's grievance was not accepted at the Ist, 2nd or 3rd steps due to various alleged procedural deficiencies within the grievance document itself, the Commission is precluded from reaching the merits of appellant's allegations but retains the power to review respondent's decision not to accept the grievance as long as the grievant alleges that the procedural decision constitutes a violation of the grievance procedure set out in the APM or other rules of the administrator. *Wing v. UW*, 81-328, 420-PC, 6/25/82

The Commission may hear a grievance alleging a retaliatory reduction in work responsibilities where the appellant has alleged that the retaliation violated §Pers 24.04(2)(c), Wis. Adm. Code, which prohibits reprisals against employes for the release of information to the public. *Wing v. UW*, 81-328,420-PC, 6/25/82

An appeal of a non-contractual grievance relating to a decision by the employer that the appellant could no longer work certain hours because of the absence of a supervisor does not relate to a "condition of employment" pursuant to §230.45(l)(c), Stats., and the Commission lacks jurisdiction. *Johnson v. DHSS*, 81-450-PC, 6/10/82

The Commission lacks jurisdiction over an appeal of a non-contractual grievance relating to alleged unprofessional

conduct and lack of decorum by court commissioners and departmental attorneys at "supplemental hearings" held to discover the assets of delinquent taxpayers for purposes of collection, because there is no arguable violation of the civil service code. *Pogliano v. DOR*, 81-466-PC, 6/10/82

The Commission lacks jurisdiction over a grievance relating to reimbursement for travel expenses. *Cloutier v. DNR*, 81-34-PC, 4/2/82

The employe grieved his supervisor's use of abusive language and management indicated at the third step that the supervisor had been counseled. In his appeal to the Commission, the grievant requested stronger action against the supervisor. The Commission concluded that it lacked jurisdiction because the decision as to how to deal with the supervisor constituted a management right under §111.90(2), Stats., and hence was not a condition of employment under §230.45(l)(c), Stats. Furthermore, there was no provision of the civil service code which arguably had been violated by the respondent. *Fox v. DNR*, 81-381-PC, 2/9/82

Where the subject of a non-contractual grievance related to the appellant's personnel file, there was no subject matter jurisdiction since the complainant could not allege a violation of the civil service code (Subch. II of Ch. 230, Stats., and Ch. Pers. Wis. Adm. Code) as required by the APM concerning non-contractual grievances because the civil service code does not govern employe access to personnel files. This subject is covered by §103.13, Stats., which was referred to by the grievant both in his grievance and in his written arguments before the Commission. *Wing v. UW*, 80-274-PC, 4/1/81

Where the appellant argued that his concerns in his non-contractual grievance were with his performance evaluation and not the decision on a monetary performance award *per se*, his appeal was still barred by §230.45(2), Stats., which makes it clear that appeals pursuant to §230.450)(c), Stats., of non-contractual grievances do not include grievances based on the evaluations used to determine awards as well as grievances based on the amount of the awards. *Wing v. UW*, 80-256-PC, 4/1/81

The appointing authority's decision to use a particular position or person as an "activity Therapy Resource person"

is not reviewable. *Marshall et al. v. DP & DHSS*, 79-136, 169-PC, 3/6/81

Notwithstanding that the Commission lacks jurisdiction over a non-contractual grievance to the extent that it relates to the denial of a discretionary performance award, the Commission would consider a charge that the agency failed to comply with the required procedure for processing a non-contractual grievance. *Williamson v. DOR*, 80-303-PC, 12/17/80

Although the DOT grievance procedure limits to the third step grievances relating to matters wholly within the department's discretion, the decision to transfer is not wholly within the agency's discretion, and thus an appeal to the Commission (fourth step) is not barred. *Harley v. DOT & DP*, 80-77-PC, 5/15/80

Where the respondent argued that the appellant's transfer involved a management right and hence was not a "condition of employment" under §230.45(l)(c), Stats., and the appellant argued that his grievance concerned the seniority provisions and the procedures to be followed in lieu of layoff, it was determined that the decision on the objection would be deferred until after the hearing on the merits. *Harley v. DOT & DP*, 80-77-PC, 5/15/80

The Commission lacks jurisdiction pursuant to §230.45(l)(c), Stats., of a non-contractual grievance concerning the denial of permission to attend certain meetings held outside the prison, since the transaction does not involve a personnel decision, and an arguable violation of the civil service code, required for a fourth step appeal pursuant to the APM, could not be perceived. *Corcoran v. DHSS*, 79-147, 199-PC, 2/15/80

The Commission lacks jurisdiction over an appeal of a denial of a non-contract grievance relating to the denial of the use of a state vehicle as this transaction does not involve a function of the administrator nor is it covered by the civil service law or rules. *Humphrey v. DOT*, 78-287-PC, 8/15/79

The Commission lacks jurisdiction over an appeal of the denial of a non-contract grievance which had requested 10% time off for the appellant to gather information for other appeals and grievances, since the grievance subject matter did not involve an allegation of violation of the civil

service law or rules or function of the administrator, and the repeal of §16.03(4), Stats. (1975), eliminated the argument that any action by an appointing authority alleged to be illegal or an abuse of discretion is appealable. *Wing v. UW*, 79-20-PC, 7/5/79

The Commission lacks jurisdiction over an appeal of the denial of a non-contractual grievance relating to a management decision as to the location of the appellant's office since the subject matter of the grievance does not involve an allegation of a violation of the civil service laws or rules or a function of administrator, or for that matter, a personnel transaction. *Scurlock v. DILHR*, 79-44-PC, 6/12/79

The Commission lacks jurisdiction over an appeal of the denial of a non-contractual grievance where the employe alleged that the agency failed to advise him of his right to assistance, as set forth in the grievance procedure, in an appeal of a reallocation to Commission, since the section of the grievance procedure providing for assistance only applies to grievance proceedings and could not apply to an appeal of a reallocation since such appeals are not processed through the grievance procedure but are made directly to the Commission. *Wing v. UW*, 78-137-PC, 4/19/79

and are governed by Chapter 20, Stats., so there can be no allegation of a violation of the civil service law or involvement by the administrator and thus no basis for an appeal to the Commission under the non-contractual grievance procedure. *Gohl v. DOR*, 78-67-PC, 11/22/78

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 102.08 through 102.16

[Previous material] [Next material]

102.08 Early filing

Where appellants filed an appeal prior to receiving written notice of their reclassification, any procedural defect was cured when they reaffirmed at the prehearing conference that they wished to continue to contest the effective date of their reclassification. *Mayer et al. v. DHSS & DER*, 95-0002-PC, 7/24/95

In an appeal of the effective date of appellants' reclassification, the fact that the appellants had filed their appeal prior to both the date of the written notice and the effective date of the action did not deprive the Commission of subject matter jurisdiction. Any jurisdictional defect caused by the premature filing was cured when appellants subsequently received written notice of the effective date and they notified the Commission that their third step grievance had been denied and they wished to proceed with their appeal. *Heath & Mork v. DOC & DER*, 93-0143-PC, 6/23/94

Appellant failed to file any appeal of a reallocation following a survey, but subsequently requested a review of the classification level of his position. Respondent DOT replied that it would review the class level of his position in the context of reviewing a number of positions in the aftermath of the survey. Approximately two years after

filing his request, respondent DOT had made no decision thereon and appellant filed an appeal withe the Commission. This appeal was untimely, because it was more than 30 days after the reallocation, and respondent DOT had not yet rendered an appealable decision on his request for classification review. While appellant could attempt to appeal a decision on that request, the current appeal must be dismissed. *Mueller v. DOT & DER*, 93-0030-PC, 6/23/93

The appellant's statement, made at the prehearing conference, that she was contesting the hiring procedure used to fill a particular vacant position constituted an amendment of her original letter of appeal which alleged that respondent's decision not to select the appellant for the position was flarbitrary, capricious and discriminatory", and the amendment related back to the date of the original filing. *Larson v. DILHR*, 86-0013-PC, 6/12/86

Where an employe alleged that his position was classified as Storekeeper 1 and that he was being required to perform Motor Vehicle Operator I duties and alleged that he might be "demoted" to the latter classification, the Commission held that no appealable demotion had occurred and there was no other basis of jurisdiction. *Helm v. UW*, 81-65-PC, 10/21/81

102.09 Relation back of amendment or of appeal to prior complaint

In an appeal of the effective date of appellants' reclassification, the fact that the appellants had filed their appeal prior to both the date of the written notice and the effective date of the action did not deprive the Commission of subject matter jurisdiction. Any jurisdictional defect caused by the premature filing was cured when appellants subsequently received written notice of the effective date and they notified the Commission that their third step grievance had been denied and they wished to proceed with their appeal. *Heath & Mork v. DOC & DER*, 93-0143-PC, 6/23/94

Appellant's appeal of an August, 1990 negative employment reference was untimely filed where it was not filed within 30 days of the date of the reference and the claim did not arise out of the same occurrence or

transaction set forth in a discrimination complaint appellant had filed in 1989. The negative reference was a discrete action which, in order to be cognizable under §230.44(1)(d), was required to have been the subject of a specific filing with the Commission, either as an original complaint, as an amendment to an original complaint, or as a separate appeal within 30 days of its occurrence. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 92-0855-PC, 3/10/93

Appellant was permitted to amend a discrimination complaint to state a civil service appeal that ran against a party not named in the original complaint and to have the amendment relate back to the date of filing of the original complaint where there was no specific showing of prejudice to a respondent and were no circumstances from which prejudice could be inferred. The requirements of §802.09(3), did not apply to the Commission's processes. *Lipford v. DER & UW*, 91-0118-PC, 7/22/92

Appellant was permitted to amend her equal rights complaint, which contested a reallocation decision, to include a civil service appeal of the same decision. *Lipford v. UW & DER*, 91-0118-PC, 12/23/91

Because a document, viewed as a proposed amendment, contained an additional allegation (lack of just cause) which was related to the subject matter of a previously filed charge (an allegedly discriminatory discharge), it was an appropriate amendment and related back to the original date of filing. *Schilling v. UW-Madison*, 90-0064-PC-ER, 9/19/90

An amendment relates back to the date of filing of the original pleading if the claim asserted in the amendment arises out of the occurrence or transaction set forth in the original pleading. An amendment was timely where appellant had, on December 7th filed a complaint of discrimination regarding a selection decision on November 12th and where on December 20th, complainant filed an amendment asking that the complaint also be considered as a letter of appeal filed under §230.44(l)(d), Stats. *Van Rooy v. DILHR*, 84-0253-PC, 4/12/85

Where an appeal was stated to be of a letter of reprimand and the letter informed the appellant of the termination of her probationary employment, the appeal could be amended

to clearly state that the termination was being appealed and the amendment would relate back to the time that the original appeal was filed. *Fisk v. DOT*, 79-83-PC, 1/23/80

102.10 Equitable estoppel as to issues of timeliness (see also 522.05)

It is appellant's burden of proof to show that he was misled by respondent regarding his appeal rights. The nature of the actual statement made is critical to an equitable estoppel analysis, as are the name and position of the person who responded to appellant's inquiries. *Livingston v. DOT*, 98-0001-PC, 4/8/98

Under certain circumstances, a failure to comply with §230.44(3) will not be fatal to an employe's ability to pursue an appeal. The most common circumstance leading to this result is when an agency responsible for the personnel transaction in question misleads the employe as to the nature of his or her appeal rights, and the employe, reasonably relying on this information, fails to file a timely appeal. *Austin-Erickson v. DHFS & DER*, 97-0113-PC, 2/25/98

A person in the employing agency who was clearly functioning in a clerical capacity and who offered to do a purely clerical favor, to forward the appeal to the proper place, was not functioning as an arm of the Commission or of the Department of Employment Relations. There was no procedural aspect to the actions of the clerical employe that might place her actions within the scope of an instruction on petitioner's notice of reallocation to contact his agency's Personnel Officer, "If you have any question on *the procedural aspects of filing an appeal*." Complete reliance such as petitioner gave to the clerical employe was inadequate when working with hard and fast rules and regulatory agencies. *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94

Where neither the Commission nor the respondent knew of the existence of this appeal until over a year after it was to have been filed, it could not be said that no prejudice attached. *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94

In a layoff appeal, appellant's statement that he was told

that "nothing could be done" in response to his question "if there was anything that could be done, and what our rights were" was not inconsistent with a statement to the effect that as of that time there were no positions available into which the appellant could transfer, demote or displace, rather than a statement that appellant had no right to appeal the layoff decision. Based upon this understanding of the context of the information provided by respondent, respondent's misconduct did not cause "a serious injustice" to appellant. In addition, if equitable estoppel was applied, the public's interest would be harmed to the extent that respondent would be required to defend a layoff decision made over two years after the statutory period for obtaining review had ended. *Blomquist v. DATCP*, 94-1032-PC, 5/26/95

Appellant's reliance on a statement by a receptionist in the DOT personnel office that his appeal would be forwarded to the Commission was not reasonable and justifiable, where appellant was aware of the need for timely filing and understood from the receptionist's comments that the receptionist in effect was making a commitment on behalf of a third person who was on vacation and would not be returning for several days, which was during the period when appellant himself was going on vacation. *Millard v. DER*, 92-0713-PC, 3/19/93; affirmed, *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94

A receptionist in the DOT personnel office was not an agent of DER for purposes of the application of equitable estoppel merely because DER had provided in its notice of reallocation that: [i]f you have any questions on the procedural aspects of filing an appeal, please contact your agency Personnel Officer," and where the appellant asked the receptionist for the Commission's address and she gratuitously offered to have the appeal forwarded to the Commission. *Millard v. DER*, 92-0713-PC, 3/19/93; affirmed, *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94

Whether or not actions of respondent led appellant to cease actively pursuing a matter, where any such reliance could not have occurred until after the 30 day filing period had already expired, equitable estoppel would not lie. *Hallman v. WCC & DOA*, 96-0146-PC, 2/12/97

It was not reasonable to rely on the statement by an employe of appellant's employing agency's administrative services section that appellant had properly addressed his reallocation appeal letter where the employe was neither the person identified in the reallocation notice as being able to answer questions on the procedural aspects of filing an appeal, nor was the employe employed by the Department of Employment Relations, where it was undisputed that the underlying action of reallocating the appellant's position was taken by DER. *Kenyon v. DER*, 95-0126-PC, 9/14/95

It was not reasonable to rely on the non-action of two of respondent's employes who received appellant's misdirected reallocation appeal just 2 working days before the final day for filing with the Commission and the reallocation notice very clearly stated that the appeal had to be submitted to the Commission. Equitable estoppel did not apply. *Kenyon v. DER*, 95-0126-PC, 9/14/95

Respondent was equitably estopped from contending that appellant's appeal was filed untimely because it was not filed with, i.e. received by, the Commission within 30 days where it was reasonable for appellant to rely on respondent's letter informing her that she could appeal the hiring decision by merely "writing" to the Commission within 30 days, which she did. *Stone v. DHSS*, 92-0789-PC, 12/29/92

The right to assert equitable estoppel does not arise unless the party asserting it has acted with due diligence and the conclusion as to whether or not an employe has exercised due diligence is, in part, a function of the nature of the respondent's action. An employe has a substantially greater responsibility to investigate the employer's information or action when the information/action is adverse to the employe's interests. *Fletcher v. ECB*, 91-0134-PC, 12/23/91

Where the appellant was clearly notified that an adverse personnel action had been taken against him, i.e., that he was not being promoted, and he was told that the reason was that he was keeping book on his co-workers in violation of work rules and he had received two previous written reprimands referencing this conduct, a reasonably prudent employe should have promptly filed an appeal. The appellant was barred from filing an appeal 3 years later after he learned that the promotion decision may have been

based upon other factors. *Fletcher v. ECB*, 91-0134-PC, 12/23/91

Where the appellant failed to provide any evidence that DER has a duty to supply the Commission's address to employes who receive a reallocation notice, the appellant failed to establish the basis for an equitable estoppel theory. *Brady v. DER*, 91-0085-PC, 9/19/91

Alleged misconduct by DNR cannot serve as the basis for an equitable estoppel theory when it is undisputed that the underlying action of reallocating the appellant's position was taken by DER rather than DNR. In dicta, the Commission also noted that the mere provision of an office directory which included an incorrect address for the Commission cannot be said to amount to fraud or a manifest abuse of discretion. *Brady v. DER*, 91-0085-PC, 9/19/91

The doctrine of equitable estoppel applied where in the letter informing appellant of the decision to remove him from a register, respondent gave one reason, the appellant then asked respondent for a "full and explicit statement of the exact cause of such refusal" and respondent replied 2 weeks later, when the time for appeal had almost run and gave a different, additional reason with which the appellant took issue. *Desrosiers v. DMRS*, 87-0078-PC, 8/5/87; motion for reconsideration denied, 9/10/87

The Commission has implicit authority to apply the principle of equitable estoppel in deciding timeliness issues. *Desrosiers v. DMRS*, 87-0078-PC, 8/5/87; motion for reconsideration denied, 9/10/87

Equitable estoppel did not apply where respondent DER promptly forwarded a misdirected appeal to the Commission and the appeal was received by the Commission after the 30 day period had run. *Gensch v. DER*, 87-0072-PC, 7/8/87

Equitable estoppel did not lie against respondent where reallocation denial letter was not misleading but had clearly indicated that any appeal should be sent within 30 days to the Personnel Commission and provided the Commission's correct address. Appellant incorrectly sent her appeal to a DER employe at DER's address. *Gensch v. DER*, 87-0072-PC, 7/8/87

The elements of equitable estoppel were present to prevent

respondents from arguing that a hold placed on appellant's reclassification to permit review of a request to create a new classification series could have had no effect on the original decision to reclassify the appellant's position. *Kriedeman v. UW & DER*, 85-0048-PC, 10/23/85

Respondent DER abused its discretion and was equitably estopped from asserting an objection based on timeliness where the appellant's letter of appeal was addressed to the Commission but listed DER's post office box and where DER failed to forward the letter to the Commission during the two weeks that remained in the 30 day filing period. *Toth v. DILHR & DER*, 84-0009-PC, 2/29/84

The respondents' argument that equitable estoppel is not available to prevent an allegation of untimely filing under §230.44(3), Stats., because subject matter jurisdiction cannot be conferred by estoppel, was rejected. *Ferguson v. DOJ & DP*, 80-245-PC, 7/22/81

Where the appellant received information from the agency personnel manager regarding her projected salary for the next year, which, although given in good faith, was erroneous, and this influenced her to decide not to appeal a reallocation, the Commission found that there was no fraud or manifest abuse of discretion on the part of the respondent, and hence equitable estoppel was not present as to the respondent, a state agency. *Ferguson v. DOJ & DP*, 80-245-PC, 7/22/81

Where the employe relied on information contained in the "Handbook for DILHR Employes" to file a non-contractual grievance and to appeal to the Commission at the fourth step rather than to have appealed directly to the Commission in the first instance, the respondent was equitably estopped from arguing that the appeal should have come directly to the Commission and that the appeal was untimely because it was filed more than 30 days after the original transaction. *Newbury v. DILHR*, 80-50-PC, 9/23/80

Equitable estoppel against a state agency requires inequitable conduct by the agency which amounts to fraud or a manifest abuse of discretion, and irreparable injury to the other party acting honestly and in good faith reliance on the agency conduct, and equitable estoppel would not be present where the appellant alleged that after having

received his exam notice on September 4, 1979, he wrote to the Division of Personnel on September 14th requesting an explanation of the "ambiguity" of his exam grade, eight days later the division phoned him, the possibility of an appeal was discussed and he requested a written confirmation of the conversation, and in a letter dated September 27th, the division quoted §230.44 but did not specify to whom the appeal should be addressed, and thereafter, the appellant wrote to the division on October 2nd requesting a hearing on the entire selection process, by letter of October 4th the division advised that the appeal should be directed to the Commission, and on October 9th he wrote to the Commission requesting a hearing. *Schleicher v. DILHR & DP*, 79-287-PC, 8/29/80

The Commission found that equitable estoppel applied and declined to accept the respondent's contention that the complainant should have investigated the matter further rather than relying exclusively on the erroneous advice of respondent's employe. *Butler et al. v. DILHR & DER*, 79-138-PC, 11/8/79

102.11 Continuing violation

A grievance arising from the alleged failure of respondent to grant appellant premium pay for overtime hours he worked in a certain capacity during the period from 1985 to 1991 was timely only with respect to the single instance during which he worked in that capacity within the 30 days prior to filing his grievance. Each of the instances in which appellant was not granted premium pay for working overtime hours represented a discrete and separable transaction, so a continuing violation theory was inapplicable. The Commission went on to dismiss the timely claim because pay issues are non-grievable. *Bornick v. DOC*, 91-0084-PC, 4/1/92

The Commission declined to apply a continuing violation theory to an appeal of a decision to reduce the appellant's salary soon after his transfer to a new position, citing *Junceau v. DOR & DP*, 82-112-PC, 6/14/82. The appeal was filed nearly 3 months after the appellant was notified of his new rate of pay. *Jacobus v. UW*, 88-0079-PC, 10/20/88

An appeal of an attorney regrade computation is not a

continuing violation, since there is no ongoing violation but rather the damages are continuing in nature. *Junceau v. DOR & DP*, 82-112-PC, 10/14/82

As to employe who transferred from DILHR to LIRC in 1977 and filed appeal in September 1978 relating in part to alleged civil service violations by DILHR, appeal is untimely as to DILHR, as against argument of continuing violation, inasmuch as LIRC exercises independent personnel authority and is not a unit of DILHR, and appellant's employment relationship with LIRC ended when she transferred to DILHR, and inasmuch as LIRC is not the successor agency to DILHR commission. *Jacobson v. LIRC* & DILHR, 78-192-PC, 12/4/79

102.13 Effect of filing grievance (or seeking other internal reconsideration) on the timeliness of subsequent appeal

The filing of a contractual grievance or other misdirected appeal does not toll the running of the time limit. *Austin-Erickson v. DHFS & DER*, 97-0113-PC, 2/25/98

Respondents' 1993 letters to appellants, which 1) were written decisions issued in response to requests by the appellants, 2) reviewed the classification levels of the appellants' positions, and 3) affirmed the correctness of the original reallocation decisions that had been made effective in 1990 were appealable pursuant to §230.44(1)(b), Stats. The fact that appellants had failed to timely appeal the reallocation decisions in 1990 did not prohibit them from filing timely appeals from the 1993 letters. *Vesperman et al. v. DOT & DER*, 93-0101-PC, etc., 2/15/94

An appeal of a certification action was untimely where it was filed more than 30 days after the date of the certification and the date the appellant, who was not certified, learned that someone else was appointed to the position. The Commission rejected appellant's contention that she had entered into "negotiations" with respondent to change the decision and that the filing period should be based on the date respondent DOT ceased to offer relief to correct their previous error where the only event occurring within the 30 day period was the appellant's rejection of an earlier proposal by respondent to allow the appellant to

interview for the position, distinguishing *Adams v. DHSS*, 83-0050-PC, 8/17/83, and *Schein v. DHSS*, 79-370-PC, 5/15/80 *Morris v. DMRS & DOT*, 90-0232-PC, 11/16/90

The time limit for filing an appeal is not tolled by the employe's pursuit of a non-contractual grievance of the same transaction *Cleveland v. DHSS*, 86-0133, 0151, 0152-PC, 7/8/87

The reclassification appeal was untimely filed where appellant was denied her Officer 2 rating by memo dated June 7, 1984, she was promoted to Officer 3 on July 22, 1984, she learned in October of 1985 that she might have been eligible to receive her Officer 2 rating on July 18, 1984, four days before she started at the Officer 3 level, and after she was informed by respondent DHSS on November 22, 1985 that her reclass request to Officer 2 was untimely, the appellant filed an appeal with the Commission on December 9, 1985. The adverse decision appellant sought to appeal was the 1984 decision rather than the November 22, 1985 "decision." Although appellant had essentially asked the respondent in October or November of 1985 to reconsider its position on reclassifying the appellant to Officer 2 and to correct its past error, the respondent, on November 22,1985, refused to do so because the time had run for appeal of the earlier decision. *LaRoche v. DHSS & DER*, 85-0227-PC, 4/30/86

The appeal of a non-selection decision was untimely where it was filed on June 18, the date of notification was April 8, nothing in the record suggested that the effective date was on or after May 19 and the appellant had sought an explanation of the decision from the person who made the decision but had not sought reconsideration by someone with the authority to overturn the selection decision, distinguishing *Adams v. DHSS*, 83-0050-PC, 8/17/83. *Bachman v. UW-Madison*, 85-0111-PC, 11/7/85

An appeal was held to be timely filed where it was submitted within 30 days of a letter from respondent secretary to the appellant stating that her review of a non-selection decision indicated the institution had not acted improperly, even though the institution's personnel director had some 45 days before the appeal was filed, advised appellant in writing that he had not been selected. The Commission's decision in *Junceau v. DOR & DP*, 82-112-PC, 10/14/82 was distinguished. *Adams v. DHSS*,

83-0050-PC, 8/17/83

An appeal was timely filed within 30 days of the letter notifying appellant of respondent's final decision, where after the first letter (received by appellant more than 30 days before the appeal was filed), the respondent reconsidered its action in light of appellant's inquiry. *Stellick v. DOR & DP*, 79-211-PC, 4/10/81

Where following notice of her nonappointment, the appellant wrote the respondent requesting directions for appealing the method used to interview her, and the respondent's agent replied in a letter that was not inconsistent with the possibility that the matter was still pending until a future discussion between the parties, the time for appeal did not start to run until the date of that meeting. *Schein v. DHSS*, 79-370-PC, 5/15/80

102.14 When appellant realizes unfairness

It is the date that notice of the action is received or the effective date of the action, not the date that an affected employe realizes what the consequences of this action will be that determines the date from which the 30 day time lime will be measured. Where appellant received notice by his written performance evaluation that he was no longer being assigned plan review duties, his appeal, in which he contended he had been demoted, filed more than 1 year later was untimely. Appellant filed the appeal only after he was notified that his position had been reallocated based in part on the absence of plan review duties. *Meisenheimer v. DILHR & DER*, 94-0829-PC, 4/28/95

The time limit for filing an application for benefits under §230.36, Stats., for a hazardous employment injury, is 14 days from the date of the injury, §ER 28.04(1), Wis. Adm. Code. This time limit is in the nature of a statute of limitations rather than a jurisdictional requirement, and does not begin to run until the employe discovers, or should have discovered under an objective standard, the relationship between the injury and his employment. Where the complainant alleges he did not become aware of a possible link between his lung disease and a source of infection among inmates with whom he worked until several months after he became aware of his diagnosis,

respondent's motion to dismiss on the ground of untimely filing was denied. *Rose v. DOC*, 93-0180-PC, 11/30/93

Once the appellant learned he had not been selected to fill certain vacancies, he had an obligation to determine whether the decisions were proper and to promptly file an appeal with the Commission if he wanted to obtain review of the decisions. His appeal, filed nearly 3 years later and resulting from having read a newspaper article regarding personnel disputes within the respondent agency, was untimely. *Grimes v. Wis. Lottery*, 91-0158-PC, 10/31/91

An appeal of a scope of competition decision was timely, even though it was filed more than one year after the appellant was initially notified of that decision, because an appeal filed within 30 days of the date of notification would have been subject to dismissal for lack of standing in light of the fact that the decision had the effect of including rather than excluding the appellant, who at the time was an employe of DHSS. It wasn't until 1) the appellant transferred to another facility which became part of a different agency upon the subsequent creation of the Department of Corrections as a separate agency and 2) the decision to use the previously established register to fill DOC vacancies that the appellant became adversely affected by the underlying scope of competition decision. The appeal was filed within 30 days of when the appellant was notified of this injury. *Augustin v. DMRS & DOC*, 90-0254-PC, 11/28/90

The time for an appeal under §230.44(3), Stats., runs from the effective date of the action or the date of notice of the action. This precludes the use of a later date where the appellant learns of something that suggests the action was improper. Even if the principles set forth in *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 1/24/86, would be applicable to appeals, the appellant would be charged with the obligation to make inquiry at the time he learned of his nonselection to determine whether respondent had effected the transaction in compliance with the civil service code. *Oestreich v. DHSS & DMRS*, 89-0011-PC, 9/8/89

Where the appellant was hired in 1970 and allegedly performed supervisory duties continuously while in a non-supervisory classification, until in 1982 when her position was audited and the supervisory duties were removed, an appeal filed in 1982 seeking back pay for

supervisory duties performed from 1970 was not timely, as opposed to the appellant's argument that she first received "notice of her misclassification" in 1982, since she had to have had notice of her actual classification, salary, and duties and responsibilities continuously since 1970, and the time for appeal does not begin to run from the date an employe first learns of the alleged illegality of his or her employment status. *Cronin v. DHSS*, 82-118-PC, 9/23/82

Where the appellants filed an appeal in 1979 with respect to a failure to pay overtime in 1977, and alleged that they were not aware they were aggrieved until after an order by the Commission in a similar case in 1979, the Commission held that the appeal time set forth in §230.44(3), Stats., starts to run from the date of notice of the action, not the date of notice of matters that might lead the appellants to believe that the action was improper, and hence the appeal was not timely filed. *Wickman v. DP*, 79-302-PC, 3/24/80

Appeal time in §230.44(3), Stats., does not commence from date appellant learns of fact that leads to belief that transaction was unfair. *Bong & Seeman v. DILHR*, 79-167-PC, 11/8/79

102.15 Failure to appeal subsequent decision

Where appeal was filed on August 11, 1983 alleging, *inter alia*, that respondents failed to give proper consideration to appellant's qualifications when making selection decisions, and where appellant filed a "more definite statement" on January 9, 1984 alleging, *inter alia*, that respondent DHSS "ignored" appellant's certification for positions available in June, August and October, 1983, the Commission held that the appeal was not timely as to the October hiring decision because the appellant failed to either file a separate appeal or file an amendment to his pending appeal within 30 days of that decision. *Pflugrad v. DER, DHSS & BVTAE*, 83-0176-PC, 3/29/84

Where a reallocation to Typist was appealed and a second, unilateral reallocation to Program Assistant was not appealed, this did not deprive the Commission of jurisdiction over the original appeal. (Note: to same effect, see *Jensen v. DP*, 79-PC-CS-386, 9/26/80) *Adkins v. DP*, 79-PC-CS-23, 9/25/80

102.16 Effect of statutory period falling on weekend/holiday

Appeals were timely filed on a Monday where the 30th day of the 30 day period fell on the preceding Sunday. §990.001(4)(b), Stats. *Starczynski & Mayfield v. DOA*, 81-275, 276-PC, 12/3/81

Pursuant to §990.001(4)(c), Stat., where the 30th day for filing an appeal was a Saturday, the appeal was timely when received the following Monday. *Cirilli & Jones v. DP*, 81-39-PC, 4/10/81

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 103.09 through 103.20

[Previous material] [Next material]

103.09 County merit system appeals

The Commission lacks subject matter jurisdiction over the decision of the Kenosha County Department of Social Services regarding the filling of a new position of Income Maintenance Supervisor within that department, inasmuch as §230.45(l)(e), Stats., provides for the Commission to hear appeals, when authorized under county merit system rules under §49.50, Stats., and the rules promulgated pursuant to §§49.50(2) and (5), Stats., (see §HSS 5.07(3), Wis. Adm. Code) do not provide for the Commission to hear appeals of this nature. *Cassity v. DHSS*, 82-195-PC, 11/11/82

By administrative rule, the Commission's authority under §230.45(i)(e), Stats., does not extend to matters relating to examination. *Goehring v. DHSS*, 78-133-PC, 10/27/78

103.11 Actions delegated by the Administrator/Secretary

The decision by the employing agency to refuse the appellant's request to review documents relating to the decision not to select him for a vacant position explicitly relied upon §230.13 and was considered to have been issued under authority delegated by the Secretary of DER, thereby

making it appealable under §230.44(1)(b). Even if it were concluded that the delegated authority exercised by the employing agency was from the Administrator of DMRS, the transaction would be appealable under §230.44(1)(a). *Deppen v. DILHR & DER*, 91-0083-PC, 3/5/92

Where the respondent UW lacked delegated authority from DER to have changed the classification of appellant's position to the PA Supervisor series, the UW's failure to have recommended a supervisory classification was not an appealable action. Where DER had not issued a decision with respect to the PA Supervisor series, the Commission limited its post-hearing order to classifications for which the UW had delegated authority. *Cernohous v. UW & DER*, 89-0131-PC, 9/13/90

Delegating a personnel decision, such as a certification action, does nothing to remove the decision from the scope of the Commission's review of decisions of the administrator of DMRS under §230.44(l)(a), Stats. *Thompson v. DMRS & DNR*, 87-0204-PC, 6/29/88

When the agency acted to deny a reclassification on a delegated basis and it later was determined that there in fact had been no delegation, the Commission lacked jurisdiction pursuant to §230.44(l)(b), Stats., to hear an appeal from that denial. *Schiffer v. DOT & DP*, 81-4, 342-PC, 2/18/82

Where the employe's supervisor requested reclassification of the employe's position to the Research Analyst 3 level and DILHR effected this on a delegated basis and the incumbent then appealed because he felt reclassification should have been to the Research Analyst 4 level, and DILHR did not have the delegated authority to reclassify to the Research Analyst 4 level, the Commission lacks jurisdiction over the appeal. The Commission noted that the appellant declined the opportunity to have the division of personnel act on the request for reclassification to 4 level. *McPeek v. DILHR & DP*, 78-252-PC, 1/30/79

103.12 Non-classified employes/positions

Where the position in question was moved from the classified to the unclassified service via legislative enactment, no appointment was necessary to place the

employe in the position following the change in status. *Bahr v. Investment Board*, 89-0009-PC, 6/21/89 [Note: In *Bahr v. State Inv. Board*, 186 Wis. 2d 379, 521 N.W.2d 152 (Court of Appeals, 1994), the court held that a plaintiff who had been employed by the Investment Board in a classified civil service position, but whose position was subsequently moved by statute from the classified to the unclassified service, was deprived of due process premised upon a protected property interest where the Investment Board had fired the plaintiff without following the procedures of the civil service law. The court was not reviewing the Commission's decision.]

The Commission lacks jurisdiction over a discharge appeal where the appellant was an employe in the unclassified service at the time of his discharge, even though the appellant had obtained permanent status in class in his position before that position was moved from the classified to the unclassified service. *Bahr v. Investment Board*, 89-0009-PC, 4/28/89; rehearing denied, 6/21/89 [Note: In *Bahr v. State Inv. Board*, 186 Wis. 2d 379, 521 N.W.2d 152 (Court of Appeals, 1994), the court held that a plaintiff who had been employed by the Investment Board in a classified civil service position, but whose position was subsequently moved by statute from the classified to the unclassified service, was deprived of due process premised upon a protected property interest where the Investment Board had fired the plaintiff without following the procedures of the civil service law. The court was not reviewing the Commission's decision.]

The Commission may not review a decision to create project positions to perform a specific function or the appropriateness of the duties assigned to a project position. *WSEU v. UW*, 84-0019-PC, 4/25/84

The Commission lacks jurisdiction over appeals of the discharges of project employes. The rights and privileges granted to project employes under §230.27(2), Stats., are distinguished from the rights granted to non-represented, classified employes under §§230.34(l)(a) and 230.44(l)(c), Stats. *Hart v. UW & DER*, 83-0190-PC, 11/9/83

In the absence of specific evidence as to who made the decision as to whether certain positions should be in the classified or unclassified service, it must be concluded that the decision is attributable as a matter of law to the

secretary of DER pursuant to §230.04(l), Stats., and the Commission has no jurisdiction over an appeal of such a decision as it is not a decision of the administrator which could be appealed pursuant to §230.44(l)(a), Stats. *Smith & Berry v. DILHR & DP*, 81-412, 415-PC, 9/23/82

The Commission lacks jurisdiction over an appeal from the termination of employment of a project employe. Appellant's status was found to have been, at all times, that of a project appointee to a project position. *Busch v. HEAB*, 82-58-PC, 6/25/82

The Commission lacks jurisdiction over an appeal of a discharge brought by a project employe. *LaPorte v. DILHR*, 81-153-PC, 10/30/81

The Commission lacks the authority to hear an appeal from a decision to create a project position. *Manlove v. DILHR*, 80-355-PC, 4/23/81

The Commission lacks jurisdiction over an appeal of a selection process for an academic staff position, inasmuch as the requirements for the examination and appointment processes set forth in subchapter II of chapter 230, Stats., and the authority of the administrator of the Division of Personnel, apply only to positions in the classified service, which does not include academic staff positions, and hence there can be no basis for an appeal under §§230.44(l)(a) or (b), Stats., and the Commission can discern no other basis for jurisdiction. *Schleicher v. UW*, 80-123-PC, 9/29/80

The Commission is unable to ascertain any provision in the statutes which would authorize it to hear a direct appeal of a decision by the Board of Regents to designate certain positions as academic staff. *WSEU v. UW*, 80-149-PC, 8/19/80

There is no statutory basis for Commission jurisdiction over an appeal of the termination of limited term employment. *Klopp v. UW*, 79-33-PC, 5/7/79

The Commission lacks jurisdiction to review an appointment to an unclassified position. *Wing v. UW*, 78-203-PC, 4/19/79

The Commission lacks jurisdiction under §230.44(l)(c), Stats., of an appeal by an employe with academic staff status whose limited term appointment was not renewed, as

this statute only covers employes in the classified service, which does not include academic staff. *Rodell v. UW*, 78-233-PC, 2/28/79

103.13 Work assignments

The decision to reallocate appellants' positions to a particular classification level rather than to another classification level was a decision made by the secretary of the Department of Employment Relations (or delegated by the secretary) pursuant to §230.09(2)(a), Stats., rather than a decision by an appointing authority that relates to the hiring process. Appellants' motion to supplement the issue for hearing to include a review of the reallocation decisions on an "abuse of discretion" standard was denied. *Arenz et al. v. DOT & DER*, 98-0073-PC, etc., 2/10/99

Under certain circumstances, a nominally temporary assignment in the classified civil service may become permanent after the passage of a significant amount of time. In a case involving an issue of constructive discipline, "temporary" reassignment lasting less than a year did not become constructively permanent due to the passage of time. Appellant's non-contractual grievance relating to his reassignment from his position as superintendent of a correctional center to a community corrections office pending an investigation of appellant's conduct at the correctional center was dismissed for lack of subject matter jurisdiction. *Stacy v. DOC*, 98-0039-PC, 8/26/98

The Commission lacks jurisdiction pursuant to §230.45(i)(c), Stats., over a non-contractual grievance relating to the assignment of duties to a represented employe. (dictum) *Teggatz v. State Pers. Comm.*, Winnebago County Circuit Court, 80-CV-1092, 1/8/82

The Personnel Board (now Commission) lacks jurisdiction over an appeal by a represented employe occupying a position classified as Institutional Aide 2 alleging that he had been improperly assigned the duty of performing non-emergency mopping. *Rich v. State Pers. Board*, Dane County Circuit Court, 159-084, 12/23/80

The reassignment of appellant, a supervisor, from the security unit at the University of Wisconsin Hospital and

Clinics to the Oakhill Correctional Institution is not a personnel action "after certification which is related to the hiring process." *Asche v. DOC*, 90-0159-PC, 5/21/97

The Commission has subject matter jurisdiction over an alleged constructive disciplinary demotion. In order to prevail, an employee must establish not only that changes in assigned duties and responsibilities imposed by management reduced the effective classification of the position, but also that the appointing authority had the intent to cause this result and to effectively discipline the employe. *Davis v. ECB*, 91-0214-PC, 6/12/92

The appellant's claim that an acting assignment exceeded the legally permissible duration was dismissed given the Commission's lack of authority to review the employing agency's conduct relative to the acting assignment question and given the absence of any contention as well as any indication that some sort of request to formally assign acting responsibilities to the appellant was actually before the Administrator of DMRS. *Bauer v. DATCP & DER*, 91-0128-PC, 4/1/92

There is no statutory provision for a direct appeal to the Commission of the denial of an acting assignment and therefore, the Commission lacks jurisdiction for that claim. *Witt v. DILHR & DER*, 85-0015-PC, 9/26/85

A reassignment to a different shift is not a disciplinary action that is appealable to the Commission. *Henderson v. DHSS*, 85-0045-PC, 8/15/85

There is no basis for jurisdiction over an appeal of the assignment of duties to a limited term employe (LTE). *Schaeffer et al. v. DOT*, 83-0059-PC, 7/7/83

The Commission lacks jurisdiction over an appeal arising from alleged reassignments of duties and responsibilities of appellant's position. The administrator of the Division of Personnel had determined that there had been no changes in the duties and responsibilities that would affect the position's classification and decided that no further action would be taken. The legal basis for the administrator's inquiry was solely in connection with the question of whether the position was correctly classified. Because the appellant sought review of the alleged reassignment of duties and not of the proper classification of her position, the Commission lacked jurisdiction. *Roberts v. DHSS &*

***DP*, 81-44-PC, 7/27/81**

The Commission is not prepared to declare that the assignment of job duties and responsibilities on a routine basis outside of and not reflected in the class specifications and position description for a position is *per se,* illegal, given the explicit statutory recognition of the right of the appointing authority to reassign work outside of the class specifications, the use of the class specifications to reflect merely the *majority* of a position's duties and responsibilities, the crippling effect if work outside the classification would be prohibited, and the absence of any specific statutory language prohibiting the assignment of duties outside the classification. However, some work assignments may be reviewable where the reassignment action runs afoul of laws in other areas, such as employe discipline. *Request for Declaratory Ruling*, 77-187, 6/1/81

There is no statutory basis for an appeal to the Commission of the assignment of job duties to an employe by the employing agency. *Kienbaum v. UW*, 79-246-PC, 4/25/80

Commission lacks jurisdiction under §230.45(l)(c), Stats. of an appeal by a represented employe of the denial of a non-contract grievance relating to the assignment of duties because §230.45(l)(c), Stats. limits jurisdiction to appeals of non-contract grievances "relating to conditions of employment." *Teggatz v. DHSS*, 79-73-PC, 12/13/79

The Commission lacks jurisdiction over an appeal of the assignment of duties as against the argument that this is cognizable under §111.91(3), Stats. *Phillips v. DPI*, 79-59-PC, 8/30/79; *Ray v. UW*, 78-129-PC, 8/30/79

103.17 Review of decision of impartial hearing officer

Request for hearing before hearing officer under Art. X of WSEU agreement is not required to have been initiated as non-contractual grievance, and the Commission has jurisdiction.

***Ray v. UW*, 78-129-PC, 3/9/79**

103.18 Decisions of the Administrator/Secretary other than those decisions listed in 103.03 through .13

The exempt or non-exempt status of appellant's position under the Fair Labor Standards Act is not a subject that the Commission has statutory authority to review. The class specifications did not indicate which class levels were considered exempt under the FLSA. *Moss v. DER*, 97-0062-PC, 2/11/98

Individual acts of harassment by petitioner's co-workers are clearly not "personnel decisions" regarding reclassification, as contemplated by §230.44(1)(b), Stats. *Seay v. Wis. Pers. Comm.*, Dane County Circuit Court, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/19/96

There is no basis to believe that the legislature, by allowing the appeal of personnel decisions to the Commission under §230.44(1)(b), Stats., intended that the Commission would oversee the otherwise lawful assignment and oversight of day-to-day duties. *Seay v. Wis. Pers. Comm.*, Dane County Circuit Court, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/19/96

Protection from retaliation, even that which stems from a reclassification request, is not included in the language of §230.09(2)(a), Stats., and therefore, is not within the plain meaning of §230.44(1)(b). *Seay v. Wis. Pers. Comm.*, Dane County Circuit Court, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/19/96

The Commission has no statutory authority to review the action that the Department of Employment Relations takes under §230.09(1)(am), Stats. *Swim & Wilkinson v. DER*, 92-0576, 0613-PC, 1/16/97

The Commission's appeal authority covers specific classification decisions based on existing class specifications. The Commission has no authority to review DER's decisions to create or change the classifications themselves or to assign or reassign classifications to pay ranges, or to fail to act in this regard. *Day et al. & Jerdee v. DILHR [DWD] & DER*, 95-0195, 0201-PC, 9/17/96

The Commission lacks jurisdiction to decide whether respondent had improperly calculated appellant's rate of pay for the period before his position was reclassified, even though the respondent had specifically acceded to

consideration of the issue at hearing. A decision to change an employe's rate of pay is not among those personnel actions listed in §230.44(1), Stats., that are appealable, where there is no reduction in base pay for reasons of discipline and the pay rate decision is not part of the initial hiring process. *Steber v. DHSS & DER*, 96-0002-PC, 6/25/96

Approval by the Administrator of the Division of Merit Recruitment and Selection of an appointing authority's request to establish or revise the employing unit structure of the agency is a "personnel decision" within the meaning of §230.44(1)(a), and, as such, is reviewable by the Commission. A "personnel decision" is a decision which affects the employment status of employes or applicants for employment and is not limited to discrete personnel transactions affecting individual employes or potential employes. *WPEC v. DMRS*, 95-0107-PC, 9/29/95

The Commission lacks jurisdiction over a dispute as to whether the pay calculations made as a result of a reclassification and regrade were correct. *Heath & Mork v. DOC & DER*, 94-0550-PC, 12/22/94

The decision as to whether or not a position should be included in the protective occupation status under the State's retirement program, ch. 40, Wis. Stats., is outside of the Commission's jurisdiction. *Cox v. DER*, 92-0806-PC, 11/3/94

An appeal with an issue relating to whether respondent had carried out an investigation was dismissed as moot or, in the alternative, for failure to state a claim, where it was undisputed that respondent had investigated the matter to the extent it deemed necessary. *ACE & Davies v. DMRS*, 94-0060-PC, *ACE & Davies v. DOA & DMRS*, 94-0069-PC, 10/24/94

The Commission has the authority to review the decision to approve the filling of a project position on a project appointment basis and to approve the recruitment and selection procedures utilized to fill the position. *ACE & Davies v. DMRS*, 94-0060-PC, *ACE & Davies v. DOA & DMRS*, 94-0069-PC, 10/24/94

A decision to assign a classification to a pay range in one pay schedule rather than to a pay range in a second pay schedule does not fall within the scope of §230.09(2)(a), so

it is not reviewable by the Commission. *Johnson v. DER*, 94-0064-PC, 7/25/94

The Commission has subject matter jurisdiction to review the initial classification given a new position, as an allocation decision under s. 230.09, Stats., even though the nature of the decision means the position has no incumbent at the time the decision is made. *Holton v. DER & DILHR*, 92-0717-PC, 11/29/93

An appointment letter which lists the class level of the position, does not affect the employe's rights, under Ch. 230, Stats., to appeal the initial allocation of the position *Holton v. DER & DILHR*, 92-0717-PC, 11/29/93

A negative action with respect to an employe's restoration eligibility involves the removal of the employe from a register, is legally attributable to the administrator and is an appealable decision pursuant to §230.44(1)(a), Stats. Appellant, who had been demoted in lieu of lay off, was informed that if he failed to accept restoration to a certain position he would forfeit any future restoration rights. *Sundling v. UW*, 93-0049-PC, 11/23/93

The language of §230.44(1)(b), permitting the appeal of decisions made or delegated by DER's secretary, is not broad enough to include alleged acts of retaliation for having previously pursued reclassification, such as the assignment of duties or interactions with supervisors and co-workers or related conduct attributable to an appointing authority. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 11/19/92; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/19/96

The appellant's claim that an acting assignment exceeded the legally permissible duration was dismissed given the Commission's lack of authority to review the employing agency's conduct relative to the acting assignment question and given the absence of any contention as well as any indication that some sort of request to formally assign acting responsibilities to the appellant was actually before the Administrator of DMRS. *Bauer v. DATCP & DER*, 91-0128-PC, 4/1/92

The decision by the employing agency to refuse the appellant's request to review documents relating to the decision not to select him for a vacant position explicitly

relied upon §230.13 and was considered to have been issued under authority delegated by the Secretary of DER, thereby making it appealable under §230.44(1)(b). Even if it were concluded that the delegated authority exercised by the employing agency was from the Administrator of DMRS, the transaction would be appealable under §230.44(1)(a). *Deppen v. DILHR & DER*, 91-0083-PC, 3/5/92

The language of §230.44(1)(a), Stats., which permits appeals from a "personnel decision under this subchapter made by the administrator" is referring to the Administrator of the Division of Merit Recruitment and selection within the Department of Employment Relations. A decision by an administrator within the Department of Administration denying a salary adjustment and establishing a seniority date was not reviewable under §230.44(1)(a). *Landwehr v. DOA*, 90-0289-PC, 6/12/91

The Commission does not have jurisdiction to review reallocation survey methodology *per se*. *Mincy et al. v. DER*, 90-0229, 0257-PC, 2/21/91; rehearing denied, 3/12/91

The Commission lacks authority to review a decision by the Secretary of DER to deny the appellant's request to convert her position from the classified service to an academic staff position. *Buckley v. DER*, 91-0018-PC, 5/1/91

The Commission's authority under §230.44(1)(b), Stats., over decisions to reallocate positions as part of the classification survey process does not extend to decisions setting the scope of the survey. An appeal of the decision not to review a particular position as part of a classification survey was dismissed where there was no indication that there was an individualized review of the appellant's position relative to the particular duties represented in the survey classifications prior to the reallocation of the positions which were included in the survey. *Herrick v. DER*, 90-0395-PC, 2/8/91

The Commission lacks the authority to review the conduct of DMRS in providing personnel testing services to non-state governmental units under §230.05(8), Stats. *Garvoille v. DMRS*, 90-0379-PC, 1/11/91

Various statements made to the appellant to the effect that her name would have been included on a certification list if a specific person on that list had not been included does not

rise to the level of a personnel action or decision. No personnel transaction took place as a consequence of the statements and the administrator never reissued the certification list. *Morris v. DMRS & DOT*, 90-0232-PC, 11/16/90

Where respondent's brief indicated that the decision to require that candidates for Youth Counselor LTE positions have specified experience or training was made by the appointing authority rather than by DMRS and that the decision was substantive rather than procedural and where the appellant did not contest these statements, the Commission dismissed the appeal for lack of jurisdiction. *Krause v. DHSS & DMRS*, 89-0057-PC, 10/4/89

The Commission concluded that the record was inadequate to determine whether jurisdiction existed. DMRS was added as a party and the respondents were provided an opportunity to raise jurisdictional objections where appellant contested the requirement that candidates for Youth Counselor LTE positions have prior Youth Counselor experience or other specified experience or training. *Krause v. DHSS*, 89-0057-PC, 6/29/89

An agency's decision to fill a vacancy by utilizing a competitive procedure is not reviewable by the Commission. However, the decision of the administrator of DMRS, when reviewing the procedure used by an agency in filling a vacancy, to designate the underlying transaction as a transfer and not a promotion is reviewable under §230.44(1)(a), Stats. DMRS was added as a party. *Meschefske v. DHSS*, 88-0057-PC, 7/13/88

The Commission lacked the authority to review a decision by DMRS establishing the scope of recruitment where DMRS had never been identified as a party and the issue for hearing did not identify any pre-certification decision. *Jensen v. UW-Milwaukee*, 86-0144-PC, 11/4/87

Because the statutory authority for administering the job announcement/oral exam aspects of the recruitment and selection process prior to certification were vested exclusively in the administrator of DMRS pursuant to §230.05(2)(b), Stats., DVA was dismissed as a party to that portion of the appeal. *Royston v. DVA*, 86-0222-PC, 6/24/87

The Commission has authority under §230.44(l)(b), Stats.,

to review a determination of the effective date of a reclassification decision. *Baggott v. DNR & DER*, 87-0012-PC, 4/29/87

The Commission lacks the authority to rule on the question of the constitutionality of the statutes relating to the requirement of Wisconsin residency for civil service employment but may hear those aspects of an appeal relating to an alleged denial of constitutional rights as applied. *Wiars v. DMRS*, 86-0209-PC, 3/4/87

The statutory basis found in H 230.09(2)(a) and 44.(I)(b), Stats., is broad enough to encompass review of a decision, attributable to the respondent, not to further process a reclassification request. To hold otherwise would preclude administrative review of an incorrect decision not to review a reclassification request. *Spilde v. DER*, 86-0040-PC, 1/8/87

The Commission lacks jurisdiction over an appeal by represented employes which alleges that respondent improperly used hiring above the minimum (HAM) rather than raised hiring rate (RHR) when setting the rate of pay for new employes within appellant's classifications, since this subject matter constituted "wages, hours and conditions of employment" as that term was used in §111.93(3), Stats., and therefore the collective bargaining agreement has a superseding effect. This result is not disturbed by the fact that respondent has consistently agreed in other forums that this subject matter is a prohibited subject of bargaining, since subject matter jurisdiction cannot be conferred by waiver, and furthermore, respondent was unsuccessful in the aforesaid contention in the cited arbitrations. *Brehmer v. DER*, 85-0218-PC, 4/4/86; explained in denial of petition for rehearing, 5/23/86

The only aspect of the transfer process that is appealable to the Commission is the administrator's action (or inaction in failing) to authorize the transfer. An appeal of the administrator's decision does not lead to jurisdiction over the transfer itself which is a decision made by the appointing authority. *Witt v. DILHR & DER*, 85-0015-PC, 9/26/85

An alleged failure or refusal by the administrator of DMRS to submit appellant's name, as someone interested in transfer, to an appointing authority pursuant to §ER-Pers.

12.03(3), Wis. Adm. Code, is appealable under §230.44(i)(a), Stats., as a decision of the administrator. *Wing v. DPI & DER*, 85-0013-PC, 9/20/85

The administrator did not make a "personnel decision" relative to appellant's attempted reinstatement that is appealable under §230.44(l)(a), Stats. *Wing v. DER*, 84-0084-PC, 4/3/85

The Commission lacks the authority to rule on the question of the constitutionality of the statutes relating to the requirement of Wisconsin residency for civil service employment. Presumably the Commission could consider questions concerning alleged constitutional violations emanating from the statutes as applied, the determination of which would not involve reaching any conclusions as to the facial constitutional validity of the statutes. *McSweeney v. DOJ & DMRS*, 84-0243-PC, 3/13/85

The Commission lacks jurisdiction to consider the appellants' contention that the existing class specifications should be rewritten to better identify their positions and the particular classifications should be assigned to higher pay ranges. Alleged errors in position standards and pay range assignments are not appealable to the Commission. *Kaminski et al. v. DER*, 84-0124-PC, 12/6/84

Where the appellant had asked the administrator to audit the actions of DHSS in filling a project position with a project appointment, where the administrator had responded by saying that DHSS's decision was "acceptable". and where the administrator's own rules require approval by the administrator for a project appointment, the Commission concluded that it had the authority to review the administrator's decision. *WFT v. DMRS*, 84-0085-PC, 10/10/84

The Commission found jurisdiction under §230.44(l)(d), Stats., over appellant's allegation that DER effectively decertified the appellant by advising an agency to ignore the appellant's name while selecting a candidate from a certification list that included the appellant. *Pflugrad v. DER, DHSS & BVTAE*, 83-0176-PC, 3/29/84

The mere failure of the administrator, DP, to act on a copy of a letter to the Commission, appealing the reassignment of duties to a limited term employe (LTE), does not constitute a "personnel decision of the administrator" cognizable

under §230.44(l)(a), Stats. *Schaeffer et al. v. DOT*, 83-0059-PC, 7/7/83

The Commission has jurisdiction over an appeal of a transfer, to the extent that pursuant to §230.44(l)(a), Stats., it can hear an appeal of a decision of the administrator authorizing the transfer pursuant to §Pers 15.02, Wis. Adm. Code. The action of the appointing authority in deciding to fill the new position by transfer and/or to propose to the administrator that the appellant be transferred into the new position are not actions that are appealable to the Commission. *Ford v. DHSS & DP*, 82-243-PC, 83-0011-PC, 83-0020-PC, 6/9/83

To the extent that seniority, back pay and fringe benefit decisions relating to the accretion of the appellant into state service fall within the scope of §230.15(l), Stats., they are reviewable by the Commission. *Smith v. DILHR & DP*, 81-412-PC, 83-0001-PC, 6/9/83

The Commission has jurisdiction over the decision of the administrator refusing to process the appellant's reclassification request without a position description agreed to by the appellant and his supervisor, but its inquiry on such an appeal must be limited to whether that decision was correct and cannot reach the substantive question of the most proper classification of appellant's position, which the administrator did not reach. *Corning v. DER & DP*, 82-185-PC, 10/27/82

In an appeal involving alleged failure by the appointing authority and the administrator to restore the appellant to his former status following a downward reallocation pursuant to §Pers 5.03(3)(h), Wis. Adm. Code, the matter is cognizable under §230.44(l)(a), Stats., with respect to the administrator, inasmuch as a failure or refusal to act can be considered to be a constructive decision, and §Pers 5.03(3)(h) does not impose the prerequisite that the employe make application for assistance in restoration to a commensurate position. *Wing v. UW & DP*, 79-148, 173-PC, 10/4/82

The Commission has jurisdiction over an appeal of a decision of the administrator pursuant to §Pers 24.06, Wis. Adm. Code, on an alleged violation of the Code of Ethics. *Steinicke v. UW & DP*, 82-76-PC, 9/23/82

As a general matter, the administrator's decisions as to

eligibility for accretion under §230.15(l), Stats., constitute a personnel decision of the administrator. However, the Commission lacks jurisdiction to review a decision by some agency other than DP to require a qualifying examination to be used as a screening device prior to an accretion decision by the administrator, where the administrator's role was limited to supplying the exam and administering and scoring it. Also, the Commission lacks jurisdiction over an alleged failure by the administrator to create an exceptional employment list where the administrator's actual role was limited to determining eligibility of individuals for accretion under §230.15(l), Stats., and it would have been improper for the administrator to have created an additional list of eligibles for accretion beyond those identified by DILHR. Once the accretion process was completed and positions remained vacant, the administrator was effectively preempted from making a decision to create an exceptional employment list due to the decision by DILHR to fill the remaining vacancies by transfer and voluntary demotion rather than by open recruitment. *Smith & Berry v. DILHR & DP*, 81-412,415-PC, 8/5/82

The Commission lacks jurisdiction over an appeal arising from alleged reassignments of duties and responsibilities of appellant's position. The administrator of the Division of Personnel had determined that there had been no changes in the duties and responsibilities that would affect the position's classification and decided that no further action would be taken. The legal basis for the administrator's inquiry was solely in connection with the question of whether the position was correctly classified. Because the appellant sought review of the alleged reassignment of duties and not of the proper classification of her position, the Commission lacked jurisdiction. *Roberts v. DHSS & DP*, 81-44-PC, 7/27/81

The Commission has jurisdiction over a selection process conducted pursuant to §230.21(2), Stats. (critical recruitment) as a decision of the administrator or on a delegated basis pursuant to §230.44(l)(a) or (b), Stats. Furthermore, even though there is no formal evaluation process, there is a "certification" and hence the potential for post-certification jurisdiction pursuant to §230.44(l)(d), Stats. *Anderson v. UW & DP*, 80-318-PC, 7/21/81

The Commission lacks the authority to review a constructive denial of a request to establish a "preventative

mechanism" to ensure that a pay compression between supervisors and the therapists they supervise did not reoccur. *Marshall et al. v. DP & DHSS*, 79-136, 169-PC, 3/6/81

The Commission lacks jurisdiction under §230.44(l)(a) or (b) over an appeal of transactions caused by or affected by changes in the compensation plan that were made by the director prior to the effective date of §230.12, Stats., and were potentially attributable to the administrator, the director's successor. *Lustig et al. v. DILHR et al*, 78-277-PC, etc., 1/12/81

The failure of the administrator to act on or decide a purported "appeal" regarding the alleged removal of duties and responsibilities is not a "personnel decision" of the administrator appealable pursuant to §230.44(l)(a), Stats. *Roberts v. DHSS*, 80-264-PC, 80-282-PC, 11/4/80

Where the administrator reviewed the merits of an agency action at the request of the appellant, the administrator's decision is appealable pursuant to §230.44(l)(a), Stats., as against the claim that the initial appeal to the administrator was misdirected. *Kaeske v. DHSS & DP*, 78-18-PC, 11/22/79

The authority to void a Career Executive register is vested in the director, bureau of personnel (now administrator) and hence the Commission has jurisdiction of an appeal from such an action. *Greene v. DOA & DP*, 76-264, 10/27/78

103.19 Determination of legality of rule

The Commission has the authority to consider the validity of an administrative rule, providing for expanded certification when necessary to achieve a balanced work force, within the context of an appeal filed under §230.44(l)(d), Stats., which provides for appeal of a "personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal," citing *Sewerage Commission of Milwaukee v. DNR*, 102 Wis. 2d 613 (1981). *Paul v. DHSS & DMRS*, 82-PC-ER-69, 82-156-PC, 10/11/84

The Commission has the implied authority to conclude that

an administrative rule is in conflict with a statute. *Paul v. DHSS*, 81-323-PC, 10/19/83

The Commission has the authority to determine whether a rule is in conflict with a statute where the Commission is reviewing a determination by an appointing authority that is based upon administrative rules regarding the accrual of vacation and sick time during an absence due to a hazardous duty injury. *Loeffler v. DHSS*, 81-376-PC, 12/17/81

A code of ethics constituting an administrative rule but not having been developed and promulgated pursuant to the rulemaking procedures of ch. 227, Stats., is invalid and void. *Kraus & Kraus v. DHSS*, 78-268-PC, 79-63-PC, 12/4/79

103.20 Post-certification actions under §230.44(1)(d), Stats., including selection decisions

Section 230.44(1)(d), Stats., does not extend to every personnel action taken after an employe has been hired. *Arenz et al. v. DOT & DER*, 98-0073-PC, etc., 2/10/99

The decision to reallocate appellants' positions to a particular classification level rather than to another classification level was a decision made by the secretary of the Department of Employment Relations (or delegated by the secretary) pursuant to §230.09(2)(a), Stats., rather than a decision by an appointing authority that relates to the hiring process. Appellants' motion to supplement the issue for hearing to include a review of the reallocation decisions on an "abuse of discretion" standard was denied. *Arenz et al. v. DOT & DER*, 98-0073-PC, etc., 2/10/99

Decisions made regarding the scope of posting for a vacancy are made prior to certification and are not cognizable under §230.44(1)(d), Stats. *Ernst v. DATCP*, 97-0152-PC, 7/1/98

The Commission's authority under §230.44(1)(d), Stats., to hear appeals of appointment decisions extends only to decisions made by the hiring authority. *Morvak v. DOT & DMRS*, 97-0020-PC, 6/19/97

The reassignment of appellant, a supervisor, from the security unit at the University of Wisconsin Hospital and

Clinics to the Oakhill Correctional Institution is not a personnel action "after certification which is related to the hiring process." *Asche v. DOC*, 90-0159-PC, 5/21/97

Actions of the appellant's employing agency to deny appellant's request for an exemption to the agency's employe fraternization policy and to remove appellant's name from an inmate's visitation list had no relationship to the process of hiring the appellant but were solely related to appellant's contacts with a particular inmate during the period of time appellant was employed by respondent. *Greuel v. DOC*, 96-0135-PC, 1/16/97

In reviewing the respondent's decision to move the appellant from one position to another, with jurisdiction under §230.44(1)(d), Stats., the Commission could not address the management decisions that preceded the personnel transaction, i.e. the decision to create the position. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

The Commission has jurisdiction to hear appellant's claim that he was underpaid upon his return to classified service when he exercised his restoration rights under §230.33(1), Stats. *Dusso v. DER & DRL*, 94-0490-PC, 12/22/94

The Commission lacks jurisdiction over an appeal which contests the denial of training. Completion of the training was a prerequisite for eligibility for promotional interviews. *Lentz v. UW & DER*, 93-0217-PC, 9/9/94

A request for waiver of final 2 months of 12-month probationary period, allegations relating to accuracy of probationary performance evaluations, and decision not to provide an exit interview were not "related to the hiring process" within the meaning of §230.44(1)(d), Stats. *Duran v. DOC*, 94-0035-PC, 6/21/94

The assignment of an employe from one position in one class to another position in the same class is a transfer, not a demotion. Although it lacked subject matter jurisdiction under §230.44(1)(c), the Commission had jurisdiction over the matter under §230.44(1)(d) to the extent the appeal challenged the transfer as being illegal or an abuse of discretion. *Kelley v. DILHR*, 93-0208-PC, 2/23/94

The phrase "after certification" in §230.44(1)(d), refers to a point in the hiring process and also delineates the DMRS administrator's legal authority in the selection process from

that of the appointing authority, citing *Wing v. DER*, 84-0084-PC, 4/3/85, and *Seep v. DHSS*, 83-0032-PC, 93-0017-PC-ER, 10/10/84. *Kelley v. DILHR*, 93-0208-PC, 2/23/94

The Commission's jurisdiction over an issue relating to the impact of ongoing collective bargaining on wages to be paid in the future (after possible reinstatement) is superseded by action of §111.93(3), Stats. However, pay upon reinstatement is subject to a certain amount of discretion on the part of the appointing authority. The decision is not governed by the applicable collective bargaining agreement and, as a result, the Commission's jurisdiction pursuant to §230.44(1)(d), Stats., is not precluded by operation of §111.93(3), Stats. *Cross-Madsen et al. v. UW & DER* 92-0828-PC, 7/30/93

The Commission has jurisdiction over an appeal from an alleged adverse employment reference from appellant's supervisor given for a vacant position within the same agency. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 11/19/92; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/19/96

There was no jurisdictional basis on which the Commission could review the appellant's pay level during the period of an alleged acting assignment where there was no certification associated with filling the acting assignment. *Bauer v. DATCP & DER*, 91-0128-PC, 4/1/92

The hiring process which resulted in appellant's appointment to a vacant position cannot serve as a basis for review of the appellant's rate of pay while serving in his previous position in another agency. *Cestkowski v. DOC*, 90-0403-PC, 2/8/91

Not all decisions "related to the hiring process" are rendered prior to or contemporaneous with the appointment decision and the failure of the appointing authority to render related decisions at that time should not operate to deprive an employe of his or her right of appeal. *Coulter v. DOC*, 90-0355-PC, 1/24/91

Where appellant alleged that duties were added to a position "after it was posted in house, after the test and after the interview list was received," the action of adding duties was not related to the hiring process where there was no

allegation that the action was taken in order to avoid having to consider one or more candidates. The appeal was dismissed. *Metzig v. DHSS*, 90-0383-PC, 1/24/91

The Commission's jurisdiction under §230.44(1)(d), Stats., does not extend to pre-certification decisions made by the appointing authority. Therefore, the Commission lacked jurisdiction over a decision to exclude from the selection process those persons who sought to demote or transfer into a position where that decision was made one month before the certification list was prepared. *Schmidt v. DHSS*, 89-0079-PC, 4/5/90

When all of the other elements of §230.44(1)(d), Stats., are present, a decision to interview only off the established register which had the effect of denying the appellant's transfer request, is an appealable transaction. Because there was a dispute of fact as to whether the decision involved occurred before or after certification, the respondent's motion to dismiss was denied without prejudice so that an evidentiary hearing could be scheduled, if necessary, for the resolution of the factual dispute. *Schmidt v. DHSS*, 88-0131-PC, 89-0079-PC, 11/15/89

Appellant's allegation that respondent's action in allowing another employe to transfer from one position to another violated the provisions of the applicable collective bargaining agreement was precluded by §111.93(3), Stats. However, the appellant was permitted to pursue her allegation that the respondent abused its discretion in failing to have informed the appellant of the possibility of transfer at the time she was being considered to fill the position from which the other employe later transferred. *Cordle v. DATCP*, 89-0037-PC, 8/24/89

The actions of granting an employe a certain status which would make the employe eligible for consideration in filling a position are actions which are simultaneous to, or which precede, the certification stage of any appointment process and are not post-certification actions. Prior to its layoff analysis, the appointing authority had tacitly decided that the appellant was not eligible to even be considered for appointment to another position. In addition, the appellant failed to identify any vacancies for which the respondent failed to consider her. *Jensen v. UW*, 88-0077-PC, 12/14/88

Even though the appellant was technically employed by respondent for one day before a decision was reached that he did not meet the physical exam requirements, the decision in question was in the nature of a nonselection decision rather than a decision to terminate for poor performance. Therefore, the jurisdictional basis falls within §230.44(1)(d), Stats., and the case may be distinguished from *Board of Regents v. Wis. Pers. Comm.*, 103 Wis. 2d 545, 309 N.W. 2d 366 (Ct. of App., 1981). Respondent made no argument that the appellant was terminated while on probation nor was there any documentary evidence that the appellant received notice as would have been required under §ER-Pers 13.08(2), Wis. Adm. Code. *Lauri v. DHSS*, 87-0175-PC, 11/3/88

The Commission has jurisdiction over respondent's decision establishing appellant's rate of pay upon appointment to a vacancy. However, jurisdiction did not extend to the action setting appellant's rate of pay upon completion of her probationary period. *Meschefske v. DHSS*, 88-0057-PC, 7/13/88

Respondent's decision as to whether to fill a position by transfer or promotion, and in the latter case whether to request in-service competition or open recruitment is a direct, undelegated power which is not appealable *per se* to the Commission. However, to the extent the appellant was contending that the decision to request further certification after appellant's initial certification and interview was a means to the end of not appointing him to the position, the action of failing or refusing to hire the appellant falls within §230.44(1)(d), Stats., and evidence tending to show respondent requested an additional, or a particular type of certification for the purpose of undermining appellant's chances for the appointment apparently would be relevant to the issue of whether the decision not to appoint the appellant was illegal or an abuse of discretion. *Ransom v. UW-Milwaukee*, 87-0125-PC, 7/13/88

Evidence relating to the decisions to request or use the register from a Fiscal Supervisor 1 position to fill an Administrative Assistant 5 - Supervisor (Finance Manager) position where the evidence is relevant to the issue raised by an appeal under §230.44(l)(d), Stats., would be admissible in the hearing of that appeal, even though a direct appeal of the decision to use the FS 1 register was untimely. *Allen v. DHSS & DMRS*, 88-0020-PC, 6/29/88

A limited term appointment is not appealable under §230.44(l)(d), Stats. *Barker v. UW*, 88-0031-PC, 4/20/88

The Commission had jurisdiction over an appeal of a non-selection decision brought by a person whose name was not on the "official" list of certified candidates, where the respondent had nevertheless considered appellant for the appointment based on his inclusion on an "unofficial" list. Respondent's Bureau of Personnel had sanctioned the use of such "unofficial" lists in the past. Even absent certification of the appellant for the position, as long as he was considered for the position after the generation of a certification list, the Commission has jurisdiction based on its rulings in *Lundeen v. DOA*, 79-208-PC, 6/3/81, and *Seep v. DHSS*, 83-0032-PC, 7/7/83. *Pfeifer v. DILHR*, 86-0149-PC-ER, 86-0201-PC, 12/17/87

The Commission lacked the authority to review a decision by DMRS establishing the scope of recruitment where DMRS had never been identified as a party and the issue for hearing did not identify any pre-certification decision. *Jensen v. UW-Milwaukee*, 86-0144-PC, 11/4/87

The Commission has jurisdiction over an appeal of the appointing authority's decision fixing the appellant's starting rate of pay, citing *Taddey v. DHSS*, 86-0156-PC (1987), despite respondent's contentions that administrative rule required it to use the minimum hourly rate for the particular pay range and that the minimum hourly rate was not determined by the respondent. *Siebers v. DHSS*, 87-0028-PC, 9/10/87

DMRS was dismissed as a party in an appeal of a selection/appointment decision given the language of §230.06(l)(b), Stats., which grants the appointing authority exclusive authority as to such decisions. *Royston v. DVA & DMRS*, 86-0222-PC, 6/24/87

The Commission has jurisdiction to review the decision establishing appellant's starting salary. *Taddey v. DHSS*, 86-0156-PC, 6/11/87

Respondent's denial of a step increase upon completion of the appellant's non-original probation is not a personnel action "related to the hiring process", citing *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis 2d 545 (Ct. of App., 1981). *Ruck v. DNR*, 86-0007-PC,

12/29/86

Where respondent DPI received notice of appellant's interest in a vacant position after the agency had received a certification for it but before an appointment had been made., appellant's appeal met the jurisdictional requirements of §230.44(i)(d), Stats., and the case was not dismissed upon DPI's assertion that it was clear that its exercise of discretion was not abusive, particularly where not all the relevant facts were undisputed. *Wing v. DPI & DER*, 85-0013-PC, 9/20/85

The phrase "after certification" in §230.44(l)(d), Stats., refers to a certain segment of the appointment process and does not require an actual certification. The intent is to permit, inter alia, appeals of all appointment decisions rather than just those where an actual certification by the administrator preceded the selection decision. The Commission distinguished or overruled a number of related prior decisions, and concluded that it had the authority to review the appointing authority's decision not to select the appellant from among a list of persons seeking transfer, reinstatement and demotion to a vacant position. No examination had been given so no eligibles had been certified. *Wing v. DER*, 84-0084-PC, 4/3/85

The Commission lacks jurisdiction to review a decision setting appellant's salary upon a voluntary demotion. *McCallum v. DOT*, 85-0036-PC, 6/18/85

The Commission has the authority to consider the validity of an administrative rule, providing for expanded certification when necessary to achieve a balanced work force, within the context of an appeal filed under §230.44(l)(d), Stats., which provides for appeal of a 11personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal," citing *Sewerage Commission of Milwaukee v. DNR*, 102 Wis. 2d 613 (1981). *Paul v. DHSS & DMRS*, 82-PC-ER-69, 82-156-PC, 10/11/84

A decision by the appointing authority on reinstatement is a "personnel action", is "related to the hiring process in the classified it service, and is "after certification" in the sense that certification refers to a point in the staffing process. In addition, the denial of appellant's reinstatement occurred after the certification for the position in question and the

statute does not require that the *appellant* be actually certified. *Seep v. DHSS*, 83-0032-PC & 83-0017-PC-ER, 10/10/84; affirmed in part, reversed in part by Racine County Circuit Court, *Seep v. State Pers. Comm.*, 84-CV-1705, 84-CV-1920, 6/20/85; affirmed in part, reversed in part by Court of Appeals District 11, 140 Wis. 2d 31, 5/6/87; [Note: the effect of the Court of Appeals decision was to affirm the Commission's decision in all respects]

The Commission has the authority to review respondent's failure or refusal to reinstate the appellant following her request of April 14, 1983, where respondent's first response thereto was to notify the appellant that she could take the exam required of all applicants. *Frank v. DHSS*, 83-0173-PC, 9/28/84

The Commission found jurisdiction under §230.44(l)(d), Stats., over appellant's allegation that DER effectively decertified the appellant by advising an agency to ignore the appellant's name while selecting a candidate from a certification list that included the appellant. *Pflugrad v. DER, DHSS & BVTAE*, 83-0176-PC, 3/29/84

The Commission lacks jurisdiction over appellant's allegation that respondent BVTAE had "continually sabotaged the [appellant's] efforts to seek employment in the public and private sectors" where there was no indication that the events complained of constituted "personnel actions" as required by §230.44(i)(d), Stats., rather than merely responses to requests for recommendation or for summaries of the appellant's employment record. *Pflugrad v. DER, DHSS & BVTAE*, 83-0176-PC, 3/29/84

The Commission has jurisdiction pursuant to §230.44(i)(d), Stats. over the denial of a reinstatement following a certification, as against the argument that a statutory prerequisite is that the appellant have been among those certified. *Seep v. DHSS*, 83-0032-PC, 7/7/83

The Commission lacks jurisdiction over an appeal from a denial of permissive reinstatement where there was no certification of a list of eligibles for the vacancy in question. The fact that the appellant was at some previous time hired to fill a different position, but at the same classification, does not mean that the appellant was certified

for the specific vacancy that was the subject of the appeal. *Scurlock v. DOJ & DILHR*, 82-8-PC, 7/26/82

The Commission lacks subject matter jurisdiction over the denial of an application for a health insurance policy, as against the argument that this was cognizable as a personnel action after certification which is "related" to the hiring process in the classified service (§230.44(l)(d), Stats.) The Commission determined that the decision to hire the appellant and the decision to deny her application for medical insurance were not "related". *Cleasby v. DOT*, 82-227-PC, 12/29/82

The Commission lacks jurisdiction over an appeal from a decision to reduce the appellant's rate of pay upon inter-departmental transfer under §230.44(l)(d), Stats., where no names were certified for the position. *Starczynski & Mayfield v. DOA*, 81-275,276-PC, 12/3/81 (Note: the precedential value of this decision was limited by *Seep v. DHSS*, 88-0032-PC (7/7/83), above.)

The Commission lacks jurisdiction over an appeal contesting both the decision to fill a position by transfer rather than promotion and the timing of the effective date of the transaction, as these decisions are within the purview of the appointing authority and hence not appealable pursuant to §§230.44(l)(a) or (b), Stats., and are not appealable under §230.44(l)(d), Stats., because they are not a personnel action after *certification* which is related to the hiring process in the classified service. *Miller v. DHSS*, 81-137-PC, 10/2/81

The Commission has jurisdiction over a selection process conducted pursuant to §230.21(2), Stats. (critical recruitment) as a decision of the administrator or on a delegated basis pursuant to §230.44(l)(a) or (b), Stats. (1981) Furthermore, even though there is no formal evaluation process, there is a "certification" and hence the potential for post-certification jurisdiction pursuant to §230.44(i)(d), Stats. *Anderson v. UW & DP*, 80-318-PC, 7/21/81

The Commission lacks jurisdiction under §230.44(l)(d), Stats., to decide whether the failure to extend a temporary intergovernmental interchange agreement (§230.047, Stats.) was an illegal act or an abuse of discretion. *Anderson v. DILHR*, 79-320-PC, 79-PC-ER-173, 7/2/81; affirmed and

remanded for additional findings on issue of mitigation of damages by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm.*, 81-CV-4078, 6/7/82

The reference in §230.44(l)(d), Stats., to an action *"after certification"* does not require that the appellant have been certified as a precondition to jurisdiction. *Lundeen v. DOA*, 79-208-PC, 6/3/81

Where the appellant requested and was eligible for reinstatement, the respondent's election not to reinstate him to a vacant position was equivalent to a denial of reinstatement or appointment occurring after certification, when the actual appointment was made. *Lundeen v. DOA*, 79-208-PC, 6/3/81

Where the appellant was certified for a position and subsequently was offered, through oversight, an appointment to a different position which was filled by a transfer and for which there never was a certification, the Commission lacked jurisdiction over the appeal relating to the second position, since there was no post-certification personnel transaction pursuant to §230.44(l)(d), Stats. *Ziemke v. DHSS*, 80-390-PC, 4/23/81

The Commission lacks jurisdiction under §230.44(l)(d), Stats., of an appeal concerning employes being required to serve essentially continual probationary periods due to successive promotions, because the appeal did not and could not allege illegal action or an abuse of discretion since the probationary periods complained of are mandated by statute. *Anderson v. DATCP*, 80-175-PC, 4/9/81

The Commission has jurisdiction pursuant to §230.44(l)(d), Stats., over an appeal alleging that the appointing authority failed to notify the administrator pursuant to §230.25(2), Stats., of the failure to fill a position after certification, as this is a post-certification personnel action relating to the hiring process. *Parisi v. UW*, 80-289-PC, 1/13/81

There is no statutory basis for a direct appeal to the Commission of the refusal of an agency to hire someone as a limited term employe, as §230.44(l)(d), Stats., does not apply because there is no certification for a limited term vacancy. *Kawczynski v. DOT*, 80-181-PC, 11/4/80

The determination of salary and the assignment of duties following a transfer are not "personnel actions after

certification… related to the hiring process in the classified service" and hence the Commission lacks jurisdiction pursuant to §230.44(l)(d), Stats., over such a transaction. *Jacobson v. LIRC & DILHR*, 78-192-PC, 9/12/80

The Commission lacks jurisdiction over an appeal of actions taken by the personnel board in conducting a selection process pursuant to §15.173(l)(b), Stats. for the unclassified position of administrator of the Division of Personnel, as against the argument that there is *implied* power to hear the appeal under §230.44(l)(a), Stats. *Knoll v. Pers. Bd.*, 79-103-PC, 10/12/79

The denial of permissive reinstatement is cognizable under §230.44(i)(d), Stats. *Cihlar v. DHSS*, 79-106-PC, 8/30/79

The Commission lacks jurisdiction over an appeal of an appointment to a position in the unclassified service; §230.44(l)(d), Stats., only applies to transactions in the classified service. *Wing v. UW*, 78-203-PC, 7/14/79

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 103 through 103.07

[Previous material] [Next material]

103.01 Probationary employes

The Commission lacks jurisdiction to hear appeals of probationary terminations, notwithstanding the provisions of Article IV, §10 of the AFSCME contract which was approved by the legislature, since there is a conflict between the contract and various provisions of the civil service code, and JOCER never introduced bills pursuant to §111.92(l), Stats., modifying the conflicting provisions of Ch. 230, Stats. Section 230.44(l)(d), Stats., does not provide an alternative basis for jurisdiction because the termination of probationary employment is not related to the "hiring process" in the classified service. *Board of Regents v. Wis. Pers. Comm.*, 103 Wis. 2d 545, 309 N.W.2d 366 (Court of Appeals, 1981)

The Personnel Board lacks jurisdiction to hear an appeal by an employe who is dismissed while serving probation after a promotion, because the employe lacks permanent status in class and the dismissal may be without just cause. The dismissal does not affect the permanent status in class previously acquired within the department and the employe must be reinstated to the former position or a similar position within the department. *DHSS v. State Pers. Bd. (Ferguson)*, 84 Wis.2d 675, 267 N.W. 2d 644 (1978)

Even if the signature on the letter terminating appellant's

employment was not the warden's and even if the warden was not aware the termination letter had been given to the appellant until more than 6 months after her date of hire, the termination letter hand-delivered to the appellant during her probationary period constituted the requisite dismissal notice under §ER-MRS 13.08(2), Wis. Adm. Code., because it was undisputed that the warden had directed that the termination of appellant's employment proceed unless information came up at the intent to terminate meeting that would substantially affect the termination decision and no such information was disclosed at the meeting. The appeal was dismissed for lack of subject matter jurisdiction. *Morschauser v. DOC*, 98-0175-PC, 3/10/99

Actual delivery of a dismissal notice is not required in order for the action to take effect. *Morschauser v. DOC*, 98-0175-PC, 3/10/99

The Commission lacks jurisdiction over an appeal from a decision to terminate employment while appellant served a permissive probationary period upon transfer. Even though the appellant held permanent status in class while in her previous employing unit, she no longer maintained that status when she was placed on probation upon her transfer to another employing unit in the same department. *Wales v. DOC*, 98-0020-PC, 4/23/98

Where respondent decided to terminate appellant's employment on August 23rd for failure to meet probationary standards on a day when appellant was off work due to illness, respondent's personnel manager left a message on appellant's answering machine at 4:00 p.m. on August 23rd informing him that such a decision had been made and asked that appellant return the call as soon as possible, and where the personnel manager unsuccessfully tried to telephone appellant at home several times on Sunday, August 24th, a day when appellant was not scheduled to work and the last day of his probationary period, and appellant did not return the call until about 2:30 on August 25th after which respondent provided appellant with written notice of the termination, appellant did not successfully complete his probationary period and, accordingly, did not attain permanent status in class. Respondent provided appellant with oral notice of the termination on August 23rd and could have provided written notice of the termination on the 23rd but for appellant's own actions of being absent

and failing to reply to the telephone messages of respondent's personnel director. Under these circumstances, even though the respondent did not provide advance written notice under §ER-MRS 13.09, and the fact that appellant did not receive written notice "immediately" as required under §ER-MRS 13.08(2), did not operate to defeat the conclusion that appellant did not successfully complete his probationary period. Because the Commission lacks the authority to hear an appeal arising from the termination of probationary employment, the appeal was dismissed for lack of subject matter jurisdiction. *Fischer v. DOC*, 96-0131-PC, 11/22/96

The Commission has jurisdiction to consider whether just cause existed for the discharge of a state employe who has achieved permanent status in class, under §230.44(1)(c), Stats., but this statutory provision does not apply to a state employe who is discharged while on probation. Appellant, who had been employed as an Officer 1, failed to establish that she had passed probation which extended six months from the completion of the preservice training program for correctional officers. *Wilson v. DOC*, 94-0065-PC, 7/7/94

A union contract provision which provided for discretionary review by the Commission of an appeal filed by a probationary employe of a termination decision does not supply the Commission with jurisdiction over such appeals. *Wilson v. DOC*, 94-0065-PC, 7/7/94

Where the respondent was found to have failed to restore the appellant to appellant's "former position or a similar position" pursuant to §ER-Pers 14.03(1), Wis. Adm. Code, after having removed or discharged him while serving a probationary period in his promotional position, respondent's action was subject to review under §230.44(1)(c), Stats. *Stevens v. DNR*, 92-0691-PC, 5/27/94

An employe who once held permanent status in class as a Correctional Officer 2 cannot be said to have permanent status in class during a subsequent probationary period imposed upon his reinstatement to another Correctional Officer 2 position. The Commission lacks jurisdiction over an appeal from the decision to terminate the appellant's employment while he was serving a probationary period upon reinstatement, as he did not have permanent status in class. *Schmidt v. DOC*, 91-0253-PC, 2/21/92

The Commission had jurisdiction where respondent had terminated appellant's employment as a MIS 4-Sup. while the appellant was serving a promotional probationary period, suspended him for 30 days without pay, reduced his rate of pay and demoted him to a position in a classification with a lower pay range. The Commission found the predisciplinary process to have been inadequate and rejected the respondent's contention that the appellant was not entitled to be restored to his MIS 4-Sup. position. While the respondent could have simply terminated the appellant's probationary employment as a MIS 4-Sup. and restored him to a position in his previous MIS 3 classification without a right to an appeal under §230.44(1)(c), once the respondent went further, the Commission had jurisdiction based on the language of §ER-Pers 14.03. *Arneson v. UW*, 90-0184-PC, 2/6/92

The Commission lacks jurisdiction over an appeal filed by a represented employe who transferred under the terms of a collective bargaining agreement and was then terminated from his new position during permissive probation. *Harshman v. UW*, 91-0019-PC, 4/18/91

A probationary employe who is serving a probationary period as a result of a promotion within the same agency as the employe's previous position may appeal a suspension, but not a demotion, pursuant to the specific language of §ER-Pers 14.03, Wis. Adm. Code. *Ketterhagen v. UW*, 90-0323-PC, 11/21/90

The language of §ER-Pers 14.03(1), Wis. Adm. Code, which refers to an employe who is removed from his/her position during a promotional probationary period and who is not restored to their "former position or a similar position . . . shall be subject to §230.44(1)(c), Stats.," does not extend an appeal right to an employe whose former position has been abolished and where no appropriate vacant position exists for transfer. The reference in the rule to §230.44(1)(c), Stats., appears to apply to those circumstances where a promotional probationary employe engages in conduct of such a nature that the appointing authority decides to separate the employe from state service. *Jensen v. UW*, 88-0077-PC, 12/14/88

Because the appellant had attained permanent status in her previous position as an Offset Press Operator 2, any review opportunities she might have pursuant to §ER-Pers 15.055,

Wis. Adm. Code, upon removal during probation from her subsequent position of Program Assistant 1, would be established by the collective bargaining agreement rather than in §230.44(1)(c), Stats. *Jensen v. UW*, 88-0077-PC, 12/14/88

Even though the appellant was technically employed by respondent for one day before a decision was reached that he did not meet the physical exam requirements, the decision in question was in the nature of a nonselection decision rather than a decision to terminate for poor performance. Therefore, the jurisdictional basis falls within §230.44(1)(d), Stats., and the case may be distinguished from *Board of Regents v. Wis. Pers. Comm.*, 103 Wis. 2d 545, 309 N.W. 2d 366 (Ct. of App., 1981). Respondent made no argument that the appellant was terminated while on probation nor was there any documentary evidence that the appellant received notice as would have been required under §ER-Pers 13.08(2), Wis. Adm. Code. *Lauri v. DHSS*, 87-0175-PC, 11/3/88

Since on the basis of undisputed material facts the appellant was required to have served a 12 month probationary period, he did not have permanent status in class at the time of his termination which was less than 12 months after he was reinstated into the position in question. The Commission lacked subject matter jurisdiction. *Janeck v. UW*, 88-0035-PC, 8/2/88

Where less than two weeks into her probationary period as a Word Processing Operator 2, the respondent DOR terminated appellant's employment, presumably due to DMRS's admittedly illegal certification of the appellant for the position in question, the operable decision was still the probationary termination decision and the Commission lacks jurisdiction over that decision. The Commission did go on to review the certification decision by DMRS. *Carey v. DMRS & DOR*, 85-0179-PC, 3/13/86

Regardless of whether an employe is in trainee status, on original probation, or on promotional probation, be or she does not have permanent status in class in the classification from which he or she is terminated, and therefore, there can be no jurisdiction for an appeal pursuant to §230.44(l)(c), Stats. *Phelps v. DHSS*, 85-0193-PC, 12/19/85

Even though language in the contract permitted the appeal

of probationary terminations has remained in the contracts since *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 54 (1981), the absence of any specific companion legislation to these agreements modifying the conflicting provisions in §230.44(l)(c), Stats., makes that language ineffective. *Phelps v. DHSS*, 85-0193-PC, 12/19/85

The Commission lacks jurisdiction over an appeal from a decision to reduce the appellant's rate of pay upon interdepartmental transfer under §230.44(l)(c), Stats., where the reduction occurred during the probationary period. *Starczynski & Mayfield v. DOA*, 81-275, 276-PC, 12/3/81

103.02 Resignations

The Commission's jurisdiction pursuant to §230.44(l)(c), Stats., over an appeal of an action taken under §230.34(i)(am), Stats. (job abandonment), is superseded by the operation of §111.93(3), Stats., as to a represented employe within a certified bargaining unit. *Matulle v. State Pers. Comm.*, Winnebago County Circuit Court, 82-CV-207, 11/19/82

The Commission has jurisdiction over involuntary resignations under §230.34(1)(am), Stats., reaffirming its decision in *Petrus v. DHSS*, 81-86-PC, 12/3/81. *Smith v. DHSS*, 88-0063-PC, 2/9/89

In the absence of any allegation of coercion, the Commission lacks jurisdiction over an appeal from a resignation. *Stauffacher v. DILHR*, 81-403-PC, 12/16/81

The Commission has jurisdiction over an appeal from a decision by the appointing authority to treat an employe as having resigned his/her position due to job abandonment, i.e., an involuntary resignation under §230.34(l)(am). *Petrus v. DHSS*, 81-86-PC, 12/3/81

The Commission lacks jurisdiction to review a resignation and to grant the appellant, retroactively, a nine-month leave of absence where there has been no allegation of a constructive discharge. *Kemp v. DHSS*, 81-370-PC, 11/19/81

The Commission lacks jurisdiction over an appeal from a resignation that was not the result of coercion or duress and was a voluntary decision. Although the Commission has jurisdiction over appeals of coerced resignations, where the resignation was submitted by the appellant but was found unacceptable by the respondent due to the proposed effective date, and more than two weeks later the respondent demanded a new letter of resignation with an agreed upon effective date and appellant went home, typed the letter and returned to the office to turn it in and then waited nearly two weeks before attempting to withdraw the resignation, no coercion was shown. *Lindas v. DHSS*, 80-231-PC, 10/2/81

A coerced resignation is cognizable as a constructive discharge pursuant to §230.44(l)(c), Stats. *Evrard v. DNR*, 79-251-PC, 2/19/80

In order to have a coerced resignation, there must be an actual overriding of the employe's judgment and will, and this normally would not be found where the employe merely is given the option of resigning or being discharged. *Evrard v. DNR*, 79-251-PC, 2/19/80

Where the respondent agency informed the appellant employe with no prior warning that he might be charged criminally, that if he did not sign a letter of resignation that had been prepared, he would be terminated, that when he asked for some time to think over his decision, he was informed that he must make an immediate decision, and where he was in an overwrought mental and physical condition, a coerced resignation was found.

***Evrard v. DNR*, 79-251-PC, 2/19/80**

103.03 Reclassifications/reallocations (see also 103.11 and 103.18)

The Commission lacked jurisdiction to enforce a settlement agreement entered into between the respondent and the former position incumbent (the agreement setting 1979 as the effective date for reallocation of the position) where the case at bar was brought by the current position incumbent and the Commission had found that irrespective of any settlement agreement, the correct effective date for reallocating the former incumbent's position was in 1983.

The court held that the settlement agreement did not have a *res judicata* effect on the current incumbent's appeal. *DER v. Personnel Commission (Klepinger),* Dane County Circuit Court, 85-CV-3022, 12/27/85

Where the parties to a classification appeal filed in 1995 agreed to settlement in 1996 which called for a re-review of the underlying decision by respondent, dismissal of 1995 case upon completion of the re-review regardless of the outcome and waiver of appellant's right to appeal the results of the re-review, appellant was barred from appealing the re-review decision issued in 1998. It would have been unjust to permit appellant to avoid his obligations under the agreement after respondents had met theirs. Although two years might seem like a long time to complete the re-review, the agreement by the parties did not specify a deadline and two years was not so unreasonable as to justify voiding the agreement. *Schaefer v. DNR & DER,* 95-0179-PC, 6/3/98

The exempt or non-exempt status of appellant's position under the Fair Labor Standards Act is not a subject that the Commission has statutory authority to review. The class specifications did not indicate which class levels were considered exempt under the FLSA. *Moss v. DER,* 97-0062-PC, 2/11/98

The Commission has no authority to impose upon respondents a specific process to follow in reviewing reclassification requests. *Harder v. DNR & DER,* 95-0181-PC, 8/5/96

The Commission's appeal authority covers specific classification decisions based on existing class specifications. The Commission has no authority to review DER's decisions to create or change the classifications themselves or to assign or reassign classifications to pay ranges, or to fail to act in this regard. *Day et al. & Jerdee v. DILHR [DWD] & DER,* 95-0195, 0201-PC, 9/17/96

The Commission lacks authority to determine whether a classification includes all positions which are comparable in duties and responsibilities or whether respondent acted within its statutory authority in establishing a one person classification. *Morrissey v. DER,* 95-0097-PC, 9/14/95

A timely appeal from a 1994 decision granting reclassification of appellant's position does not provide a

basis for reviewing a 1990 reallocation decision that was the subject of a re-review in 1992. *Milchesky v. DOT & DER*, 94-0546-PC, 5/15/95

The Commission lacks jurisdiction over a dispute as to whether the pay calculations made as a result of a reclassification and regrade were correct. *Heath & Mork v. DOC & DER*, 94-0550-PC, 12/22/94

Where respondents disputed the Commission's jurisdiction because, as of the commencement of the hearing, respondents had not issued a written denial of appellant's reclassification request, the deficiency was cured where respondents' counsel stated that had the final written decision been issued, appellant's reclassification request would have been denied based upon the applicable classification specifications. *Alme v. DNR & DER*, 93-0129-PC, 9/21/94

A decision to assign a classification to a pay range in one pay schedule rather than to a pay range in a second pay schedule does not fall within the scope of §230.09(2)(a), so it is not reviewable by the Commission. *Johnson v. DER*, 94-0064-PC, 7/25/94

In an appeal of the effective date of a reclassification, the Commission has jurisdiction to determine whether the respondent's policy specifying the minimum qualifications necessary for reclass comported with the class specifications and, if so, whether respondents applied the policy to the appellant's position in a correct manner. *Heath & Mork v. DOC & DER*, 93-0143-PC, 6/23/94

In a reallocation appeal, the appellant must identify an alternative classification which s/he feels better describes the position than the class level assigned by respondent. The Commission dismissed an appeal for lack of subject matter jurisdiction where the appellant agreed that he was reallocated to the most appropriate classification, but felt the class specifications were flawed. *Kiefer v. DER*, 92-0634-PC, 5/2/94

Respondents' 1993 letters to appellants, which 1) were written decisions issued in response to requests by the appellants, 2) reviewed the classification levels of the appellants' positions, and 3) affirmed the correctness of the original reallocation decisions that had been made effective in 1990 were appealable pursuant to §230.44(1)(b), Stats.

***Vesperman et al. v. DOT & DER*, 93-0101-PC, etc., 2/15/94**

The Commission has subject matter jurisdiction over an appeal of a decision by respondent DER to reallocate a position from Accountant-Advanced to Accountant-Advanced-Management, notwithstanding respondent's contention that the WERC has the ultimate responsibility to determine whether a position falls within the scope of "management" as defined by §111.81(13), Stats., for collective bargaining purposes. *Paynter v. DER*, 93-0120-PC, 12/13/93

The Commission has subject matter jurisdiction to review the initial classification given a new position, as an allocation decision under s. 230.09, Stats., even though the nature of the decision means the position has no incumbent at the time the decision is made. *Holton v. DER & DILHR*, 92-0717-PC, 11/29/93

An appointment letter which lists the class level of the position, does not affect the employe's rights, under Ch. 230, Stats., to appeal the initial allocation of the position *Holton v. DER & DILHR*, 92-0717-PC, 11/29/93

The Commission's authority to hear appeals pursuant to §230.44(1)(b), Stats., of DER's decisions pursuant to §230.09(2)(a) to reallocate positions does not include the authority to hear appeals of DER's decisions to conduct surveys and to establish, modify, and abolish classifications or to assign and reassign classifications to pay ranges. The Commission is limited to a determination of whether DER's decision that a position is better described by a particular classification in the position standards, as opposed to another classification (or classifications), was correct. *Pope v. DER*, 92-0131-PC, 8/23/93

Even though there was no formal written request for reclassification from the appellant, there was a fair inference to be drawn that the appellant was alleging the respondents' conduct caused him to reasonably believe the respondents were carrying out a reclassification review of his position so that he did not file a formal reclass request on his own. The limited topic for hearing would be whether a reclassification of the appellant's position was constructively denied. *Bauer v. DATCP & DER*, 91-0128-PC, 4/1/92

The Commission does not have jurisdiction to review reallocation survey methodology *per se*. *Mincy et al. v. DER*, 90-0229, 0257-PC, 2/21/91; rehearing denied, 3/12/91

The Commission's authority under §230.44(1)(b), Stats., over decisions to reallocate positions as part of the classification survey process does not extend to decisions setting the scope of the survey. An appeal of the decision not to review a particular position as part of a classification survey was dismissed where there was no indication that there was an individualized review of the appellant's position relative to the particular duties represented in the survey classifications prior to the reallocation of the positions which were included in the survey. *Herrick v. DER*, 90-0395-PC, 2/8/91

The Commission lacks jurisdiction over decisions regarding salary adjustments made in connection with reallocations. *Garr et al. v. DER*, 90-0163-PC, etc., 1/11/91

The Commission lacks the authority to consider which of two areas of specialization within one classification level best described the appellant's position. *Kuschel v. DER*, 90-0190-PC, 11/16/90

Where the respondent UW lacked delegated authority from DER to have changed the classification of appellant's position to the PA Supervisor series, the UW's failure to have recommended a supervisory classification was not an appealable action. Where DER had not issued a decision with respect to the PA Supervisor series, the Commission limited its post-hearing order to classifications for which the UW had delegated authority. *Cernohous v. UW & DER*, 89-0131-PC, 9/13/90

Where the appellant alleged that she had frequently requested and discussed reclassification with her superiors prior to filing a formal request for reclassification, those allegations of inappropriate conduct by her superiors fell within the scope of review of the decision establishing the effective date for reclassification of her position. *Vollmer v. UW & DER*, 89-0056-PC, 4/12/90

The decision as to effective date is more than merely a procedural adjunct of the underlying classification decision and is in effect a decision as to the appropriate classification for a certain period in time. The issue of effective date is

part of the reclassification decision under §230.09(2)(a), Stats., and is appealable under §230.44(1)(b), Stats., reaffirming *Baggott v. DNR & DER*, 87-0012-PC, 4/29/87. *Popp v. DER*, 88-0002-PC, 3/8/89

The Commission has authority over an appeal involving an unsatisfactory performance evaluation which was used to deny reclassification in a progression series. To the extent the evaluation figured in the denial of reclassification, it is reviewable as part of that denial. *Cohn v. DHSS & DER*, 88-0028-PC, 6/29/88

Where appellant participated in a successful group appeal of a reallocation and then retired after the entry of the Commission decision but before the Commission's decision ultimately was upheld in judicial review proceedings and effectuated, and respondent failed to include him in the group of employes who received reallocations as a result of the ultimate implementation of the Commission's decision, the failure to have granted reclassification of the appellant's position with an effective date of September 20, 1985 (as had been granted in a settlement agreement with other members of the original group) was an appealable action under §230.44(l)(b), Stats., and DER is a necessary party. *Thompson v. DOT & DER*, 88-0037-PC, 6/29/88

Where it was not possible, on the record before it, to determine how the appellant had raised an additional classification for consideration during the position audit and whether the personnel analyst had indicated he would consider the additional classification, the Commission directed the parties to proceed to hearing on an issue broad enough to allow a determination of this preliminary question in order not to unnecessarily delay a hearing on the merits. *Kleinert v. DER*, 87-0206-PC, 2/24/88

Even though employes may use the term "reclassification" loosely in a way that includes the legal definition of both "reclassification" and 11regrade", the record indicated that the appellant had requested reclassification for her position and regrade for herself. Therefore, the Commission established an issue for hearing that included a subissue relating to regrade (versus opening the position for competition). *Stratil v. DILHR & DER*, 87-0210-PC, 2/24/88

The Commission lacked jurisdiction over an appeal relating

to a requested reclassification where there was no final decision by DER as to the reclassification request. The appeal arose out of what might be construed as a constructive denial by DOR of appellant's reclass request. Before the Commission could determine whether a constructive denial had occurred, DOR formally denied the appellant's request and advised the appellant that the next level of review was before DER. Appellant then sought review by DER. That review was pending at the time DOR moved to dismiss the appeal with the Commission. *Seefeldt v. DOR & DER*, 87-0143-PC, 12/17/87

An appeal of a reclassification date was properly before the Commission where it was timely as to respondent UW-M's April 10, 1987 decision and the requested date of July 1, 1985 did not precede the date that UW-M became responsible, as the appointing authority, for appellant's position. The fact that the appellant sought an effective date in 1985 did not make the appeal of the 1987 decision untimely. *Warda v. UW-Milwaukee & DER*, 87-0071-PC, 11/4/87

The Commission has authority under §230.44(l)(b), Stats., to review a determination of the effective date of a reclassification decision. *Baggott v. DNR & DER*, 87-0012-PC, 4/29/87

Even though the appellant never filed a formal reclassification request, his position was within a progression series where the mere passage of time (absent disciplinary action) would generate a reclassification. Therefore, where someone cloaked with authority intervened in the automatic reclassification process and actually or effectively denied the reclassification that had been due to occur, the Commission has authority to review that denial. *Pero v. DHSS & DER*, 83-0235-PC, 3/29/84

The Commission lacks the authority to consider alternative classifications other than those expressly or implicitly encompassed by the respondent's reclassification decision where the Commission is reviewing that decision. *Kennedy et al. v. DP*, 81-180,etc-PC, 1/6/84

The responsibilities referred to in §230.09(2)(c), Stats., (when an agency anticipates changes in program or organization affecting assignment of duties or responsibilities) are the responsibility of the appointing

authority rather than DER and, therefore, are not a proper issue in a reallocation appeal. *Reding v. DER*, 83-0149-PC, 11/9/83

The Commission has jurisdiction to review respondents' decision to classify, at the Job Service Specialist I level, permanent positions created within DILHR. *Smith & Berry v. DILHR & DP*, 81-412,415-PC, 8/5/82

Where an appeal was filed as a result of the respondents' decision not to process certain reclassification requests and where the net effect of a prehearing conference agreement was for the respondent to alter its prior position and to conduct classification reviews of the positions involved, the jurisdictional basis for the original appeal was removed and that appeal was, therefore, dismissed. *Barnett et al. v. DOT & DP*, 81-366-PC, 7/27/82

When the agency acted to deny a reclassification on a delegated basis and it later was determined that there in fact had been no delegation, the Commission lacked jurisdiction pursuant to §230.44(l)(b), Stats., to hear an appeal from that denial. *Schiffer v. DOT & DP*, 81-4, 342-PC, 2/18/82

103.04 Salary range of a classification

The Commission lacks jurisdiction over an appeal relating to the level of pay for those persons who transferred from one position to another prior to January 3, 1988 and were in probationary status on that date (due to their transfer) when phase 2 of the Comparable Worth pay adjustments was implemented. *Gundlach v. DER*, 88-0016-PC, 6/29/88

Where there had been no legislation modifying the specific language in §230.44(i)(b), Stats., to include pay range assignments, the language in Article 10 of the WSEU contract permitting such appeals was ineffectual. *Gundlach v. DER*, 88-0016-PC, 6/29/88

The Commission lacks jurisdiction to consider the appellant's contentions that the existing class specifications should be rewritten to better identify their positions and the particular classifications should be assigned to higher pay ranges. Alleged errors in position standards and pay range assignments are not appealable to the Commission.

***Kaminski et al. v. DER*, 84-0124-PC, 12/6/84**

The Commission lacks authority to create a new classification, assign the classification to a particular pay range and then allocate the appellants' positions to the new classification. These are all decisions of the secretary of DER and are not among those decisions specifically made appealable to the Commission. *Smetana et al. v. DER*, 84-0099, etc.-PC, 8/31/84

The Commission lacks jurisdiction over an appeal from a decision to assign a classification to a particular pay range. *Preder v. DER*, 84-0112-PC, 8/21/84

The Commission lacked jurisdiction under §230.44(l)(a), Stats., to review an appeal of the assignment of a classification series to a salary scale, given the role of the Personnel Board in approving the pay scale at issue. *WFT v. DP*, 79-306-PC, 4/2/82

The Commission lacks jurisdiction over an appeal of the assignment of the Library Associate series to a particular salary scale, as given the role of the Personnel Board in this transaction there is no decision of the administrator that is appealable under §230.44(l)(a), Stats.

***WFT v. DP*, 79-306-PC, 4/2/82**

103.05 Union contracts and bargaining agreements -- effect of §111.93(3), Stats.

The Commission lacks the authority to review a decision denying hazardous employment injury benefits under §230.36(4), Stats., where appellant was a classified employe in a bargaining unit with a collective bargaining agreement in effect. Appellant alleged her union representatives refused to process her grievance relating to the denial. The Commission's authority was superseded by the collective bargaining agreement pursuant to §111.93(3), Stats. *Jones v. DOC*, 98-0069-PC, 11/18/98

The Commission's jurisdiction for constructive discharge claims under §230.44(1)(c), is superseded by the collective bargaining agreement for positions covered by a collective bargaining agreement. *Krueger v. DHSS*, 92-0068-PC-ER, 7/23/96

An employe has a right to obtain review by the Commission of a suspension imposed while the employe was in an unrepresented position, even though the conduct that resulted in the discipline occurred while the employe was in a represented position. *Krasny v. DOC*, 94-0036-PC, 11/17/95

The Commission's authority to review the approval by the Administrator of the Division of Merit Recruitment and Selection of an appointing authority's request to establish or revise the employing unit structure of the agency was not superseded by the applicable collective bargaining agreement, where a bargaining agreement provision related to notice of and opportunity for input into the determination to establish or revise employment units and the corresponding statutory provision related to the determination itself. *WPEC v. DMRS*, 95-0107-PC, 9/29/95

Any potential jurisdiction which the Commission might have under ch. 230, Stats, over the pay calculations made as a result of a reclassification and regrade would be superseded by the bargaining agreement. *Heath & Mork v. DOC & DER*, 94-0550-PC, 12/22/94

The provision in the bargaining agreement purporting to give the Commission the discretion to appoint a hearing officer to hear "appeals from actions taken by the Employer under Section 111.91(2)(b) 1 and 2, Wis. Stats.," does not provide the Commission with that authority, citing *Board of Regents v. Wis. Pers. Comm.*, 103 Wis. 2d 545, 309 N.W.2d 366 (Ct. App. 1981), and *Wilson v. DOC*, 94-0065-PC, 7/8/94. *Lentz v. UW & DER*, 93-0217-PC, 9/9/94

Since the applicable collective bargaining agreement specifically deals with the issue of transfers within and between employing units which was the subject of the appeal, the Commission's jurisdiction was superseded by §111.93(3), Stats. *Gandt v. DOC*, 93-0170-PC, 1/11/94

The Commission's jurisdiction over an issue relating to the impact of ongoing collective bargaining on wages to be paid in the future (after possible reinstatement) is superseded by action of §111.93(3), Stats. However, pay upon reinstatement is subject to a certain amount of discretion on the part of the appointing authority. The decision is not governed by the applicable collective bargaining agreement

and, as a result, the Commission's jurisdiction pursuant to §230.44(1)(d), Stats., is not precluded by operation of §111.93(3), Stats. *Cross-Madsen et al. v. UW & DER* 92-0828-PC, 7/30/93

The rate of pay on demotion is not a prohibited subject of bargaining so any jurisdiction by the Commission is superseded by operation of §111.93(3), Stats. *Ballweg v. DHSS*, 92-0378-PC, 11/13/92

The Commission's jurisdiction over hazardous employment injury benefits for an employe within a bargaining unit is superseded by the operation of §111.93(3). *Bell v. DOT*, 91-0098-PC, 10/17/91

The Commission's jurisdiction under §230.44(1)(d) over a decision not to select the appellant for a vacant position was not superseded where the contract provided that if the vacancy could not be filled by transfer, it could be filled "in accordance with the Wisconsin Statutes" and where there had been no applicants for transfer. The appellant had been ineligible for transfer because she was still serving a probationary period in the same classification as the vacancy but she was considered for hire as one of seven certified promotional candidates. There was no provision in the bargaining agreement governing the exercise of the appointing authority's discretionary hiring authority subsequent to the exercise of its discretion to consider the appellant's candidacy for the hire. *Jorgensen v. DOT*, 90-0298-PC, 6/12/91

The Commission lacks jurisdiction over an appeal filed by a represented employe who transferred under the terms of a collective bargaining agreement and was then terminated from his new position during permissive probation. *Harshman v. UW*, 91-0019-PC, 4/18/91

It is those provisions which are actually bargained and actually stated in a collective bargaining agreement which are given superseding effect, citing *Taddey v. DHSS*, 86-0156-PC, 6/11/87. *Coulter v. DOC*, 90-0355-PC, 1/24/91

Appellant's allegation that respondent's action in allowing another employe to transfer from one position to another violated the provisions of the applicable collective bargaining agreement was precluded by §111.93(3), Stats. However, the appellant was permitted to pursue her

allegation that the respondent abused its discretion in failing to have informed the appellant of the possibility of transfer at the time she was being considered to fill the position from which the other employe later transferred. *Cordle v. DATCP*, 89-0037-PC, 8/24/89

The language of §111.93(3), Stats., acts to supersede Commission jurisdiction over an appeal of the denial of hazardous employment injury benefits under §230.36(4), Stats., by a represented employe, citing *Wendt v. DHSS*, 81-110-PC, 12/3/81. *Lynch v. DHSS*, 88-0041-PC, 8/10/88

While the Commission cannot explicitly award back pay in a reclassification/reallocation appeal, an appeal filed by a represented employe relating to the effective date for a reallocation decision is not barred by §111.93(3), Stats. *Popp v. DER*, 88-0002-PC, 5/12/88

The Commission lacked jurisdiction over an appeal by a represented employe of a suspension. The contract, which otherwise would have expired, had been extended by mutual agreement during the pendency of contract negotiations and employes covered by the extended contract could still file grievances under the contact, even though the grievance might not move through the various steps until after negotiations ended. *Mugerauer v. DHSS*, 87-0122-PC, 9/10/87

The phrase "wages, fringe benefits, hours and conditions of employment" used in §111.93(3), Stats., is construed to mean mandatory and permissive subjects of bargaining, but not prohibited subjects of bargaining. The Commission's decision in Jones v. DNR, 78-PC-ER-12, 11/8/79, was specifically overruled. *Taddey v. DHSS*, 86-0156-PC, 6/11/87

Pay schedules that were attached to the collective bargaining agreement specifically "for informational purposes only" and were not a subject of negotiations by the parties to the contract, were not a mandatory subject of bargaining and, if a permissive subject, the parties to the negotiations did not bargain and reach agreement on it. Therefore, the provisions of the agreement did not supersede the statutes granting the Commission the authority to review respondent's decision establishing appellant's starting salary. *Taddey v. DHSS*, 86-0156-PC, 6/11/87

The Commission lacks jurisdiction over an appeal by

represented employes which alleges that respondent improperly used hiring above the minimum (HAM) rather than raised hiring rate (RHR) when setting the rate of pay for new employes within appellant's classifications, since this subject matter constituted "wages, hours and conditions of employment" as that term was used in §111.93(3), Stats., and therefore the collective bargaining agreement has a superseding effect. This result is not disturbed by the fact that respondent has consistently agreed in other forums that this subject matter is a prohibited subject of bargaining, since subject matter jurisdiction cannot be conferred by waiver, and furthermore, respondent was unsuccessful in the aforesaid contention in the cited arbitrations. *Brehmer v. DER*, 85-0218-PC, 4/4/86; explained in denial of petition for rehearing, 5/23/86

The Commission lacks subject matter jurisdiction under §230.45(l)(c), Stats., over an appeal of a non-contractual grievance concerning certain temporary layoffs and the decision not to restore certain fringe benefits lost as a result of the layoffs to employes who, like appellant, were represented at the time of the layoffs but nonrepresented at the time the fringe benefits were restored. While the Commission held the subject matter was included within the meaning of the term "condition of employment" as used in §230.450)(c), Stats., read in connection with §ER 46.03(l), Wis. Adm. Code, it held that the subject matter of the grievance was not within the control of the employing agency (DHSS) as defined in §ER 46.020), Wis. Adm. Code, since authority for the decision was vested in DER. *Schmaltz v. DHSS & DER*, 85-0067-PC, 2/6/86 and 7/25/86

The Commission lacks the authority to hear an appeal of an alleged constructive discharge where the employe's position was part of a bargaining unit, even though the employer had returned the employe's contractual grievance at the third step stating that because the employe had resigned he was no longer an employe and could not utilize the contractual grievance procedure. *Wolfe v. UW System (Stevens Point)*, 85-0049-PC, 9/26/85

So long as the subject matter of the appeal relates to a bargainable subject, the fact that it is not arbitrable under the contract is not material in the context of §111.93(3), Stats., which applies "whether or not the matters contained in such statutes are set forth in such labor agreement." *Wolfe v. UW System (Stevens Point)*, 85-0049-PC, 9/26/85

The Commission lacks jurisdiction over a decision establishing appellant's salary following a demotion in lieu of layoff where appellant is within a bargaining unit. *Linde v. DER*, 84-0050-PC, 8/31/84

The Commission lacks jurisdiction over a decision establishing initial pay upon reinstatement where the appellant's position is within a certified bargaining unit with a labor agreement in effect. *Larson v. UW*, 84-0017-PC, 7/19/84

The Commission lacks jurisdiction over an appeal of respondent's refusal to reinstate the appellant, where appellant would only be eligible for reinstatement if her separation was without delinquency or misconduct, where appellant had grieved her discharge to (but not beyond) the third step in the contractual grievance procedure and where the Commission lacks jurisdiction over bargainable subjects such as a review of appellant's discharge, pursuant to §111.93(3), Stats. *Schmit v. DHSS*, 83-0234-PC, 4/25/84

The Commission lacks jurisdiction over an appeal from an involuntary demotion where the employe is within a collective bargaining unit. *Swenson v. DATCP*, 83-0152-PC, 1/4/84; (petition for rehearing denied, 2/17/84)

The Commission lacks jurisdiction to hear an appeal of a salary level established upon appellant's voluntary demotion and reinstatement (resulting in a reduction of appellant's salary) where appellant's positions were covered by a collective bargaining agreement, regardless of whether or not the terms of the agreement were broad enough to permit arbitration of the decision in question. *Zeier & Fogelberg v. DHSS*, 83-0057, 0067-PC, 9/16/83

The Commission has jurisdiction pursuant to §230.44(l)(d), Stats., over the denial of a reinstatement following a certification, as against the argument that its jurisdiction is superseded by §111.93(3), Stats. *Seep v. DHSS*, 83-0032-PC, 7/7/83

No jurisdiction exists over an appeal alleging that a represented employe was being paid less than others in the same classification, inasmuch as the only potential basis for an appeal would be §230.44(l)(c), Stats., as an alleged reduction in pay, and any possible jurisdiction would be

superseded by the operation of §111.93(3), Stats. *Tedford v. DHSS*, 81-455-PC, 3/4/82

The Commission lacks jurisdiction over an appeal of a voluntary demotion of an employe in a certified bargaining unit because pursuant to §§230.34(l)(ar) and 111.930), Stats., the collective bargaining agreement has a superseding effect. *Rasmussen v. DHSS*, 81-434-PC, 2/9/82

Although in a general sense the Commission has jurisdiction over involuntary resignations under §230.34(l)(am), Stats., as constructive discharges, this jurisdiction is superseded as to represented employes by the operation of §111.93(3), Stats. (see also §§111.92(2)(c), 111.90(3), and 111.91(l)(a), Stats.) notwithstanding that the appellant was terminated under the provisions of a statute that was effective after the negotiation of the current labor agreement, and the agreement did not contain a provision on abandonment/resignations as set forth in §230.340)(am), Stats., as this factor is immaterial under the language of §111.93(3), Stats. *Matulle v. UW*, 81-433-PC, 1/27/82; affirmed by Winnebago County Circuit Court, *Matulle v. State Pers. Comm.*, 82-CV-207, 11/19/82

The Commission lacks jurisdiction over an appeal from the denial of hazardous duty benefits under §230.36, Stats., where the appellant's position was covered by a labor agreement that specifically provides both that the appeal of denials of such benefits are subject to the contract grievance mechanism and that the §230.36(4) appeal mechanism does not apply. *Wendt v. DHSS*, 81-110-PC, 12/3/81

The Commission lacks jurisdiction to review the determination of a beginning salary following promotion where appellant's position is covered by a labor agreement. *Leick v. DOT*, 81-305-PC, 11/19/81

The Commission lacks jurisdiction to review the salary level established upon demotion in lieu of layoff where the appellant's position is covered by a labor agreement. §111.93(3), Stats. *Welch v. DHSS*, 81-272-PC, 10/30/81

The Commission lacks jurisdiction over a question of the initial starting salary of an employe in a certified bargaining unit because of the superseding effect of §111.93(3), Stats., citing a September 6, 1978 Attorney General's opinion to the effect that the subjects of raised hiring rates and hiring above the minimum are not prohibited subjects of

bargaining. *Dobbins v. DHSS*, 81-91-PC, 6/3/81

The establishment of priorities of pay adjustments resulting from personnel transactions such as reallocations, completion of probation, and promotions involves a prohibited subject of bargaining. Therefore, the Commission's jurisdiction is not superseded by the contract. *Stellick v. DOR & DP*, 79-211-PC, 4/10/81

The Commission lacks jurisdiction over an appeal regarding step increases following probationary periods inasmuch as the subject matter is a subject of bargaining and any possible jurisdictional basis is superseded by the operation of §111.93(3), Stats. *Anderson v. DATCP*, 80-175-PC, 4/9/81

Appeals whose subject matter is a prohibited subject of bargaining and is identified as such in the collective bargaining agreement, do not fall within the heading of "wages, hours and conditions of employment," and §111.93(3), Stats., does not act to supersede the Commission's jurisdiction. *Lustig et al. v. DILHR, et al*, 78-277-PC, etc., 1/12/81

The Commission lacks jurisdiction over an appeal from non-selection to a vacant position where if the appellant were appointed to the vacant position, the transaction would have been a transfer and subject to the contract. *Rasmussen v. DHSS*, 79-353-PC, 8/19/80

The Commission lacks jurisdiction over the appeal of a discharged represented employe, pursuant to §111.93(3), Stats. *Walsh v. UW*, 80-109-PC, 7/28/80

The Commission lacks authority to hear an appeal from a layoff decision where the appellant's position is covered by a labor agreement, even though the union had declined to represent the appellant in arbitration proceedings. *Lott v. DHSS & DP*, 79-160-PC, 3/24/80

An appeal of a denial of a request for leave of absence without pay is not cognizable under §§230.36(4) and 230.45(l)(d), Stats., because it involves a represented employe and a matter that is subject to bargaining and hence the Commission's jurisdiction is superseded by §111.93(3), Stats. *Preston v. DOT*, 79-374-PC, 3/24/80

The Commission lacks jurisdiction over an appeal as to the

rate of pay received by the appellant prior to her reclassification, where §111.91(1), Stats., specifically includes "salary adjustments upon temporary assignment of employes to duties of a higher classification" as being subject to bargaining and where the appellant was a member of a bargaining unit. *Sopa v. DILHR*, 79-36-PC, 2/15/80

Commission has no jurisdiction in light of provisions of §§111.91(2) (b)l and 111.93(3), Stats., over an agreement between the union and an agency to limit the scope of competition for vacancies in the classified service on a campus. *Kienbaum v. UW*, 79-213-PC, 12/13/79

The Commission lacks jurisdiction over an appeal, by an employe covered by the WSEU collective bargaining agreement, of non-payment of additional salary following appointment in an acting capacity to a supervisory position, inasmuch as there is no statutory provision for direct appeal of this subject matter and also, jurisdiction is precluded by the effect of §§111.91(l) and 111.93(3), Stats. *Reissman v. DILHR*, 78-78-PC, 2/28/79

103.06 Bargaining unit placement

The Commission lacks jurisdiction to review a decision to place a certain classification within one bargaining unit rather than another. *Harpster v. DER*, 84-0121-PC, 8/31/84

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 103.21 through 130

[Previous material] [Next material]

103.21(1) No jurisdiction

The Commission lacks the authority to review a decision denying hazardous employment injury benefits under §230.36(4), Stats., where appellant was a classified employe in a bargaining unit with a collective bargaining agreement in effect. Appellant alleged her union representatives refused to process her grievance relating to the denial. The Commission's authority was superseded by the collective bargaining agreement pursuant to §111.93(3), Stats. *Jones v. DOC*, 98-0069-PC, 11/18/98

The Commission lacks jurisdiction under §230.44(1)(g)2., regarding the information respondent allegedly provided to complainant when she chose the type of leave to take for a period of absence from her employment. The alleged conduct was not among those specific personnel actions made appealable in §230.44(1)(g)2. *Ellis v. UWHCA*, 98-0052-PC, 8/12/98

Decisions made regarding the scope of posting for a vacancy are made prior to certification and are not cognizable under §230.44(1)(d), Stats. *Ernst v. DATCP*, 97-0152-PC, 7/1/98

A constructive demotion does not exist where there has been a "temporary" change in duties at a lower level from a classification standpoint for a period of five months. It was

undisputed that appellant was reassigned pending an investigation and that his reassigned duties were below the level of duties he had performed in his permanent position. However, appellant retained his classification and all related benefits during the "temporary" reassignment. The Commission concluded it lacked jurisdiction over the appeal under §230.44(1)(c). *Stacy v. DOC*, 97-0098-PC, 2/19/98; affirmed by Pierce County Circuit Court, *Stacy v. Wis. Pers. Comm.*, 98-CV-0053, 7/9/98

Pursuant to §230.44(1)(e), Stats., the Commission lacks jurisdiction over discretionary performance awards. *Angha v. DHFS*, 97-0135-PC, 1/14/98

The Commission lacked jurisdiction to enforce a settlement agreement entered into between the respondent and the former position incumbent (the agreement setting 1979 as the effective date for reallocation of the position) where the case at bar was brought by the current position incumbent and the Commission had found that irrespective of any settlement agreement, the correct effective date for reallocating the former incumbent's position was in 1983. The court held that the settlement agreement did not have a res judicata effect on the current incumbent's appeal. *DER v. Pers. Comm. (Klepinger)*, Dane County Circuit Court, 85-CV-3022, 12/27/85

The Commission lacks jurisdiction to hear an appeal relating to a letter placing appellant "on notice that any reoccurrence of . . . problematic behavior will result in the implementation of progressive discipline" where there was no "demotion, layoff, suspension, discharge or reduction in base pay" pursuant to §230.44(1)(c), Stats., nor did appellant proceed through the first three steps of the non-contractual grievance procedure, distinguishing *Basinas v. State*, 104 Wis. 2d 539, 312 N.W.2d 483 (1981). *Klemmer v. DHFS*, 97-0034-PC, 7/2/97

The denial of the use of sick leave benefits and resultant action of treating the absence as unexcused is not a disciplinary action covered by §230.44(1)(c), Stats. However, to the extent the absence was one of the bases of a suspension that was properly appealed to the Commission, evidence relating to the unexcused absence would be relevant. *Kanitz v. UW*, 97-0019-PC, 5/21/97

Section 230.44(4)(c), Stats., does not give the Commission

the authority to enforce its own orders. *Pearson v. UW-Madison*, 84-0219-PC, 9/16/85; affirmed by Dane County Circuit Court, *Pearson v. UW & Wis. Pers. Comm.*, 85-CV-5312, 6/25/86; affirmed by Court of Appeals District IV, 86-1449, 3/5/87

The Commission lacks jurisdiction to decide whether respondent had improperly calculated appellant's rate of pay for the period before his position was reclassified, even though the respondent had specifically acceded to consideration of the issue at hearing. A decision to change an employe's rate of pay is not among those personnel actions listed in §230.44(1), Stats., that are appealable, where there is no reduction in base pay for reasons of discipline and the pay rate decision is not part of the initial hiring process. *Steber v. DHSS & DER*, 96-0002-PC, 6/25/96

None of the statutory provisions which serve as the basis on which the Commission may exercise jurisdiction encompass an allegation of "racketeering." *Balele v. DILHR et al.*, 95-0063-PC-ER, 10/16/95

The decision as to whether or not a position should be included in the protective occupation status under the State's retirement program, ch. 40, Wis. Stats., is outside of the Commission's jurisdiction. *Cox v. DER*, 92-0806-PC, 11/3/94

The Commission lacks jurisdiction over the creation of a civil service position. *ACE & Davies v. DMRS*, 94-0060-PC, *ACE & Davies v. DOA & DMRS*, 94-0069-PC, 10/24/94

The Commission lacks jurisdiction over an appeal which contests the denial of training. Completion of the training was a prerequisite for eligibility for promotional interviews. *Lentz v. UW & DER*, 93-0217-PC, 9/9/94

The decision to remove the appellant's responsibilities as chairperson of the Division of Sciences and Mathematics at the University of Wisconsin-Superior was not reviewable as an appeal, because the appellant was employed in a faculty position rather than in the classified service. *Nelson v. UW*, 94-0282-PC, 10/24/94

A decision to assign a classification to a pay range in one pay schedule rather than to a pay range in a second pay

schedule does not fall within the scope of §230.09(2)(a), so it is not reviewable by the Commission. *Johnson v. DER*, 94-0064-PC, 7/25/94

The assignment of an employe from one position in one class to another position in the same class is a transfer, not a demotion. Although it lacked subject matter jurisdiction under §230.44(1)(c), the Commission had jurisdiction over the matter under §230.44(1)(d) to the extent the appeal challenged the transfer as being illegal or an abuse of discretion. *Kelley v. DILHR*, 93-0208-PC, 2/23/94

Petitioner's handicap discrimination charge and discharge appeal were barred by exclusivity provision of Worker's Compensation Act (WCA), where he had pursued a WCA claim for work-place injuries which prevented him from returning to work subsequent to the injuries and which resulted in his discharge. *Powers v. UW*, 92-0746-PC, 92-0183-PC-ER, 6/25/93

Where appellants had not alleged any actual or threatened injury by the Commission's action or inaction, they did not have a right to a hearing under §227.42, Stats. *ACE et al. v. DHSS et al.*, 92-0238-PC, 3/29/93

Respondent's reassignment/transfer of appellant constituted a management right pursuant to §ER 46.04(2), Wis. Adm. Code, and hence was non-grievable under the noncontractual grievance procedure. However, since appellant alleged that respondent improperly failed to handle the transaction in the context of a layoff, this provided a basis for jurisdiction under §230.44(1)(c), Stats. *Ramsden v. DHSS*, 92-0826-PC, 2/25/93

The fact that the employer has not formally denominated a personnel transaction as a disciplinary action does not mean that under certain circumstances it cannot be cognizable as a constructive disciplinary action under §230.44(1)(c). *Davis v. ECB*, 91-0214-PC, 5/14/92; explained further in interim decision, 6/21/94

There was no jurisdictional basis on which the Commission could review the appellant's pay level during the period of an alleged acting assignment where there was no certification associated with filling the acting assignment. *Bauer v. DATCP & DER*, 91-0128-PC, 4/1/92

The Commission lacked jurisdiction over an agency's

decision to request removal of the appellant's name from a certification. *Chadwick v. DMRS & DHSS*, 91-0177-PC, 10/21/91

The Commission lacks jurisdiction over decisions regarding salary adjustments made in connection with reallocations. *Garr et al. v. DER*, 90-0163-PC, etc., 1/11/91

The Commission was without authority to resolve complainant's assertions that a decision by respondent to deny him compensation for attending his own deposition violated the Fair Labor Standards Act or would constitute an improper disciplinary action. However, the Commission did construe both the Commission's rules and ch. 804, Stats., as not entitling complainant to compensation during his deposition. *Holubowicz v. DOC*, 90-0048, 0079-PC-ER, 8/22/90

The Commission lacks jurisdiction over an appeal from the failure to make an "accommodation" as required by §230.37(2), Stats. To the extent it was an appeal of a discharge decision, the Commission's jurisdiction was superseded by operation of §111.93(3), Stats. *Keul v. DHSS*, 87-0052-PC-ER, 6/1/90

The Commission lacks the authority to review the imposition of a suspension with pay where there was no allegation that the suspension caused the appellant to lose any overtime pay or any pay increase to which he otherwise would have been entitled. *Passer v. DHSS*, 90-0003-PC, 5/16/90

The Commission lacked the authority to grant a request filed in 1989 to reopen an appeal which was dismissed with prejudice pursuant to a settlement agreement on November 18, 1987, or to open a new appeal arising from the alleged breach of the settlement agreement. *Krueger v. DHSS*, 89-0070-PC, 1/10/90

The Commission lacks jurisdiction over a decision denying the appellant's application for a salary add-on. *Marquardt v. DHSS & DER*, 89-0106-PC, 10/4/89

The Commission lacks jurisdiction over an appeal of a decision not to award compensation add-ons to appellant's position or an appeal of a tacit decision not to conduct a classification survey of the appellant's position. *Olson v. DHSS*, 88-0087-PC, 12/5/88

An agency's decision to fill a vacancy by utilizing a competitive procedure is not reviewable by the Commission. However, the decision of the administrator of DMRS, when reviewing the procedure used by an agency in filling a vacancy, to designate the underlying transaction as a transfer and not a promotion is reviewable under §230.44(1)(a), Stats. DMRS was added as a party. *Meschefske v. DHSS*, 88-0057-PC, 7/13/88

Respondent's decision as to whether to fill a position by transfer or promotion, and in the latter case whether to request in-service competition or open recruitment is a direct, undelegated power which is not appealable *per se* to the Commission. However, to the extent the appellant was contending that the decision to request further certification after appellant's initial certification and interview was a means to the end of not appointing him to the position, the action of failing or refusing to hire the appellant falls within §230.44(1)(d), Stats., and evidence tending to show respondent requested an additional, or a particular type of certification for the purpose of undermining appellant's chances for the appointment apparently would be relevant to the issue of whether the decision not to appoint the appellant was illegal or an abuse of discretion. *Ransom v. UW*, 87-0125-PC, 7/13/88

The Commission lacks jurisdiction over an appeal from a decision not to reinstate prorated fringe benefits (sick leave, vacation, length of service payments) to the appellants after their layoff. The layoff was a five day mandatory layoff for all union employes. The union and the state subsequently reached an agreement to restore the benefits lost during the layoff period, but appellants had changed positions and were unrepresented at the time the agreement became effective. *Buechner & Koberle v. DER & UW*, 85-0089-PC, 11/22/85, reversing an interim decision issued 9/13/85

The only aspect of the transfer process that is appealable to the Commission is the administrator's action (or inaction in failing) to authorize the transfer. An appeal of the administrator's decision does not lead to jurisdiction over the transfer itself which is a decision made by the appointing authority. *Witt v. DILHR & DER*, 85-0015-PC, 9/26/85

A refusal by an appointing authority to permit a transfer into a position has no appealable elements because it does

not involve even a theoretical exercise of power by the administrator. *Witt v. DILHR & DER*, 85-0015-PC, 9/26/85

There is no statutory provision for a direct appeal to the Commission of the denial of an acting assignment and therefore, the Commission lacks jurisdiction for that claim. *Witt v. DILHR & DER*, 85-0015-PC, 9/26/85

The Commission lacks jurisdiction to review a decision setting appellant's salary upon a voluntary demotion. *McCallum v. DOT*, 85-0036-PC, 6/18/85

The Commission lacks the authority to rule on the question of the constitutionality of the statutes relating to the requirement of Wisconsin residency for civil service employment. Presumably the Commission could consider questions concerning alleged constitutional violations emanating from the statutes as applied, the determination of which would not involve reaching any conclusions as to the facial constitutional validity of the statutes. *McSweeney v. DOJ & DMRS*, 84-0243-PC, 3/13/85

The Commission lacks jurisdiction to review an allegation that an appointing authority violated the Administrative Code by failing to seek and obtain approval from the administrator of DMRS for extending appellant's acting assignment beyond the 45 day and six-month periods established in those rules. *Hagman v. DNR*, 84-0194-PC, 1/30/85

The Commission lacks the authority to preside over "actions" brought under §230.41, Stats. Actions under that section are to be filed in circuit court. *Hagman v. DNR*, 84-0194-PC, 1/30/85

The Commission lacks the authority to review a decision to change an employe's overtime status. *Tiser v. DER*, 84-0160-PC, 9/28/84

The Commission lacks jurisdiction over an appeal of respondent's refusal to reinstate the appellant, where appellant would only be eligible for reinstatement if her separation was without delinquency or misconduct, where appellant had grieved the discharge to (but not beyond) the third step in the contractual grievance procedure, and where the Commission lacks jurisdiction over bargainable subjects such as a review of appellant's discharge, pursuant to §111.93(3). *Schmit v. DHSS*, 83-0234-PC, 4/25/84

The responsibilities referred to in §230.09(2)(c), Stats., (when an agency anticipates changes in program or organization affecting assignment of duties or responsibilities) are the responsibility of the appointing authority rather than DER and, therefore, are not a proper issue in a reallocation appeal. *Reding v. DER*, 83-0149-PC, 11/9/83

There is no basis for jurisdiction over an appeal of the assignment of duties to a limited term employe (LTE). *Schaeffer et al. v. DOT*, 83-0059-PC, 7/7/83

The Commission has jurisdiction over an appeal of a transfer, to the extent that pursuant to §230.44(l)(a), Stats., it can hear an appeal of a decision of the administrator authorizing the transfer pursuant to §Pers 15.02, Wis. Adm. Code. The action of the appointing authority in deciding to fill the new position by transfer and/or to propose to the administrator that the appellant be transferred into the new position are not actions that are appealable to the Commission. *Ford v. DHSS & DP*, 82-243-PC, 83-0011-PC, 83-0020-PC, 6/9/83

The Commission has no jurisdiction over a decision by the appointing authority to reassign a position. *Ford v. DHSS & DP*, 82-243-PC, 83-0011-PC, 83-0020-PC, 6/9/83

There are no statutory bases for appealing (and therefore the Commission lacks jurisdiction over appeals of) the following alleged improper actions by the appointing authority: 1) exclusion from the DHSS Performance Planning and Development (PPD) Program which required an annual PPD session between the supervisor and the employe; 2) failure to provide the appellant with a position description during a 16 month period contrary to §230.09, Stats.; 3) failure to provide an employe performance evaluation since March 1980 contrary to §230.37, Stats.; 4) denial of an "automatic" wage step increase. *Thorn v. DHSS*, 81-459-PC, 6/9/83

With respect to an appeal of a decision of the Administrator, Division of Personnel, to remove an applicant from certification pursuant to §Pers 6.10(8), Wis. Adm. Code, there is no claim stated against BVTAE, the agency which requested the decertification. *Pflugrad v. BVTAE & DP*, 82-207-PC, 12/29/82

Pursuant to Chapter 317, Section 2015, Laws of 1981, the

Commission has no jurisdiction to hear an appeal of a reduction in pay of a nonrepresented employe who is demoted or exercises the right of displacement on or after May 1, 1982. *Staral v. UW*, 82-146-PC, 9/30/82

Appellants were found to lack permanent status in class, thereby precluding review under §230.44(l)(c), Stats. of an alleged "discharge decision," where appellants had previously been employed as LTE's but had not completed the requisite probationary period and were never notified that they had obtained permanent status in class and where they were most recently working for various veterans organizations under contract with DILHR, even though the terms of the contract granted DILHR a supervisory role over the appellants and also made DILHR an equal partner in all hiring and disciplinary decisions. *Smith & Berry v. DILHR & DP*, 81-412,415-PC, 8/5/82

The Commission lacks jurisdiction to review the denial of an equity adjustment (§230.12(5)(a), Stats.) *Davis v. DHSS*, 82-1-PC, 6/25/82

Use of abusive language by co-workers does not constitute a personnel action appealable to the Commission under §230.44, Stats. *Schmit v. DHSS*, 82-49-PC, 4/2/82

The Commission lacks jurisdiction over an appeal of the determination of a probationary step increase as there is no basis for jurisdiction under §§230.44(i)(a), (b), or (c), Stats., and since the Court of Appeals has held that the hiring process does not include employe's probationary period it cannot be argued successfully that this appeal could be heard under §230.44(l)(d), Stats. *Forrester v. DP & DNR*, 80-252-PC, 3/19/82

The Commission lacks subject matter jurisdiction over an appeal of the denial of an application for transfer. *Olbrantz & Harring v. DHSS*, 81-462, 468-PC, 3/4/82

There is no statutory basis for the Commission to assert jurisdiction over the direct appeal of a reprimand. There was no indication that the matter had been grieved noncontractually before the appeal. *Anand v. DHSS*, 81-438-PC, 1/8/82

Where the appeal could be characterized as an appeal of a denial of a merit increase, the Commission lacks jurisdiction. §230.44(l)(e), Stats. *Thorn v. DHSS*,

81-401-PC, 12/18/81

The Commission lacks jurisdiction to hear an appeal from a decision to hire student hourly employes to fill what had been a permanent custodial position. *Basch v. UW*, 80-124-PC, 12/16/81

The Commission lacks jurisdiction over an appeal of the decision to hire LTE project employes. *Rickard v. DILHR*, 80-382-PC, 12/16/81

The Commission lacks jurisdiction to review the salary level to be paid to an employe upon promotion, which is a determination within the authority of the appointing authority. *Mueller et al. v. DHSS*, 81-92, etc.-PC, 12/16/81; *Black et al. v. DP*, 81-266-PC, 11/19/81

The Commission lacks jurisdiction over an appeal contesting both the decision to fill a position by transfer rather than promotion and the timing of the effective date of the transaction, as these decisions are within the purview of the appointing authority and hence not appealable pursuant to §§230.44(l)(a) or (b), Stats., and are not appealable under §230.44(l)(d), Stats., because they are not a personnel action *after certification* which is related to the hiring process in the classified service. *Miller v. DHSS*, 81-137-PC, 10/2/81

Where a represented employe filed an appeal of a performance evaluation, the Commission's jurisdiction apparently was not barred by the operation of §230.12(5)(e), Stats., since the evaluation apparently had no connection with a discretionary performance award, but the Commission still lacks jurisdiction because there is no provision of the statutes which authorizes a direct appeal of a performance evaluation. Although performance evaluations may enter into reclassification decisions under the new personnel rules, there has been no allegation of a reclassification decision and hence there could be no appealable personnel decision under §§230.44(l)(a) or (b), Stats. Also, it does not follow that the Commission must have jurisdiction in light of a recent arbitration decision that performance evaluations are not contractually grievable, as there must be a specific statutory provision giving the Commission the authority to hear an appeal. *Welniak v. UW*, 81-126-PC, 6/3/81

The Commission lacks jurisdiction under §230.44(l)(a) or

(b) over an appeal of transactions effected or affected by changes in the compensation plan that were made by the director prior to the effective date of §230.12, Stats., and were potentially attributable to the administrator, the director's successor. *Lustig et al. v. DILHR et al.*, 78-277-PC, etc., 1/12/81

The Commission lacks jurisdiction over so much of an appeal that alleges that position standards are incorrect because they fail to contain "administrative elements", because the promulgation of the position standards required a decision by the Personnel Board as well as by the administrator, and it is likely that the legislature did not intend that general questions about the position standards could be resolved in individual personnel transactions occurring years after the standards were approved by the Board. *Ziegler & Hilton v. DP*, 80-34-PC, 79-358-PC, 12/8/80

The Commission lacks jurisdiction to hear an appeal alleging "continuous erosion" or removal of duties and responsibilities. *Roberts v. DHSS*, 80-264 & 282-PC, 11/4/80

There is no basis for the Commission to assert jurisdiction over a direct appeal of the assignment of an academic teacher to supervise the appellant. *Foder v. DHSS*, 78-185-PC, 12/28/79

There is no basis for asserting jurisdiction under §§230.44 or 230.45, Stats. of an appeal of a decision effecting mandatory retirement. *Leonhardt v. DHSS*, 79-171-PC, 12/4/79

There is no basis for the Commission to assert jurisdiction over an appeal alleging that the agency violated §Pers 24.09 Wis. Adm. Code, in procedures used to investigate a complaint against an employe. *Frey v. DOT*, 79-107-PC, 8/30/79; *White v. DOT*, 79-112-PC, 1/15/80

The Commission's subject matter jurisdiction over a noncontractual grievance relating to a discretionary performance award derives from §230.45(1)(c), not §230.44(1)(b), Stats., since it does not involve the type of decision which the administrator of DMRS has the authority to render. *Peterson & Hoel et al. v. DOT*, 78-178, 193-PC, 4/19/79

There is no statutory basis for Commission jurisdiction over an appeal of the termination of limited term employment. *Klopp v. UW*, 79-33-PC, 5/7/79

103.21(2) Jurisdiction present

Where a career executive was downwardly reassigned and alleged it was for disciplinary reasons and was an unreasonable and improper exercise of the appointing authority's discretion, the Commission had jurisdiction over the appeal pursuant to §230.44(l)(c), Stats., and §§Pers 30.10(l)(2), and (5), Wis. Adm. Code, construed as defining appealable demotions for career executive officers. *Basinas v. State of Wis. (Personnel Commission)*, 104 Wis. 2d 539, 312 N.W.2d 483 (S. Ct. 1981)

A written reprimand "equal to and carrying the weight of a one day suspension" but resulting in no loss of pay was a constructive suspension and the Commission had jurisdiction to review the discipline pursuant to §§230.44(1)(c) and .45(1)(a), Stats. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

The Commission will look beyond the employer's characterization of an action to determine whether it had the legal effect of an action over which the Commission has jurisdiction pursuant to §230.44(1)(c), Stats. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

A cognizable claim of constructive suspension can exist if the employe demonstrates that the disputed transaction had the same legal effect as a suspension. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

It is not dispositive for appeal purposes whether a personnel transaction fits or does not fit within the definition of a particular type of transaction. The Commission must examine the practical effect the transaction has on the employe's employment status, in the context of the employer's intention in effecting the transaction, and the policy factors which underlie the statutory framework of the civil service, to determine whether the transaction partakes more of the nominal category of personnel transaction, e.g., a reprimand, or more of the more serious category, e.g., a suspension. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

A disciplinary suspension has three obvious impacts on an employe. First, the employe is relieved of the performance of his or her duties. Second, he or she loses the opportunity to earn wages during the period of the suspension. Third, the employe's disciplinary record is blemished and this record may move the employe up the ladder in terms of progressive discipline in connection with any future disciplinary action. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

Where respondent's disciplinary action blemished appellant's disciplinary record with a suspension rather than with a reprimand, it was considered a constructive suspension that could be appealed under §230.44(1)(c), Stats., even though the discipline resulted in neither any interruption in appellant's performance of his duties nor any interruption in his salary. Respondent's intention was to discipline appellant in a manner that would be as close as possible to a one day suspension without jeopardizing appellant's exempt status under the Fair Labor Standards Act. The discipline imposed had a significantly more severe disciplinary impact on appellant's employment status than a mere reprimand. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

Where the respondent was found to have failed to restore the appellant to appellant's "former position or a similar position" pursuant to §ER-Pers 14.03(1), Wis. Adm. Code, after having removed or discharged him while serving a probationary period in his promotional position, respondent's action was subject to review under §230.44(1)(c), Stats. *Stevens v. DNR*, 92-0691-PC, 5/27/94

Where, effective October 14, 1984, the appellant received an increase in her base salary as a result of the approval of a raised hiring rate and in May of 1988, respondent reassigned the appellant's classification to a higher pay range, effective June 10, 1984, the respondent's decision "correcting overpayment errors" and requiring the appellant to refund salary received when her pay rate was recalculated to reflect the higher pay range but without the raised hiring rate, constituted a "reduction in base pay" under §230.44(1)(c), Stats. *Schmidt v. DER*, 89-0058-PC, 2/26/91

Where the appellant suffered from an injury in 1986 while employed by the respondent as a correctional officer at Waupun Correctional Institution, the exclusivity provision of the Worker's Compensation Law does not extend to

foreclose an appeal of a decision in 1988 to terminate the appellant's employment as a Social Services Collection Specialist 1 in the respondent's Division of Management Services. *Smith v. DHSS*, 88-0063-PC, 2/7/90

The Commission has the authority to rule on whether due process requires a predisciplinary hearing where the civil service code neither mandates nor prohibits such a hearing. *Showsh v. DATCP*, 87-0201-PC, 11/28/88; rehearing denied, 3/14/89; reversed on other grounds by Brown County Circuit Court, *Showsh v. Wis. Pers. Comm.*, 89-CV-445; affirmed by Court of Appeals, 90-1985, 4/2/91

Even though allegations in an appeal of sex discrimination may repeat allegations contained in a companion complaint under the Fair Employment Act, there is no reason why appellant cannot pursue her allegations of illegality with respect to civil service code provisions which concern nondiscrimination in certain aspects of employment independent of the Fair Employment Act. *Witt v. DILHR & DER*, 85-0015-PC, 9/26/85

The Commission has jurisdiction pursuant to §230.44(l)(c), Stats., over a reduction in supplemental supervisory pay, as a constructive reduction in base pay, where the agency took a duty that had been an ongoing function of a position, identified it as a basis for supplemental supervisory pay for the sole purpose of being able to bring the starting salary of the position to a level that would meet the salary requirements of the appellant, and subsequently removed the supplemental pay for no convincing reason other than to augment the salary of another employe. *Mirandilla v. DVA*, 82-189-PC, 7/21/83

The decision as to the appellant's appropriate responsibility add-on level under the physician's pay plan is appealable to the Commission pursuant to §230.44(l)(a), Stats., inasmuch as the administration of the pay plan is the responsibility of the administrator pursuant to §230.12(l)(a), Stats. *Zechnich v. DHSS & DP*, 79-4-PC, 9/29/80

107 Effect of prior settlement agreement reached in another proceeding

Where the parties to a classification appeal filed in 1995 agreed to settlement in 1996 which called for a re-review of

the underlying decision by respondent, dismissal of 1995 case upon completion of the re-review regardless of the outcome and waiver of appellant's right to appeal the results of the re-review, appellant was barred from appealing the re-review decision issued in 1998. It would have been unjust to permit appellant to avoid his obligations under the agreement after respondents had met theirs. Although two years might seem like a long time to complete the re-review, the agreement by the parties did not specify a deadline and two years was not so unreasonable as to justify voiding the agreement. *Schaefer v. DNR & DER*, 95-0179-PC, 6/3/98

Respondent was required to reallocate the appellant's position effective August 26, 1979 rather than July 15, 1983, where, in settlement of a separate appeal filed by appellant's predecessor in the same position, respondent had agreed to reallocate the position effective August 26, 1979. *Klepinger v. DER*, 83-0197-PC, 5/9/85; reversed by Dane County Circuit Court, *DER v. Wis. Pers. Comm. (Klepinger)*, 85-CV-3022, 12/27/85

110 Declaratory rulings (see also 523)

Appellants were found to have no interest in pursuing a matter as a declaratory ruling proceeding pursuant to §227.41, Stats., where they failed to plead such a proceeding, they failed to respond to respondents' arguments in opposition to the Commission proceeding with the matter as a declaratory ruling proceeding under §227.41 and they relied solely on §§230.44(1) and 227.42 as jurisdictional bases. *ACE et al. v. DHSS et al.*, 92-0238-PC, 3/29/93

Appellant's were "interested" persons for purposes of seeking a declaratory ruling under §227.41, if for no other reason, because of their allegation that an evasion of the civil service code had resulted in the improper expenditure of tax dollars. *ACE et al. v. DHSS et al.*, 92-0238-PC, 1/12/93

130.5(2) Appointment to future vacancy

The Commission lacks the authority to require as a remedy for a perceived abuse of discretion in a non-appointment case that the appellant be appointed, if still qualified, to the position upon its next vacancy. *DHSS v. Wis. Pers. Comm. (Paul)*, Dane County Circuit Court, 81-CV-1635, 9/18/83 (dictum)

Where in an appeal of a selection decision, the Commission found that the respondent had violated the civil service law in improperly awarding veterans points and improperly using a trainee designation, the Commission was barred by the decision of the Circuit Court from awarding back pay and from requiring respondent to appoint the appellant to the position in question, and was also prevented from ordering the appellant reclassified because the issue of reclassification had not been addressed at the hearing. The only remaining remedy was to order respondent to cease and desist from similar violations. *Martin v. DILHR*, Case No. 74-132, 12/16/81

As a remedy in a successful appeal of a non-selection decision, the Commission ordered the respondent to appoint the appellant, if still qualified, to the disputed position (or comparable one) upon its next vacancy. *Pearson v. UW-Madison*, 84-0219-PC, 9/16/85; affirmed by Dane County Circuit Court, *Pearson v. UW & Wis. Pers. Comm.*, 85-CV-5312, 6/25/86; affirmed by Court of Appeals District IV, 86-1449, 3/5/87

130.5(4) Attorneys fees

The Commission lacks the authority to award back pay, a pay raise or attorneys fees as a remedy in a successful appeal of a decision not to select the appellant. *Pearson v. UW & Wis. Pers. Comm.*, Court of Appeals District IV, 86-1449, 3/5/87

The Commission lacked the authority to consider appellant's supplementary motion for attorney's fees and costs arising from attempts by appellant's counsel to obtain full compliance or a compromise settlement with respect to the remedy ordered by the Commission where the decision and order was served on May 15 and the supplementary motion was filed on August 26. *Arneson v. UW*, 90-0184-PC, 11/13/92

The Commission lacks the authority to award attorneys fees under §230.44(4)(c), Stats., as a remedy in a successful non-selection appeal. *Pearson v. UW-Madison*, 84-0219-PC, 9/16/85; affirmed by Dane County Circuit Court, *Pearson v. UW & Wis. Pers. Comm.*, 85-CV-5312, 6/25/86; affirmed by Court of Appeals District IV, 86-1449, 3/5/87

The Commission lacks statutory authority to award, and hence may not require the respondent to pay, attorney's fees as a result of a successful appeal. *Bjorklund v. DHSS*, 79-327-PC, 2/13/81

130.5(6) Back pay

The remedy of back pay is not available in reinstatement cases. *Seep v. State Pers. Comm.*, Court of Appeals District 11, 140 Wis. 2d 32, 5/6/87; affirming in all respects *Seep v. DHSS*, 83-0032-PC, 83-0017-PC-ER, 10/10/84

The Commission lacks the authority to award back pay, a pay raise or attorneys fees as a remedy in a successful appeal of a decision not to select the appellant. *Pearson v. UW & Personnel Commission*, Court of Appeals District IV, 86-1449, 3/5/87

Where the Commission rejects a reclassification denial, it lacks the authority to require retroactive salary payment as a remedy. *DER v. Wis. Pers. Comm. (Cady)*, Dane County Circuit Court, 79-CV-5099, 7/24/81

The Commission lacks authority to award back pay in denial of reclassification appeals. *DHSS v. Wis. Pers. Comm. (Eschenfeldt)*, Dane County Circuit Court, 81-CV-5126, 4/27/81

The Personnel Board, after determining that an employe's position is misclassified, lacks the authority to award back pay retroactively to a date prior to the date on which the Board is required to act on an appeal (i.e., 45 days after the date on which the appeal was filed with the Board). *Ehly v. State Pers. Bd.*, Dane County Circuit Court, 158-371, 9/22/78; affirmed by Court of Appeals, 78-719, 6/26/79

The Personnel Board lacks the authority to order back pay

retroactive to the time at which an employe assumed a position which the Board later deemed misclassified. *Nunnelee v. State Pers. Bd.*, Dane County Circuit Court, 158-464, 9/14/78

The Commission lacks the authority to award attorneys fees under §230.44(4)(c), Stats., as a remedy in a successful non-selection appeal. *Pearson v. UW-Madison*, 84-0219-PC, 9/16/85; affirmed by Dane County Circuit Court, *Pearson v. UW & Wis. Pers. Comm.*, 85-CV-5312, 6/25/86; affirmed by Court of Appeals District IV, 86-1449, 3/5/87

Where the appellant left the position in question subsequent to having filed an appeal of a reclassification denial, the respondent's motion to dismiss on the ground that the Commission lacked the authority to require that back pay be paid was denied, because regardless of whether such authority were present, the Commission must assume that if it were to determine that the position should have been reclassified, that the agency would comply with the Wisconsin Personnel Manual promulgated by the Division of Personnel, and effectuate the transaction retroactively. *McGrew v. UW & DP*, 81-443-PC, 1/10/83

Where in an appeal of a selection decision, the Commission found that the respondent had violated the civil service law in improperly awarding veterans points and improperly using a trainee designation, the Commission was barred by the decision of the Circuit Court from awarding back pay and from requiring respondent to appoint the appellant to the position in question, and was also prevented from ordering the appellant reclassified because the issue of reclassification had not been addressed at the hearing. The only remaining remedy was to order respondent to cease and desist from similar violations. *Martin v. DILHR*, Case No. 74-132, 12/16/81

A transfer does not fall within the categories of transactions set forth in §230.43(4), Stats. (requiring the awarding of back pay in the event of reinstatement pursuant to order of the Commission), and retroactive pay is limited to those transactions enumerated. *Stasny v. DOT*, 78-158-PC, 10/12/79 (Note: This case was affirmed by the Dane County Circuit Court in all respects except for restoration of sick leave. *DOT v. Pers. Comm. (Stasny)* Dane County Circuit Court, 79-CV-6102, 6130, 3/27/81

In an appeal of the refusal to admit the appellant to an examination, if the appellant were successful with her appeal but someone else already had been appointed to the position in question, she would not be entitled, as a remedy, to a salary award. *Noltemeyer v. DILHR & DP*, 78-14-PC, 78-28-1, 12/20/78

130.5(8) Other

Restoration of sick leave is beyond the remedial powers of the Commission in an appeal of a noncontractual grievance which determined that the appellant had been improperly transferred and that this exacerbated his medical condition to the point where he had to take medical leave. *DOT v. Wis. Pers. Comm. (Stasny)*, Dane County Circuit Court, 79-CV-6102, 6130, 3/27/81

The Commission lacks the authority to issue a preliminary injunction with respect to a civil service appeal filed under §230.44(1)(b), Stats. *Van Rooy v. DILHR & DER*, 87-0117-PC, 87-0134-PC-ER, 10/1/87

In an earlier decision, the Commission had ruled in favor of the appellants in a dispute over the proper effective date of a reclassification. Appellants subsequently disputed the payroll calculations used by respondents in determining the amount of back pay and the appellants' hourly rate. The Commission held that it lacked the authority to enforce its own orders and dismissed the appeals. *Guzniczak & Brown v. DHSS & DER*, 83-0210, 0211-PC, 4/6/88

Although there were violations of §230.16, Stats., in an exam process with respect to its timing and nonverbal feedback from one of the oral exam panel members, there was no showing of obstruction or falsification as set forth in §230.43(l), Stats., and therefore the Commission could not require the removal of the incumbent, and the remedy would be to require the respondents to cease and desist from further violations of the kind found in this case. *Zanck & Schuler v. DP*, 80-380-PC, 81-12-PC, 12/3/81

The Commission lacks the authority to grant what functionally amounts to a preliminary injunction. *Lyons v. DHSS*, 79-81-PC, 4/26/79; affirmed by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm. (Lyons)*,

80-CV-4948, 7/14/81

130.7(1) Exam

Although there were violations of §230.16, Stats., in an exam process with respect to its timing and nonverbal feedback from one of the oral exam panel members, there was no showing of obstruction or falsification as set forth in §230.43(l), Stats., and therefore the Commission could not require the removal of the incumbent, and the remedy would be to require the respondents to cease and desist from further violations of the kind found in this case. *Zanck & Schuler v. DP*, 80-380-PC, 81-12-PC, 12/3/81

In an appeal of the refusal to admit the appellant to an examination, if the appellant were successful with her appeal but someone else already had been appointed to the position in question, she would not be entitled, as a remedy, to a salary award. *Noltemeyer v. DILHR & DP*, 78-14-PC, 78-28-1, 12/20/78

130.7(2) Grievance

Restoration of sick leave is beyond the remedial powers of the Commission in an appeal of a noncontractual grievance which determined that the appellant had been improperly transferred and that this exacerbated his medical condition to the point where he had to take medical leave.

***DOT v. Pers. Comm. (Stasny)*, Dane County Circuit Court, 79-CV-6102, 6130, 3/27/81**

130.7(4) Imposition of discipline

Where respondent had terminated appellant's employment as a MIS 4-Sup. while the appellant was serving a promotional probationary period, suspended him for 30 days without pay, reduced his rate of pay and demoted him to a position in a classification with a lower pay range, and where the Commission found the predisciplinary process to have been inadequate, the Commission rejected the

respondent's contention that the appellant was not entitled to be restored to his MIS 4-Sup. position. While the respondent could have simply terminated the appellant's probationary employment as a MIS 4-Sup. and restored him to a position in his previous MIS 3 classification without a right to an appeal under §230.44(1)(c), once the respondent went further, there was no basis for respondent to argue that appellant was not entitled to restoration to his previous position as a remedy to successful appeal, citing §ER-Pers 14.03. *Arneson v. UW*, 90-0184-PC, 2/6/92

130.7(6) Post-certification action relating to hire, including non-appointment

The Commission did not exceed its authority where it rejected the decision of the respondent denying appellant's reinstatement and remanded the case for action in accordance with its decision. While the effect of the order may be appellant's reinstatement, the Commission's actions were clearly within the confines of its authority to "affirm, modify or reject the action which is the subject of the appeal." *Seep v. Pers. Comm.*, Court of Appeals District 11, 140 Wis 2d 32, 5/6/87; affirming in all respects *Seep v. DHSS*, 83-0032-PC, 83-0017-PC-ER, 10/10/84

The remedy of back pay is not available in reinstatement cases. *Seep v. State Pers. Comm.*, Court of Appeals District 11, 140 Wis. 2d 32, 5/6/87; affirming in all respects *Seep v. DHSS*, 83-0032-PC, 83-0017-PC-ER, 10/10/84

The Commission lacks the authority to award back pay, a pay raise or attorneys fees as a remedy in a successful appeal of a decision not to select the appellant. *Pearson v. UW & Personnel Commission*, Court of Appeals District IV, 86-1449, 3/5/87

The Commission lacks the authority to require as a remedy for a perceived abuse of discretion in a non-appointment case that the appellant be appointed, if still qualified, to the position upon its next vacancy. *DHSS v. Wis. Pers. Comm. (Paul)*, Dane County Circuit Court, 81-CV-1635, 9/18/83 (dictum)

The Commission lacks the authority to award attorneys fees under §230.44(4)(c), Stats., as a remedy in a successful

non-selection appeal. The Commission did order the respondent to appoint the appellant, if still qualified, to the disputed position (or comparable one) upon its next vacancy. *Pearson v. UW-Madison*, 84-0219-PC, 9/16/85; affirmed by Dane County Circuit Court, *Pearson v. UW & Wis. Pers. Comm.*, 85-CV-5312, 6/25/86; affirmed by Court of Appeals District IV, 86-1449, 3/5/87

Where in an appeal of a selection decision, the Commission found that the respondent had violated the civil service law in improperly awarding veterans points and improperly using a trainee designation, the Commission was barred by the decision of the Circuit Court from awarding back pay and from requiring respondent to appoint the appellant to the position in question, and was also prevented from ordering the appellant reclassified because the issue of reclassification had not been addressed at the hearing. The only remaining remedy was to order respondent to cease and desist from similar violations. *Martin v. DILHR*, Case No. 74-132, 12/16/81

130.7(8) Reclassification/reallocation

Where the Commission rejects a reclassification denial, it lacks the authority to require retroactive salary payment as a remedy. *DER v. Wis. Pers._Comm. (Cady)*, Dane County Circuit Court, 79-CV-5099, 7/24/81

The Commission lacks authority to award back pay in denial of reclassification appeals. *DHSS v. Wis. Pers. Comm. (Eschenfeldt)*, Dane County Circuit Court, 81-CV-5126, 4/27/81

The Personnel Board, after determining that an employe's position is misclassified, lacks the authority to award back pay retroactively to a date prior to the date on which the Board is required to act on an appeal (i.e., 45 days after the date on which the appeal was filed with the Board). *Ehly v. State Pers. Bd.*, Dane County Circuit Court, 158-371, 9/22/78; affirmed by Court of Appeals, 78-719, 6/26/79

The Personnel Board lacks the authority to order back pay retroactive to the time at which an employe assumed a position which the Board later deemed misclassified. *Nunnelee v. State Pers. Bd.*, Dane County Circuit Court,

158-464, 9/14/78

Where the appellant left the position in question subsequent to having filed an appeal of a reclassification denial, the respondent's motion to dismiss on the ground that the Commission lacked the authority to require that back pay be paid was denied, because regardless of whether such authority were present, the Commission must assume that if it were to determine that the position should have been reclassified, that the agency would comply with the Wisconsin Personnel Manual promulgated by the Division of Personnel, and effectuate the transaction retroactively. *McGrew v. UW & DP*, 81-443-PC, 1/10/83

The provisions of §230.44(4)(c), Stats., permitting the Commission to modify the appealed action do not apply where the appeal was not brought pursuant to §230.44 and where the remedy sought cannot be accomplished by modifying the appealed action. *Stasny v. DOT*, 78-158-PC, 10/12/79 (Note: This case was affirmed by the Dane County Circuit Court in all respects except for restoration of sick leave. DOT v. Pers. Comm. (Stasny), Dane County Circuit Court, 79-CV-6102, 6130, 3/27/81

130.7(10) Other

A transfer does not fall within the categories of transactions set forth in §230.43(4), Stats. (requiring the awarding of back pay in the event of reinstatement pursuant to order of the Commission), and retroactive pay is limited to those transactions enumerated. *Stasny v. DOT*, 78-158-PC, 10/12/79 (Note: This case was affirmed by the Dane County Circuit Court in all respects except for restoration of sick leave. DOT v. Pers. Comm. (Stasny), Dane County Circuit Court, 79-CV-6102, 6130, 3/27/81)

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 200 through 202

[Previous material] [Next material]

---

200 DISCIPLINARY ACTIONS: Discharges, Suspensions, Reductions in Base Pay and Demotions

201.01 General requirements

Since notice of changes in assigned duties and responsibilities which could affect the classification of a position is required by §230.09(2)(c), Stats., to be provided in writing to the affected employe, the date from which the 30-day time limit for appeal of such new assignments should be measured is the date such written notice is received. Such notice is required for the limitations period to start in a claim of constructive demotion. *Davis v. ECB*, 91-0214-PC, 6/21/94

Based upon §230.34(1)(b), respondent was limited in its attempt to show just cause for discharge to presenting evidence of the one reason for termination as given in the letter of discharge. Respondent was not permitted to rely upon additional reasons given in a letter sent to appellant about 6 weeks after discharge. *Liethen v. WGC*, 93-0095-PC, 10/20/93

The purpose of the notice of discipline is to inform an

employe of the nature of the charges so that he can adequately prepare his defense. Therefore a reasonable standard to apply in disciplinary notice cases is whether the notice is sufficiently specific to allow the disciplined employe to prepare a defense. *Bents v. Comm. of Banking*, 86-0193-PC, 5/28/87

An objection to the sufficiency of a discharge letter is waived unless timely filed. *Israel v. DHSS*, 84-0041-PC, 7/11/84

The Commission has the authority to rule on a motion testing the sufficiency of a notice of discharge. *Israel v. DHSS*, 84-0041-PC, 7/11/84

Those portions of a discharge letter found to provide insufficient notice were ordered stricken. However, where only 4 small portions of a 5 page discharge letter were found to be insufficient, respondent was provided 20 days to amend the letter. By merely offering additional details regarding specific charges in the letter, the amendments would fall far short of adding new charges. *Israel v. DHSS*, 84-0041-PC, 7/11/84

201.02 Insufficient notice

Disciplinary notice which referred to appellant's "failure to recognize and react to inappropriate DOC staff actions and behavior including harassment" and to appellant's "use of profane language" was woefully inadequate. It was virtually impossible for complainant to prepare and defend himself without more clues as to when, by whom, who was present, when the alleged violations occurred and in what context. *Asche v. State Pers. Comm.*, Dane County Circuit Court, 93 CV 1365, 12/8/93; affirmed by Court of Appeals, 94-0450, 4/6/95

Those paragraphs of appellant's discharge notice found to be insufficiently specific to permit the appellant to prepare a defense were stricken. However, because most of the charges contained in the notice were either sufficient or unchallenged, respondent was provided 20 days to amend those portions of the notice found to be insufficient. *Bents v. Comm. of Banking*, 86-0193-PC, 5/28/87

Notice of discharge was concluded to be insufficiently specific pursuant to Wisconsin Supreme Court cases since it provided only broad conclusory statements without supplying underlying details, and employe was reinstated. *Huesmann v. State Historical Society*, 81-348-PC, 1/8/81

201.03 Sufficient Notice

Notice of discharge was adequate where it incorporated by reference a detailed analysis of the appellant's performance in an employe evaluation form. *Finnegan v. State Pers. Bd.*, Dane County Circuit Court, 164-096, 7/19/79

Where the notice of discharge specifically spelled out the respects in which petitioner's work was inefficient and failed to meet the requirements of her job, it met due process procedural standards. *Zehner v. State (Pers. Bd.)*, Dane County Circuit Court, 156-399,2/20/78

The discharge notice need not indicate why and how the respondent selected discharge as the appropriate level of discipline. *Thostenson v. DHSS*, 85-0229-PC, 4/16/86

The discharge letter need not be so specific as to provide answers to all questions that an appellant may pose regarding the basis for the discharge. The employing agency is not required to attach a copy of its disciplinary investigation file to the discharge letter, nor is the agency required to provide the appellant with an analysis of the rule under which the discipline was imposed or a history of that rule. The employing agency is not required to anticipate the defenses that an employe may advance and to provide in the discharge letter, all those facts that are necessary to those defenses. *Thostenson v. DHSS*, 85-0229-PC, 4/16/86

A discharge letter that alleged the appellant's conduct violated Wisconsin's misconduct in public office statute (§946.12, Stats.) and 7 U.S.C. ¶2024 was found sufficient. The respondent was not required to specify the subsections or phrases of the statutes that were alleged to have been violated. *Thostenson v. DHSS*, 85-0229-PC, 4/16/86

A discharge letter alleging that the appellant had taken food stamps from her place of employment to her apartment did not have to state the precise date the food stamps were

transferred to the apartment because the date of the transfer is not a basis for the discharge action and its absence does not effectively prevent the appellant from preparing a defense. *Thostenson v. DHSS*, 85-0229-PC, 4/16/86

Where the letter of termination cited eight grounds for imposing discipline, the first seven referred to letters or merit ratings which were provided to the appellant in written form when initially issued and were also placed in the record at the hearing, the letter as a whole provided adequate notice to the appellant despite the conclusion that the eighth reason cited in the letter, if viewed alone, would not have provided sufficient notice. *Fauber v. DOR*, 82-138-PC, 8/21/84; affirmed by Milwaukee County Circuit Court, *Fauber v. State Pers. Comm.*, 649-551, 10/8/85

The letter of suspension issued under the signature of the employe's direct supervisor was not defective under §230.34(l)(b), Stats., where the appointing authority had engaged in prior discussions regarding the recommendation to suspend the appellant and had issued a memo of concurrence prior to the effective date of the suspension. *Plasterer v. DOT*, 83-0007-PC, 9/28/83

The letter informing the appellant of his discharge from employment as a Planning Analyst 3 provided adequate notice of the reasons therefore as against the argument that it was insufficiently specific where although the letter referred in general terms to inadequacies in "conceptual skills, analytical skills, program knowledge, timeliness and writing skills," it also indicated that these inadequacies previously had been brought to his attention through evaluations and other communications from his supervisors over a certain period of time, and the totality of the circumstances established that the appellant, a professional employe, in fact had been well aware of the specific reasons assigned by his employer for his discharge. *Anand v. DHSS*, 82-136-PC, 3/17/83

It was held that the notice of suspension was adequate where the detailed nature of the appeal and the questions raised therein made it clear that the appellant had actual notice of what was alleged to have occurred but was not certain of exactly what part of that conduct was deemed to have been improper, citing *State ex rel. Deluca v. Common Council*, 72 Wis. 2d 672 , 679-680, 242 N.W. 2d 689

(1976). *Hess v. DNR*, 79-203-PC, 12/4/79

201.04 Notice determining the issues

Misconduct for which the appellant was not charged in the letter of suspension cannot serve as the basis for discipline. *Powers v. UW*, 88-0029-PC, 5/10/90; affirmed by Dane County Circuit Court, *Powers v. Wis. Pers. Comm.*, 90 CV 3023, 2/12/91

201.05 Amendment of notice

Those paragraphs of appellant's discharge notice found to be insufficiently specific to permit the appellant to prepare a defense were stricken. However, because most of the charges contained in the notice were either sufficient or unchallenged, respondent was provided 20 days to amend those portions of the notice found to be insufficient. *Bents v. Comm. of Banking*, 86-0193-PC, 5/28/87

Respondent was not permitted to amend a discharge letter, after the appeal was filed, to add additional charges, despite the general liberality in permitting amendments to pleadings. The amendment requested would be an explicit violation of §§230.34(l)(a) and (b), Stats., and §Pers 23.01, Wis. Adm. Code. *Alff v. DOR*, 78-227-PC, 3/8/79

202.02 Tardiness and/or absence

Just cause existed for the decision to discharge appellant, an Inmate Complaint Investigator at a correctional institution, due to an absenteeism violation (for taking leave when appellant had no remaining leave) and two misconduct violations (for not using time off work for the purpose requested, for failing to report to work as previously promised, for failing to notify the institution when she was going to be absent, for being insubordinate when refusing to provide her supervisor with the name of her mental health professional and for refusing to return to her supervisor's office as directed) where appellant had three other

misconduct violations in the previous 12 months as well as two other absenteeism violations during the same period. *Garner v. DOC*, 94-0031-PC, 11/22/94; affirmed Milwaukee County Circuit Court, *Garner v. Wis. Pers. Comm.*, 94-CV-013477, 11/28/95

Where the appellant had been unable to work at all for an extended period due to medical reasons, and there was no foreseeable change in status, there was just cause for discharge. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

Appellant's one day suspension was upheld where he was tardy on 5 days during a 12 month period, the respondent's written policy called for a suspension upon the 5th incident of tardiness and the appellant's supervisor was uniform in administering the tardiness policy in her work unit. Appellant's supervisor did not control whether employes in other work units were allowed to use leave time to cover tardiness. *Fofana v. DHSS*, 88-0150-PC, 1/10/90

There was just cause for appellant's discharge where she had previously been reprimanded and suspended for tardiness and when she was subsequently tardy on 28 of 46 work days. Appellant was also found to have performance deficiencies. *Welke v. UW-Milwaukee*, 81-51-PC, 12/22/83

Thirty day suspension was upheld where appellant was absent from his assigned duties in an excessive manner for coffee breaks, lunches, etc., and where appellant had purchased a radio from the wife of an inmate despite knowing the transaction was forbidden by administrative policy. However, appellant was not guilty of "failing to provide accurate information" where he had refused to acknowledge daily absences of 1 to 3 hours when questioned and his explanation as to why he was absent for the one hour a day that he acknowledged was considered an unacceptable response by management. *Baxter v. DHSS*, 82-85-PC, 8/31/83

The failure of certain employes to notify the institution that they would not return to work at the normal time after lunch provided just cause for discipline regardless of whether this was covered by a disseminated institutional policy, inasmuch as they knew or should have known that such failure might well create problems at the institution. *Bender et al. v. DHSS*, 81-382, 383, 384-PC, 3/19/82

202.03 Insubordination; failure to follow orders

If the employer makes a reasonable request for an employe to attend a medical examination and the employe refuses, the employer must possess the power to enforce their order. To the extent §230.37(2), Stats., is read to require a balancing of the appointing authority's interest, served by an order that an employe submit to a medical examination, and the employe's constitutionally protected privacy rights, there is a legitimate public interest in assuring that an employe, who is being sent out of the office and into the public realm in order to evaluate various agencies which deal with the employing agency, is mentally capable and fit for employment, for both reasons of security and of efficiency. *Haney v. Wis. Pers. Comm.*, Dane County Circuit Court, 95-CV-0867, 2/15/96

A five day suspension of the director of a treatment program for adolescent patients at a mental health institution was affirmed where the employe knew from his supervisor that he should not proceed with a plan to have a patient discharged to live in his home without obtaining an exception to the staff/patient relationships policy but the employe went ahead with a 30 day placement of the patient in his home on an extended pass. The employe willfully disregarded his supervisor's instruction which created liability exposure for the institution and set a poor example for the other staff in the program over which the employe had management responsibilities. The employe's conduct had the potential to compromise his ability to insist that other program staff follow the work rules applicable to them. The length of the suspension was not unreasonable as a means of achieving the goal that similar conduct not recur. While stressful factors present in the workplace may have contributed to the exercise of poor judgment by the employe, they did not excuse creating a serious potential liability for the institution. *Malesevich v. DHSS*, 96-0087-PC, 3/26/97

There was just cause for three day and seven day suspensions of the appellant as well as his discharge where, over the course of a month, he refused to submit to each of three psychological evaluations scheduled for him by respondent under §230.37(2), Stats., where respondent

reasonably believed that appellant demonstrated performance problems that might be attributable to some disability. If the employer is unable to determine an employe's "fitness to continue in service" or "capacity to continue in employment," the only logical course of action is to discontinue such employment. *Haney v. DOT*, 93-0232-PC, 94-0012-PC, 3/9/95 ; affirmed by Dane County Circuit Court, *Haney v. Wis. Pers. Comm.*, 95-CV-0867, 2/15/96

Just cause existed for the decision to discharge appellant, an Inmate Complaint Investigator at a correctional institution, due to an absenteeism violation (for taking leave when appellant had no remaining leave) and two misconduct violations (for not using time off work for the purpose requested, for failing to report to work as previously promised, for failing to notify the institution when she was going to be absent, for being insubordinate when refusing to provide her supervisor with the name of her mental health professional and for refusing to return to her supervisor's office as directed) where appellant had three other misconduct violations in the previous 12 months as well as two other absenteeism violations during the same period. *Garner v. DOC*, 94-0031-PC, 11/22/94; affirmed Milwaukee County Circuit Court, *Garner v. Wis. Pers. Comm.*, 94-CV-013477, 11/28/95

Where an employe/supervisor was charged with insubordination for failing to follow institutional policies concerning inmate evacuation during fires, respondent established that he failed to follow the letter of the written policies, but the employe could not be held accountable for insubordination because his actions were not contrary to the policies actually followed and enforced by management. However, respondent did establish that appellant was negligent in the performance of his duties by failing as shift commander to become thoroughly familiar with institution policies, and by his decision to halt the evacuation of inmates during a fire, where he gave conflicting rationales for his decision, and failed to consider all of the implications of his actions. *Reimer v. DOC*, 92-0781-PC, 2/3/94

Appellant's discourteous and abusive actions toward supervisors who issued work order and his refusal to carry out order constituted just cause for discipline. A 3-day suspension not excessive in view of previous one-day

suspension and documented history of similar behavior. *Drewieck v. UW*, 92-0810-PC, 6/25/93

In order to find the appellant had been "insubordinate/disobedient" as charged, respondent must first establish that there was in effect a policy which appellant violated, second, that appellant either had actual knowledge of the policy or should have had knowledge under an objective test, and third, that appellant either knew, or should have known under an objective test, that the policy prohibited the conduct in question. *Larsen v. DOC*, 90-0374-PC, 91-0063-PC-ER, 5/14/92

Where, appellant, a captain in a maximum security correctional institution, arranged for and effectuated a shift trade without prior authorization and in knowing violation of policy, her conduct could reasonably be said to have a tendency to impair her performance or the efficiency of the group with which she worked, regardless of whether any harm actually resulted from what occurred. *Larsen v. DOC*, 90-0374-PC, 91-0063-PC-ER, 5/14/92

Some discipline was warranted against the appellant, a lieutenant in a correctional institution, where she ignored a direct order not to investigate a particular matter and where she breached the institution's security by arranging to have an inmate brought into segregation to speak to the key witness in the investigation. Another charge was not found to be justified and the demotion and 15 day suspension was modified to a demotion. *Kode v. DHSS*, 87-0160-PC, 11/23/88

Discipline was warranted in light of appellant's poor work performance, insubordination, insensitivity to affirmative action issues and other specified shortcomings. The performance of appellant as the agency's chief financial officer tended to impair the performance of the agency. *Bents v. Office of the Commissioner of Banking*, 86-0193-PC, 7/13/88; modified and remanded by Dane County Circuit Court, *Bents v. Wis. Pers. Comm. & OCB*, 88 CV 4234, 4/3/89; on remand, the Commission affirmed the discharge decision, 10/4/89

Respondent established that the appellant, an office director, violated work rules relating to insubordination and failing to provide accurate and complete information as to 2 of 5 incidents which were identified in the letter of suspension,

thereby warranting the imposition of discipline. *Monson v. DHSS*, 87-0076-PC, 6/20/88; affirmed by Dane County Circuit Court, *Monson v. Wis. Pers. Comm.*, 88-CV-4059, 4/20/89

There was just cause for suspending the appellant for one day for "failure to carry out assignments or instructions" where appellant, a supervisor, failed to timely complete a new work schedule, and where the appellant had received numerous verbal warnings to improve her work performance and had received a written reprimand for excessive absenteeism. However, the Commission found a subsequent demotion of the appellant to be excessive discipline. *Smith v. UW*, 84-0101, 0108-PC, 5/9/85; clarified on 8/5/85

Respondent's decision to demote the appellant from her supervisory position was modified to a 30 day suspension where appellant had altered the work assignments of certain of her cleaning crew in order to accommodate the handicap of a crew member, despite appellant's supervisor's requirement that he approve all changes. The Commission upheld a prior one-day suspension of the appellant. *Smith v. UW*, 84-0101, 0108-PC, 5/9/85; clarified on 8/5/85

Filing of "false reports" held not to justify the imposition of discipline. Management had asked the appellant to prepare an activity report/itinerary for the prior twelve month period and the appellant's report was contradicted by reliable documentary evidence for seven of the days during the period. However, six of the seven entries were supported by appellant's personal calendar. *Blake v. DHSS*, 82-208-PC, 1/4/84

Discharge arising from an outburst amounting to insubordination was found to be excessive discipline where the appellant otherwise had a good work record, it was the first such incident in over three years of employment and it did not occur in front of any subordinate employes. The discharge was modified to a 20 day suspension. *Barden v. UW-System*, 82-237-PC, 6/9/83

A three day suspension was upheld where appellant, a program assistant, was negligent or inattentive in processing a certification request resulting in a two week delay in the effective date of a restoration, where appellant did not file documents on the days identified by her supervisor and had

a filing backlog of up to one month and where appellant had disregarded her supervisor's express instructions to use the word processing center for all form letters. The appellant had previously received a written reprimand for a comparable violation. *Roberts v. DHSS*, 80-169-PC, 3/17/83

Just cause for some form of discipline existed where appellant took a trip outside his district despite prior denial of permission for such a trip by appellant's supervisor. Discipline of two day suspension without pay plus non-reimbursement for travel expenses was found to be excessive where the appellant previously had an unblemished record, and had gained nothing from insubordinate act and where the clarity of instructions not to take the trip had been brought into question. The suspension was modified to exclude any loss in pay. *Johnson v. DOT*, 81-256-PC, 12/4/81

The assignment of the appellant-physician to make an on-site appraisal of a patient problem and compile the case facts if he lacked expertise to make a judgment was a reasonable assignment. *Lyons v. DHSS*, 79-81-PC, 7/23/80; affirmed by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm., (Lyons)*, 80-CV-4948, 7/14/81

Where the appellant-physician refused to carry out a reasonable assignment to make an on-site evaluation of a potential medical treatment problem and then decide whether he was qualified to judge the propriety of care given to a deceased patient and if he felt unqualified to compile the case facts for presentation to others so that an evaluation could be made, a five day suspension was for just cause. Any further discipline was excessive where appellant had a good prior professional record, honestly held a principled belief that the assignment was improper and where he continued to perform all other assigned duties. *Lyons v. DHSS*, 79-81-PC, 7/23/80; affirmed by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm., (Lyons)*, 80-CV-4948, 7/14/81

202.04 Poor work record

Where an employe failed to complete assigned tasks in a timely manner and failed completely to perform a

substantial portion of his duties for a two month period, there was an ample showing of just cause, and just cause does not require that an employe be put on notice that he or she is in immediate danger of discharge. *Finnegan v. State Pers. Bd.*, Dane County Circuit Court, 164-096 7/18/79)

Discipline was warranted in light of appellant's poor work performance, insubordination, insensitivity to affirmative action issues and other specified shortcomings. The performance of appellant as the agency's chief financial officer tended to impair the performance of the agency. *Bents v. Office of the Commissioner of Banking*, 86-0193-PC, 7/13/88; modified and remanded by Dane County Circuit Court, *Bents v. Wis. Pers. Comm. & OCB*, 88 CV 4234, 4/3/89; on remand, the Commission affirmed the discharge decision, 10/4/89

Respondent established just cause for disciplining the appellant where appellant's work performance consistently failed to satisfy reasonable performance expectations, appellant's performance did not improve in any significant manner during the period of time she was on a Performance Improvement Program despite continuing feedback and training. The failure to meet reasonable performance standards for a position impairs the performance of the duties of the position and impairs the efficiency of the group with which the employe works, citing *Tews v. PSC*, 89-0150-PC, 89-0141-PC-ER, 6/29/90. The decision to discharge appellant was not excessive. *Rufener v. DNR*, 93-0074-PC-ER, etc., 8/4/95

There was just cause for discipline where appellant, the data processing coordinator for a division, failed to order equipment, failed to provide certain instructions, failed to submit monthly reports and stored files relating to his outside business on his state computer's disk space. Appellant's misconduct resulted in work not being completed when needed, discontent and disruption in the unit, and a lapse of funds for equipment. *Gifford v. DOT*, 94-0034-PC, 7/24/95

Respondent's decision to discharge the appellant, a 17 year employe, was upheld where the appellant's performance problems were long-standing and he had failed to make any significant improvements. *Fauber v. DOR*, 82-138-PC, 8/21/84; affirmed by Milwaukee County Circuit Court, *Fauber v. State Pers. Comm.*, 649-551, 10/8/85

Appellant's poor work record, a prior suspension for negligent performance of duties, and longstanding tardiness problems justified her discharge. *Welke v. UW-Milwaukee*, 81-51-PC, 12/22/83

Just cause was found for the discharge of an Auditor 4 based on inadequate work performance. *Buchanan v. DOR*, 81-289-PC, 12/8/82

The Commission found that there was just cause for the discharge of the head of the state property insurance fund based on major operational problems in the fund for which the appellant was responsible due to inadequate supervision and lack of substantive knowledge. Furthermore, discharge was not excessive in view of the magnitude of the problems. *Hogoboom. v. Commissioner of Insurance*, 80-107-PC, 10/2/81; affirmed by Dane County Circuit Court, *Hogoboom v. State Pers. Comm.*, 81-CV-5669, 4/23/84; affirmed by Court of Appeals District IV, 84-1726, 12/11/85

In a case involving the discharge and suspension of the head of an audit bureau, the Commission discusses whether various charges of inadequate performance constitute just cause, as that term was defined in *Safransky v. Personnel Board*, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974). *Alff v. DOR*, 78-227,243-PC, 10/1/81; affirmed by Dane County Circuit Court, *Alff v. Pers. Comm.*, 81-CV-5489, 1/3/84; affirmed by Court of Appeals District IV, 84-264, 11/25/85; petition for review by Supreme Court denied 2/18/86

Just cause existed for terminating the appellant from his position based upon appellant's lack of competence in the position and his failure to improve. *Ruff v. State Investment Board*, 80-105, 160, 222-PC, 8/6/81; affirmed by Dane County Circuit Court, *Ruff v. State Pers. Comm.*, 81-CV-4455, 7/23/82; affirmed by Court of Appeals Distict IV, 82-1572, 11/8/83

The Commission upheld the imposition of a one day suspension based on four separate incidents of inadequate performance by a lieutenant in the state patrol. The appellant had previously received two written reprimands. *Clark v. DOT*, 79-117-PC, 10/10/80

Some charges of mismanagement by the appellant were

upheld and some were found not to be supported, and the evidence was discussed. *Evrard v. DNR*, 79-251-PC, 1/22/80

202.10(1) Off-duty

An employe's off-duty misconduct can constitute just cause for disciplinary action when the activity either can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works or is so substantial, oft-repeated, flagrant or serious that his retention in service will undermine public confidence in government, citing *State ex rel. Gudlin v. Civil Service Comm.*, 27 Wis. 2d 77, 133 N.W.2d 799 (1965). *Jacobs v. DOC*, 94-0158-PC, 5/15/95

Just cause existed for the imposition of discipline against appellant, a supervising officer at a correctional institution, where appellant failed to inform management that he had pleaded no contest to an ordinance violation of issuing a worthless check when he wrote a $20 personal check which bounced due to insufficient funds. While the appellant argued that respondent's policy requiring employes to report county ordinance violations of this nature was unclear, the language of the policy was consistent with respondent's interpretation that it encompassed ordinance violations and another supervisor at the institution saw appellant's name in the court records column of the local paper and advised appellant that if the column was referring to appellant, the appellant should make a report to management. *Jelinek v. DOC*, 96-0161-PC, 7/2/97

Just cause existed where a co-worker told appellant that his attentions were unwelcome, after further incident, respondent told appellant that further contacts with the co-worker were prohibited and warned him that failure to comply could result in discipline, there were subsequent incidents of contact by appellant with the co-worker and the co-worker's performance suffered due to appellant's unwelcome attentions. A five-day suspension was not excessive discipline. It was not determinative whether appellant actually committed a violation of state or federal discrimination laws. The correct inquiry is whether the

respondent's actions were reasonable under the circumstances. *Erickson v. WGC*, 92-0207-PC-ER, 92-0799-PC, 5/15/95

A 12 day suspension without pay was upheld for a supervisory employe's conduct of kissing another employe on the neck under circumstances which would have lead a reasonable person to believe that he engaged in unwelcome physical conduct of a sexual nature. The conduct violated a work rule and, in all likelihood, constituted a violation under the FEA. The offending employe previously had been disciplined for similar behavior which resulted in a 5 day suspension. *Harron v. DHSS*, 91-0204-PC, 8/26/92

Demotion was affirmed where the revocation of the appellant's driver license made it impossible for him to perform the duties previously assigned him, the respondent considered other alternatives before the demotion decision was reached and during the period in which reassignment was being considered, the respondent first learned that the appellant had been driving a vehicle without a valid driver's license for most of the 4 years he had worked in the position. *Jensen v. DHSS*, 88-0128-PC, 6/29/89

A five day suspension was affirmed for an employe of the Department of Revenue who failed to file his tax return until 9 months after the filing deadline and did not request an extension. The employe had an excellent work record with no previous violations. *Clark v. DOR*, 80-98-PC, 6/3/81

Thirty day suspension was upheld where appellant was absent from his assigned duties in an excessive manner for coffee breaks, lunches, etc., and where appellant had purchased a radio from the wife of an inmate despite knowing the transaction was forbidden by administrative policy. However, appellant was not guilty of "failing to provide accurate information" where he had refused to acknowledge daily absences of 1 to 3 hours when questioned and his explanation as to why he was absent for the one hour a day that he acknowledged was considered an unacceptable response by management. *Baxter v. DHSS*, 82-85-PC, 8/31/83

A five day suspension was reduced to one day in a First Amendment case where appellant had a good record with no prior discipline during 11 years of employment where

the appellant's actions had the effect of accusing a judge of unethical conduct and where appellant had represented to a court that he appeared on behalf of his employing agency when in fact he lacked such authority. *Hess v. DNR*, 79-203-PC, 8/19/80; affirmed by Dane County Circuit Court, *DNR v. Pers. Comm. (Hess)*, 80-CV-5437, 6/24/81

202.10(2) On-duty

Just cause existed for the imposition of discipline where there were 10 substantiated allegations of misconduct violating four separate work rules, including the failure to carry out instructions and giving false information during an investigation. Appellant frequently served as the shift commander for the 3rd shift at a correctional institution. A number of his subordinates perceived favoritism by him towards a female subordinate officer. His supervisor directed him not to treat the subordinate any differently than the other correctional officers. Nevertheless, appellant continued to spend more time with that particular officer than with the other officers on duty, switched her assignment so she could cook breakfast for him, made numerous telephone calls to her at her home when he was on duty and did not answer truthfully when he was asked, during the disciplinary investigation, how frequently he called her. *Bergh v. DOC*, 98-0018-PC, 1/27/99

It is axiomatic that violation of an employer work rule, particularly one relating to a serious matter such as theft, particularly by a supervisor, and particularly in a correctional setting where employes are expected to model appropriate behavior for inmates, tended to impair the performance of appellant's duties or the efficiency of the group with which he worked. There was just cause for the imposition of discipline where appellant, who was responsible for supervising a textile operation employing inmate and other workers to manufacture gloves and other clothing products at a correctional institution in a business partnership between a private corporation and state government, gave gloves to various individuals for their personal use. *England v. DOC*, 97-0151-PC, 9/23/98

There was just cause for disciplining the appellant, the manager of a health services unit at a correctional

institution, where appellant failed to obtain approval from a physician before dispensing ginseng and vitamins to an inmate, failed to document dispensing those medications on the inmate's medical records, failed to follow the preferred practice of recording the medications on a special needs form, provided incorrect information at the investigatory meeting and failed to correct that information. *Kleinsteiber v. DOC*, 97-0060-PC, 9/23/98

Fraternization does not involve providing something to an inmate which is generally available to the entire inmate population of an institution. *Kleinsteiber v. DOC*, 97-0060-PC, 9/23/98

There was just cause for the imposition of discipline against a campus police sergeant who simulated masturbation when telling a joke about a co-worker and later misrepresented the truth about the incident to his second-level supervisor. However, discharge was excessive where respondent failed to prove allegations of other misconduct referenced in the discharge letter and where a 10 day suspension issued two months before the discharge and relied on for reasons of progressive discipline was thrown out because of a lack of due process. Some of the other jokes told by appellant that were referenced in the discharge decision were not outside the parameter of long-standing accepted behavior in the workplace. *Brenon v. UW*, 96-0016-PC, 2/12/98

There is just cause for the imposition of discipline against appellant, the supervisor of a security unit at the University of Wisconsin Hospital and Clinics, where appellant brought into the security unit a photo of a naked boy with a drawing of a large penis superimposed on it, showed the photo to other male officers present in the security unit and the photo was seen by a female member of the hospital's nursing staff. Appellant's actions violated respondent's harassment policy and had a tendency to impair the performance of appellant's duties as a supervisor and the efficiency and effectiveness of the work unit. *Asche v. DOC*, 90-0159-PC, 5/21/97

Appellant violated respondent's work rules and an executive directive by causing mental anguish to a subordinate, using loud and abusive language toward the subordinate, engaging in conduct which caused a hostile and intimidating working environment and making derogatory comments to the subordinate about females. There was just cause for the

imposition of a one day suspension, even though the underlying conduct involved one rather than multiple incidents. *Chyba v. DOC*¸ 94-0500-PC, 7/23/96

Respondent did not sustain its burden of proof that appellant had accessed and divulged confidential information regarding a selection process and improperly shared that information with a candidate where respondent's case was undermined significantly by credibility problems and competing evidence. Because the appellant was not guilty of the misconduct alleged, respondent's action of demoting the appellant was rejected. *Shew v. DHSS*, 95-0091-PC, 4/16/96

There was just cause for discipline where appellant, the data processing coordinator for a division, failed to order equipment, failed to provide certain instructions, failed to submit monthly reports and stored files relating to his outside business on his state computer's disk space. Appellant's misconduct resulted in work not being completed when needed, discontent and disruption in the unit, and a lapse of funds for equipment. *Gifford v. DOT*, 94-0034-PC, 7/24/95

Appellant was not excused from carrying out an assignment merely because it was not in his position description where appellant had never objected to the assignment or claimed it to be inappropriate and his only excuse for not completing the assignment was that it was undesirable. *Gifford v. DOT*, 94-0034-PC, 7/24/95

Just cause existed where appellant, a captain and shift commander at a correctional institution, engaged in a pattern of sexually predatory behavior toward female subordinates and he knew or should have known that his actions violated not only agency policy but also state and federal law, and exposed respondent to extensive potential liability. Appellant's reckless use of a firearm exacerbated the seriousness of his misconduct. Although the appellant's mental state during this period could be considered a mitigating factor, it was not entitled to great weight given appellant's manipulative behavior and the fact that he was not out of touch with reality; therefore, discharge was not excessive discipline in light of the strong public policy against sexual harassment that justifies strong measures by management against employes who have engaged in sexual harassment. *Jacobs v. DOC*, 94-0158-PC, 5/15/95

Repeated acts of sleeping on the job met the just cause standard. *O'Connor v. DHSS*, 94-0339, 0497-PC, 3/31/95

Just cause existed for disciplining appellant, a Revenue Agent, for unplugging his phone (which prevented him from receiving phone inquiries) contrary to specific policy and for failing to file taxpayer correspondence for more than 2 months. Appellant was aware of the instructions given him by his supervisor, he decided not to comply, and the failure to comply had a tendency to adversely affect the efficiency of the work unit. *Breckon v. DOR*, 93-0199-PC, 10/4/94

Just cause existed for imposing discipline for appellant's failure to provide requested medical verification for her continued absences, where the absences contributed to a work backlog and required the temporary reassignment of other staff. A one day suspension was not excessive where it was consistent with respondent's written guidelines as a second category B violation. *Garner v. DOC*, 94-0013-PC, 7/27/94

Just cause existed for imposing discipline for appellant's action of leaving her lock-box key, which must be presented daily to obtain a door key for a high-security area within the correctional institution, at a bus stop outside the institution's secured perimeter. However, a 3 day suspension was modified to 2 days where the relative degree of risk imposed was slight. *Garner v. DOC*, 94-0013-PC, 7/27/94

A constructive demotion of appellant in lieu of layoff had occurred based upon respondent's creation of a new position through substantial changes in appellant's AA 3 position. Respondent's intent in effecting this constructive demotion had been to discipline appellant because of dissatisfaction with her performance in the AA 3 position. *Davis v. ECB*, 91-0214-PC, 6/21/94

Where an employe/supervisor was charged with insubordination for failing to follow institutional policies concerning inmate evacuation during fires, respondent established that he failed to follow the letter of the written policies, but the employe could not be held accountable for insubordination because his actions were not contrary to the policies actually followed and enforced by management. However, respondent did establish that appellant was negligent in the performance of his duties by failing as shift

commander to become thoroughly familiar with institution policies, and by his decision to halt the evacuation of inmates during a fire, where he gave conflicting rationales for his decision, and failed to consider all of the implications of his actions. *Reimer v. DOC,* 92-0781-PC, 2/3/94

Respondent's decision to discharge the appellant was rejected where the decision had been premised on three separate incidents. Appellant's actions in the first two incidents might have been inconsistent with performance standards and Board rules, but were consistent with supervisory instructions/practice and appellant was not primarily responsible for monitoring the activities in question. The Commission found that appellant's actions in the third incident did not violate respondent's rules, nor had respondent clearly communicated its expectations or interpretation of the rule. *Higgins v. Wis. Racing Bd.*, 92-0020-PC, 1/11/94

In dicta, the Commission noted that the appellant's telephone conversation with a female employe's minor sister in which he asked her to pose for photographs in her underwear did not violate a work rule prohibiting employes from engaging in unauthorized personal business where the respondent would not have disciplined the appellant but for the sexual nature of the telephone conversation. *Arneson v. UW*, 90-0184-PC, 2/6/92

In dicta, the Commission noted that in determining whether an employe's conduct was threatening or intimidating, thereby violating a work rule, the Commission should apply an objective standard, i.e., whether the actions would be deemed threatening or intimidating to the average similarly situated employe. *Arneson v. UW*, 90-0184-PC, 2/6/92

In dicta relating to a claim of sexual harassment, the Commission noted that the appellant did not engage in "repeated" conduct of a sexual nature and there was no evidence that the appellant's conduct was unwelcome. *Arneson v. UW*, 90-0184-PC, 2/6/92

In dicta, the Commission noted that the appellant's telephone conversation with a female employe's minor sister in which appellant asked her to pose for photographs in her underwear constituted the violation of a work rule (the failure to exercise good judgment) and constituted just

cause for the imposition of discipline. *Arneson v. UW*, 90-0184-PC, 2/6/92

There was just cause for the demotion of the appellant from her position as a Property Assessment Supervisor where the appellant's action of making a reduction in a town's assessments for agricultural improvements was shown to have been largely politically motivated rather than having been based on generally accepted principles of equalization. *Sanders v. DOR*, 89-0076-PC, 11/16/90; affirmed by Chippewa County Circuit Court, *Sanders v. Wis. Pers. Comm.*, 90 CV 433, 9/4/91

Where the complainant consistently failed to meet reasonable and uniformly applied performance standards for her Auditor Specialist 3 position, it was axiomatic that the *Safransky* test was met. *Tews v. PSC*, 89-0150-PC, 89-0141-PC-ER, 6/29/90

Discipline was warranted where appellant, a supervisor in a correctional institution, allowed two inmates to add a state-owned bedspread and a bathrobe to the list of the inmates' personal property in clear violation of institution policies and procedures and where the appellant made personal use of a state typewriter on state time. *Hebert v. DHSS*, 89-0093-PC, 6/27/90

The appellant's conduct of hugging and kissing a co-worker during a counseling session constituted unwelcomed physical contact meriting discipline because it undermined the normal working relationship between the two employes and, if observed by an inmate, could also serve as a tool for exerting leverage over staff. *Harron v. DHSS*, 89-0152-PC, 6/27/90

Discipline was warranted where the appellant, a Property Assessment Specialist 1, failed to meet the minimum field review quantity rating standard. *Barker v. DOR*, 89-0116-PC, 5/16/90

Discipline was warranted where the appellant, a shift captain at a correctional institution, had pointed and discharged a firearm at another correctional officer and had known the firearm was loaded with a dummy round. *Paul v. DHSS*, 87-0147-PC, 4/19/90

Two statements made by the appellant, "For me, you are dead" and "I should get a gun and shoot Dan Stillings," did

not rise to the level of "threatening, intimidating, or inflicting injury" within the meaning of the employing agency's work rule, where the persons to whom the statements were made or who were mentioned in the statements did not interpret them as threats of physical or other retaliation. *Showsh v. DATCP*, 89-0043-PC, 4/17/90

Discipline was warranted where the appellant had neglected to carry out his assignment of inspecting a scheduled slaughter, intentionally falsified agency records and gave false information to his supervisors regarding his time of arrival at the meat plant. *Showsh v. DATCP*, 89-0043-PC, 4/17/90

Where appellant, a Conservation Warden Supervisor, was found to have made a suggestion to a warden under his supervision that the warden use car-killed deer funds to purchase a scanner from the appellant, thereby engaging in illegal conduct, the appellant's misconduct tended to impair the performance of his duties and constituted just cause for the imposition of discipline. *Mitchell v. DNR*, 83-0228-PC, 8/30/84

Where appellant obtained a first-aid kit from a supply room attendant after telling the attendant he wanted to take it with him to his cottage over the weekend, and agreed to sign out for the kit with the supply room manager after the weekend, appellant was at least temporarily authorized to use the kit over the weekend and the appellant did not violate the work rule prohibiting employes from "Stealing or unauthorized possession of state… property ……" However, the appellant intended to use the kit for his personal benefit rather than entirely in the course of his employment, thereby violating an administrative rule. The Commission reduced the level of discipline imposed from a 30 day suspension to a I day suspension, in part due to appellant's previously unblemished work record. *Hammond v. DOT*, 83-0172-PC, 5/16/84

Appellant's dismissal was upheld where evidence established to at least a reasonable certainty, that the bulk of the 18,000 miles driven by the appellant in a state vehicle were for personal rather than business purposes. *Blake v. DHSS*, 82-208-PC, 1/4/84

The Commission upheld appellant's one day suspension for conducting personal business while on duty where appellant

had previously been reprimanded for such conduct and where the captain in the district where appellant was employed consistently regarded such conduct as being unacceptable even though other districts in the state may have viewed similar conduct differently. *Zabel v. DOT*, 82-137-PC, 11/30/83

The Commission upheld a two day suspension imposed against a supervisor for grabbing a subordinate employe after the supervisor perceived the employe to be sticking her tongue out at the supervisor. *MacDonald v. Sec. of State*, 80-364-PC, 8/17/83

The Commission overturned a one day suspension of a supervisor who reasonably perceived that an employe was insubordinate and then "ordered" the subordinate employe to discontinue their discussion and to follow her to the office of the appointing authority. However, a two day suspension of the supervisor for grabbing the employe's arm was upheld. *MacDonald v. Sec. of State*, 80-364-PC, 8/17/83

Appellant's one-day suspension was upheld where appellant, a supervisor of probation and parole agents had received very specific training as to the proper interpretation of a new administrative rule but failed to comply with the rule regarding parolees who were suspects in assaultive acts against a member of the public. *Nuter v. DHSS*, 82-148-PC, 7/21/83

No just cause was found where the appellant was disciplined for failing to act in accordance with a newly promulgated administrative rule and where the Commission concluded that the rule in fact provided appellant discretion in how to respond to the incident in question. Respondent contended that appellant, a supervisor of probation and parole agents, was required to direct that a client be placed in custody based on information received about the client's conduct. *McBeath v. DHSS*, 82-119-PC, 7/7/83

There was just cause for a 3 day suspension where it was found that the appellant sexually harassed co-employes where he made unwelcome sexual advances, requested sexual favors, engaged in gratuitous physical conduct of a sexual nature, and made baseless claims of having engaged in sexual intimacies with one of them, and where most if not all of the activity took place in a dormitory that was

found to be a work environment during hours supervised by the respondent employer. *Amim v. DHSS*, 81-17-PC, 3/17/83

A three day suspension was upheld where appellant, a program assistant, was negligent or inattentive in processing a certification request resulting in a two week delay in the effective date of a restoration, where appellant did not file documents on the days identified by her supervisor and had a filing backlog of up to one month and where appellant had disregarded her supervisor's express instructions to use the word processing center for all form letters. The appellant had previously received a written reprimand for a comparable violation. *Roberts v. DHSS*, 80-169-PC, 3/17/83

There was just cause for the 3 day suspension of the appellant, a supervisor, for engaging in loud, disruptive exchanges with a subordinate, and the amount of the discipline imposed was not excessive. *Pagliano v. DVA*, 82-99-PC, 2/7/83

There was just cause for the suspension of employes at Taycheedah Correctional Institution (TCI) who violated a work rule by returning to the institution after lunch while exhibiting evidence of having consumed alcoholic beverages, notwithstanding that they had decided to take leave time for that afternoon., as they each had at least one specific duty to perform at the institution that afternoon and to that extent they were "at work." *Bender et al. v. DHSS*, 81-382, 383, 384-PC, 3/19/82

Just cause was found with respect to the decision to discipline the appellant, a state patrol sergeant, for failure to take earlier action with respect to appellant's concern that a subordinate trooper had been drinking. *Holt v. DOT*, 79-86-PC, 11/8/79

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 205 through 270

[Previous material] [Next material]

205.1 Constitutional Rights

To the extent §230.37(2), Stats., is read to require a balancing of the appointing authority's interest, served by an order that an employe submit to a medical examination, and the employe's constitutionally protected privacy rights, there is a legitimate public interest in assuring that an employe, who is being sent out of the office and into the public realm in order to evaluate various agencies which deal with the employing agency, is mentally capable and fit for employment, for both reasons of security and of efficiency. *Haney v. Wis. Pers. Comm.*, Dane County Circuit Court, 95-CV-0867, 2/15/96

The first amendment rights of the appellant were not violated when he was suspended for making uncomplimentary and caustic remarks about the urban renewal efforts of certain communities and local officials during a speech before a large group of urban development professionals, because the employer's interest in maintaining good working relationships with local officials would outweigh appellant's interests in being able to express his opinions under the balancing test mandated by *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, (1968). *Stitt v. DOD*, 88-0090-PC, 6/19/89

Specific instructions to appellant, an office director, to fully explain the department's position whenever discussions arose, did not infringe on the employe's first amendment rights. *Monson v. DHSS*, 87-0076-PC, 6/20/88; affirmed by Dane County Circuit Court, *Monson v. Wis. Pers.*

***Comm.*, 88-CV-4059, 4/20/89**

Disciplinary action was upheld where employer based its decision on appellant's complete employment history, and the protected speech in question constituted one factor in a performance evaluation decision which was in turn one factor in the final decision and there was no strong link between the protected activity and the discipline imposed. *Ruff v. State Investment Board*, 80-105, 160, 222-PC, 8/6/81; affirmed by Dane County Circuit Court, *Ruff v. State Pers. Comm*. 81-CV-4455, 7/23/82; affirmed by Court of Appeals District IV, 82-1572, 11/8/83

The First Amendment rights of public employes to comment publicly on matters of public concern which are related to their employes' functions are protected from employer interference, subject to a balancing of state and private interests. It is possible for the employer to base a disciplinary decision in part on an employe's exercise of protected speech, where the employer's decision would have been reached in the absence of protected speech, as long as the employer relied on other permissible reasons at the time of the decision. *Ruff v. State Investment Board*, 80-105, 160, 222-PC, 8/6/81; affirmed by Dane County Circuit Court, *Ruff v. State Pers. Comm*. 81-CV-4455, 7/23/82; affirmed by Court of Appeals District IV, 82-1572, 11/8/83

A state employe is protected by the First Amendment, and to determine whether speech is constitutionally protected against infringement, it is necessary to balance the interest in free speech against the interest of the state as employer in promoting the efficiency of the public services it performs through its employes. Where a probationary employe's response to a performance evaluation was, in part, critical of his supervisors, it was held that the subsequent termination of his probationary employment did not violate his First Amendment rights in light of the nature of the probationary period in general under the civil service system, the long-standing and well-documented concern of the respondent with appellant's defensive attitude and behavior, and the nature of appellant's work, which was professional in nature, involved much communication, and placed a premium on a cooperative and non-defensive attitude. *Chiat v. WCCJ*, 78-152-PC 6/5/79

205.3 Absence of standards of performance

Objective standards or minimum performance standards, such as a minimum hourly page rate or allowable error rate, are not required to measure the performance of a Technical Typist. *Zehner v. Pers. Bd.*, Dane County Circuit Court, 156-399, 2/20/78

The employing agency cannot be required to anticipate every possible wrong turn that an employe can make and to give that employe a set of directives that will cover every such eventuality. While an employe at a management level requiring the frequent exercise of discretion should not be disciplined over a mere difference of opinion regarding such an exercise of discretion, management is not prevented from imposing discipline where the judgment exercised by the employe is egregious, simply because the employe has not been forewarned that disciplinary action would result. *Paul v. DHSS*, 87-0147-PC, 4/19/90

The Commission rejected the appellant's contention that findings of misconduct cannot be based on errors for which there was no established criteria for measuring performance unless the conduct was egregious, noting that the appropriate just cause standard is set forth in *Safransky* and that this was not a case in which there were conflicting analyses of work performance by different supervisors. *Bents v. Office of the Commissioner of Banking*, 86-0193-PC, 7/13/88; modified and remanded by Dane County Circuit Court, *Bents v. Wis. Pers. Comm. & OCB*, 88 CV 4234, 4/3/89; on remand, the Commission affirmed the discharge decision, 10/4/89

The respondent was not required to articulate quantifiable standards against which appellant's performance could be compared where two of the three violations alleged insubordination or reluctance to carry out instructions and where the other violation alleged a failure to promptly process a certification request despite express instructions. *Roberts v. DHSS*, 80-169-PC, 3/17/83

205.5 Failure of management to train and supervise

Where the appellant had several years experience as a Technical Typist I prior to a demotion to the position in question after having failed to pass probation as a Technical Typist 2, there was no requirement that the employer provide further training in the skills expected of an experienced employe in that classification. Since she received specific instructions on the formats needed for her work, was provided with a separate copy of a medical dictionary, and her supervisor, an Administrative Secretary 1, tried to be helpful in pointing out deficiencies in her work and in trying to aid her in correcting them it could not be said that the deficiencies in the appellant's performance were due to any lack of proper training and supervision. The absence of any mention of supervisory duties in the Administrative Secretary I position standards is immaterial since the duties had in fact been assigned to the appellant's supervisor. *Zehner v. Pers. Board*, Dane County Circuit Court, 156-399, 2/20/78

205.7 Multiple punishment

The appellant's argument that he was disciplined twice for the same incident, receiving both an "oral reprimand" from his supervisor and a 10 day suspension, was rejected where the supervisor was unaware of certain details of the incident, including appellant's falsification of records, when he first discussed the incident with appellant. *Showsh v. DATCP*, 89-0043-PC, 4/17/90

205.8(1) Pre-disciplinary procedural requirements, generally

Appellant, who received a 5 day suspension which was reduced by the Commission to 2 days, was denied due process where he did not receive notice of the charges against him before the suspension was imposed. The exception to the due process requirement based on a necessity for quick action was not present where the suspension did not occur until more than three months after the alleged violations. *Showsh v. Wis. Pers. Comm.*, Brown County Circuit Court, 89-CV-445, 6/29/90; affirmed by Court of Appeals, 90-1985, 4/2/91

Where the respondent failed to explicitly inform the appellant that he was the target of its investigation and was the accused, not just a witness, respondent violated his due process rights and prejudiced his defense. No postsuspension procedure afforded the appellant a similar opportunity to persuade the decision makers to forgo their right to impose a particular penalty. *Showsh v. Wis. Pers. Comm. & DATCP,* Court of Appeals, 90-1985, 4/2/91

The Commission rejected appellant's contention that he was denied due process protections when the same individual participated both in the investigation and in the final decision-making process and where appellant argued that the individual held personal animosity toward appellant. *England v. DOC,* 97-0151-PC, 9/23/98

Where appellant admitted to his supervisor that he had told certain jokes that were racially demeaning, respondent's subsequent action of suspending the appellant for 10 days was rejected because respondent had failed to provide appellant with a due process hearing. In addition, the admission was made before appellant had been told of the nature of the complaints against him, respondent had not informed appellant that respondent might view the charges as serious, and the supervisor never disclosed the potential that suspension or some other serious form of discipline could result. Appellant's admission did not absolve respondent from according him further due process protections. The Commission distinguished *Gilbert v. Homar,* 117 S.Ct. 1807 (1977). *Brenon v. UW,* 96-0016-PC, 2/12/98

Appellant received the required procedural due process with respect to his suspensions and terminations even though one person made the underlying work order, conducted the investigation of its alleged violation, conducted the pre-disciplinary proceeding, recommended discipline to her superiors and imposed discipline. There was no evidence that the relationship between appellant and this individual, who was appellant's third-level supervisor, was anything other than a regular working relationship derived exclusively from working at their jobs for a number of years and there was no evidence that the supervisor had displayed, for example, vituperative behavior towards appellant. *Haney v. DOT,* 93-0232-PC, 94-0012-PC, 3/9/95 ; affirmed by Dane County Circuit Court, *Haney v. Wis. Pers. Comm.,* 95-CV-0867, 2/15/96

A pre-suspension hearing during which the employe was asked if she had struck a supervisor and to give "her side of the story," but was not provided any explanation of the employer's evidence was defective under the test set forth in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546, 84 L. Ed. 2d 494, 506, 105 S. Ct. 1487 (1985). The employer was not justified in omitting a hearing completely with respect to a second alleged striking incident that occurred the same day as the first, on the ground that when she was questioned about the first incident, appellant professed a memory lapse. Also, the record was not consistent with respondent's post-hearing assertion of exigent circumstances due to a concern about the threat of further violence. *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Respondent was not required to turn over its entire investigative file to appellant during a pre-disciplinary hearing preceding a ten-day suspension, where respondent discussed the evidence on which it was relying. The question of the adequacy of the investigation conducted by management prior to the predisciplinary hearing is not an issue that is raised by an appeal of this nature, which involves a *de novo* hearing. *Reimer v. DOC*, 92-0781-PC, 2/3/94

Notice given on Friday of a predisciplinary hearing the following Monday did not violate appellant's due process rights. The essential requirements of due process, notice and an opportunity to respond, were met. *Higgins v. Wis. Racing Bd.*, 92-0020-PC, 1/11/94

Appellant was not given adequate notice that he was the target of possible discipline, nor adequate notice of the charges against him, nor an adequate explanation of the employer's evidence where, inter alia, the focus of the predisciplinary meeting was on corroborating the employer's allegations, only parts of the allegations were provided to the appellant and it wasn't until the end of the meeting that the appellant was told he was facing possible discipline ranging from reprimand to discharge. *Arneson v. UW*, 90-0184-PC, 2/6/92

Where the person who presided at the appellant's predisciplinary hearing and played a key role in the investigation and disciplinary recommendation was not

impartial, the appellant was denied due process even though this person only recommended action to someone else who had the final authority in the matter. *Fofana v. DHSS*, 90-0120-PC, 8/15/91

Where there was long-standing acrimony between the decision maker at the predisciplinary hearing and the appellant and the respondent did not follow its normal procedure of designating the subject employe's immediate supervisor as the decision maker and the designated person had probable incompatible interests due to prior relationships with the various parties involved in the incident, the predisciplinary hearing was inadequate and the resulting suspension was rejected. *Fofana v. DHSS*, 90-0120-PC, 6/28/91; rehearing denied, 8/15/91

Appellant's due process rights were not violated even though he was not provided a written notice of the predisciplinary hearing which referred to an incident on February 19, where, at the time the predisciplinary hearing began regarding an incident on February 26th, respondent's management was unaware of the incident on the 19th and there was no allegation that the appellant was not provided a full opportunity to explain his side of the February 19th events during the predisciplinary hearing. The letter of suspension issued to the appellant was based on the incidents on both the 19th and the 26th. *Powers v. UW*, 88-0029-PC, 5/10/90; affirmed by Dane County Circuit Court, *Powers v. Wis. Pers. Comm.*, 90 CV 3023, 2/12/91

Due process requirements of notice and an opportunity to respond were satisfied with respect to a decision to treat the appellant as having abandoned her job. The appellant's property interest was less than in a termination situation because she was not in pay status at the time, was not capable of performing the duties of her position or any equivalent position and would not be stigmatized by respondent's actions by having a firing on her record since the transaction would be characterized in her record as a resignation. *Smith v. DHSS*, 88-0063-PC, 2/9/89

The requirements of due process are minimal in a case involving a suspension with the right to a trial-type hearing on an appeal and the key requirement is that the employer not act without first giving the employe an opportunity to present his version of the facts. Appellant was not denied due process even though he was not advised explicitly that

he could be disciplined, where he was called into a meeting with his second-level supervisor who informed him of a number of concerns he had about appellant's actions and asked appellant for his version of the events. At the meeting, the appellant asked if he needed a lawyer and the supervisor replied that he did not. *Letzing v. DOD*, 88-0036-PC, 1/25/89

The due process clause does not require a direct meeting between the employe and the appointing authority as part of the pretermination proceeding. *Paul v. DHSS*, 87-0147-PC, 1/12/89

The Commission has the authority to rule on whether due process requires a predisciplinary hearing where the civil service code neither mandates nor prohibits such a hearing. *Showsh v. DATCP*, 87-0201-PC, 11/28/88; rehearing denied, 3/14/89; reversed on other grounds by Brown County Circuit Court, *Showsh v. Wis. Pers. Comm.*, 89-CV-445, 6/29/90; affirmed by Court of Appeals, 90-1985, 4/2/91

A week's salary, lost as a consequence of a suspension, is a property interest that is protected by the due process clause. *Showsh v. DATCP*, 87-0201-PC, 11/28/88; rehearing denied, 3/14/89; reversed on other grounds by Brown County Circuit Court, *Showsh v. Wis. Pers. Comm.*, 89-CV-445, 6/29/90; affirmed by Court of Appeals, 90-1985, 4/2/91

Predisciplinary proceedings were held to be adequate where appellant received verbal notice of a predisciplinary hearing and appeared with counsel. Advance written notice of this hearing and of the work rules deemed to have been violated are not required. Where there was sufficient notice that management considered the matter to be very serious, respondent did not have to advise appellant of the range of disciplinary action that could result from the charges against her. *Kode v. DHSS*, 87-0160-PC, 11/23/88

Simply because the state has provided for certain pre-disciplinary procedures by its own regulations does not mean *per se* that those procedures are required as a matter of constitutional due process. However, the Commission would give some weight to the fact that the particular employer has made a formal determination that certain procedures are necessary elements under the due process

clause before discipline can be imposed on its employes, not in the sense that these elements are legislatively-engrafted constitutional minima, but in the sense that they are part of the overall circumstances and reflect, to a certain extent, the employer's assessment of its own interests and what procedures it can and should afford its employes. *McCready & Paul v. DHSS*, 85-0216, 0127-PC, 5/28/87

Appellants, as employes who were protected by a 'just cause' type restriction on termination under the civil service law, were entitled under the due process clause to a pre-termination hearing, citing *Cleveland Bd. of Educ. v. Laudermill*, 470 U.S. 532 (1985) *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 5/28/87

The Commission concluded that the appellant was denied his right to procedural due process of law in connection with the pre-termination process where the appellant did not receive adequate notice of the charges against him or an adequate explanation of the employer's evidence as it related to those charges which contributed to him not having an adequate opportunity to present his side of the story as to the charges and where management misled him to believe that no serious discipline was being considered. *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 5/28/87

The Commission concluded that the appellant was denied his right to procedural due process of law in connection with the pretermination process where the appellant was not told that he might be discharged, respondent failed to comply with the provisions in the Supervisor's Manual requiring management to present out the pre-disciplinary hearing a tentative conclusion that disciplinary action is warranted and the appellant was never apprised of the full range of management's concerns about the incident and therefore he lacked notice of the charges against him. *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 5/28/87

Where the appellants were suspended without pay for relatively short periods, they were afforded at least a limited opportunity to respond to the charges before suspension, and they were afforded a *de novo* hearing before the Commission following their appeals, they were afforded as much procedural protection as might be required by the Fourteenth Amendment Due Process Clause under an expansive reading of *Arnett v. Kennedy*, 416 U.S.

134,94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974) *Bender et al. v. DHSS*, 81-382, 383, 384-PC, 3/19/82

205.8(2) Notice of imminent danger of termination

Where an employe failed to complete assigned tasks in a timely manner and failed to completely perform a substantial portion of his duties for a two month period, there was an ample showing of just cause, and just cause does not require that an employe be put on notice that he or she is in immediate danger of discharge. *Finnegan v. State Pers. Bd.*, Dane County Circuit Court, 164-096, 7/18/79

No such warning is required by the civil service code and in this case the appellant had some warning that the respondent was dissatisfied with his performance. *Alff v. DOR*, 78-227,243-PC, 10/1/81; affirmed by Dane County Circuit Court, *Alff v. Pers. Comm.* 81-CV-5489, 1/3/84; affirmed by Court of Appeals District IV, 84-264, 11/25/85; petition for review by Supreme Court denied, 2/18/86

205.9 Other

There is no requirement that the Commission measure the appellant's performance against the level of performance of other employes assigned similar responsibilities. *Bents v. Wis. Pers. Comm. & Office of the Commissioner of Banking*, Dane County Circuit Court, 88 CV 4234, 4/3/89

Respondent did not violate appellant's due process rights by failing to have appellant perform two goals listed in her position description. The decision to discharge the appellant was upheld. The Commission rejected appellant's contention that because she did not perform certain duties listed in her position description, respondent had violated its own requirements of the Performance Improvement Program. The obvious intent of the "accurate position description" requirement in respondent's manual code was that employes be fully apprised of the duties and responsibilities they were to be performing and on which they were to be evaluated during the PIP review period. Respondent met this requirement. *Rufener v. DNR*,

93-0074-PC-ER, etc., 8/4/95

The appellant was not justified in thinking that his behavior was appropriate and would not subject him to discipline just because someone else was not disciplined for similar conduct where appellant had been involved in prior incidents resulting in counseling. *Powers v. UW*, 88-0029-PC, 5/10/90

The Commission rejected the appellant's contention that his regular duties were unimpaired by misconduct which had occurred while he was performing a voluntary activity, where the appellant was in paid status at the time of the misconduct and the voluntary activity was approved by management. *Paul v. DHSS*, 87-0147-PC, 4/19/90

Even if a situation is not covered by a specific rule or regulation, an employe, particularly a management or supervisory employe, who exercises poor enough judgment can be subjected to discipline. *Kode v. DHSS*, 87-0160-PC, 11/23/88

210.2 Excessiveness, generally

Respondent's decision to demote appellant from his position as captain and shift commander for a correctional institution to a sergeant position was not excessive where appellant had received a 10 day suspension one year earlier and appellant's supervisors had lost their trust in appellant and could no longer rely on the accuracy of his information. Respondent substantiated 10 allegations of misconduct violating four separate work rules, including the failure to carry out instructions and giving false information during an investigation. A number of his subordinates perceived favoritism by him towards a female subordinate officer. His supervisor directed him not to treat the subordinate any differently than the other correctional officers. Nevertheless, appellant continued to spend more time with that particular officer than with the other officers on duty, switched her assignment so she could cook breakfast for him, made numerous telephone calls to her at her home when he was on duty and did not answer truthfully when he was asked, during the disciplinary investigation, how frequently he called her. *Bergh v. DOC*, 98-0018-PC, 1/27/99

Respondent's discharge decision was excessive where respondent failed to show that appellant's actions constituted fraternization, or that such actions even had significant security implications and where the decision to discharge appellant was primarily premised on the conclusion that appellant, a supervisor, had engaged in fraternization. The deficiencies in appellant's work performance and conduct which respondent was able to establish were primarily health care practice deficiencies that respondent did not view as seriously, in the disciplinary context, as fraternization. Appellant was the manager of a health services unit at a correctional institution and had no previous discipline in the position. The discharge was modified to a 10 day suspension without pay and a demotion to a non-supervisory position. *Kleinsteiber v. DOC*, 97-0060-PC, 9/23/98

There was just cause for the imposition of discipline against a campus police sergeant who simulated masturbation when telling a joke about a co-worker and later misrepresented the truth about the incident to his second-level supervisor. However, discharge was excessive where respondent failed to prove allegations of other misconduct referenced in the discharge letter and where a 10 day suspension issued two months before the discharge and relied on for reasons of progressive discipline was thrown out because of a lack of due process. Some of the other jokes told by appellant that were referenced in the discharge decision were not outside the parameter of long-standing accepted behavior in the workplace. *Brenon v. UW*, 96-0016-PC, 2/12/98

A five day suspension was excessive for appellant's failure to report to management that he had pleaded no contest to an ordinance violation of issuing a worthless check when he wrote a $20 personal check which bounced due to insufficient funds, because 1)there was no evidence that the five day suspension was commensurate with other cases involving similar work rule violations; 2) there was nothing inherent in the violation from which it could be inferred that as substantial a penalty as a five day suspension was warranted; 3) the warden was of the opinion that, but for concerns that under the Fair Labor Standards Act any suspension had to be at least 5 days in duration, a two to three day suspension would have been appropriate; 4)appellant's immediate supervisor was of the opinion that a two day suspension was appropriate and five days was

excessive; and 5) appellant had no prior disciplinary record. The suspension was reduced to a written reprimand. *Jelinek v. DOC*, 96-0161-PC, 7/2/97

A 15 day suspension of appellant, the supervisor of a security unit at the University of Wisconsin Hospital and Clinics, was excessive where the appellant brought into the security unit a photo of a naked boy with a drawing of a large penis superimposed on it, showed the photo to other male officers present in the security unit and the photo was seen by a female member of the hospital's nursing staff. Appellant's actions violated respondent's harassment policy and had a tendency to impair the performance of appellant's duties as a supervisor and the efficiency and effectiveness of the work unit. Appellant's conduct warranted a 3 day suspension. *Asche v. DOC*, 90-0159-PC, 5/21/97

A five day suspension of the director of a treatment program for adolescent patients at a mental health institution was affirmed where the employe knew from his supervisor that he should not proceed with a plan to have a patient discharged to live in his home without obtaining an exception to the staff/patient relationships policy but the employe went ahead with a 30 day placement of the patient in his home on an extended pass. The employe willfully disregarded his supervisor's instruction which created liability exposure for the institution and set a poor example for the other staff in the program over which the employe had management responsibilities. The employe's conduct had the potential to compromise his ability to insist that other program staff follow the work rules applicable to them. The length of the suspension was not unreasonable as a means of achieving the goal that similar conduct not recur. While stressful factors present in the workplace may have contributed to the exercise of poor judgment by the employe, they did not excuse creating a serious potential liability for the institution. *Malesevich v. DHSS*, 96-0087-PC, 3/26/97

Appellant violated respondent's work rules and an executive directive by causing mental anguish to a subordinate, using loud and abusive language toward the subordinate, engaging in conduct which caused a hostile and intimidating working environment and making derogatory comments to the subordinate about females. There was just cause for the imposition of a one day suspension, even though the underlying conduct involved one rather than multiple

incidents. *Chyba v. DOC*, 94-0500-PC, 7/23/96

Respondent established just cause for disciplining the appellant where appellant's work performance consistently failed to satisfy reasonable performance expectations, appellant's performance did not improve in any significant manner during the period of time she was on a Performance Improvement Program despite continuing feedback and training. The failure to meet reasonable performance standards for a position impairs the performance of the duties of the position and impairs the efficiency of the group with which the employe works, citing *Tews v. PSC*, 89-0150-PC, 89-0141-PC-ER, 6/29/90. The decision to discharge appellant was not excessive. *Rufener v. DNR*, 93-0074-PC-ER, etc., 8/4/95

Just cause existed where appellant, a captain and shift commander at a correctional institution, engaged in a pattern of sexually predatory behavior toward female subordinates and he knew or should have known that his actions violated not only agency policy but also state and federal law, and exposed respondent to extensive potential liability. Appellant's reckless use of a firearm exacerbated the seriousness of his misconduct. Although the appellant's mental state during this period could be considered a mitigating factor, it was not entitled to great weight given appellant's manipulative behavior and the fact that he was not out of touch with reality; therefore, discharge was not excessive discipline in light of the strong public policy against sexual harassment that justifies strong measures by management against employes who have engaged in sexual harassment. *Jacobs v. DOC*, 94-0158-PC, 5/15/95

Factors which enter into the determination of whether the degree of discipline imposed was excessive include the weight or enormity of the employe's offense or dereliction, including the degree to which it did or could reasonably be said to tend to impair the employer's operation, the employe's prior record and discipline imposed by the employer in other cases. *Jacobs v. DOC*, 94-0158-PC, 5/15/95

Just cause existed where a co-worker told appellant that his attentions were unwelcome, after further incident, respondent told appellant that further contacts with the co-worker were prohibited and warned him that failure to comply could result in discipline, there were subsequent

incidents of contact by appellant with the co-worker and the co-worker's performance suffered due to appellant's unwelcome attentions. A five-day suspension was not excessive discipline. It was not determinative whether appellant actually committed a violation of state or federal discrimination laws. The correct inquiry is whether the respondent's actions were reasonable under the circumstances. *Erickson v. WGC,* 92-0207-PC-ER, 92-0799-PC, 5/15/95

There was just cause for three day and seven day suspensions of the appellant as well as his discharge where, over the course of a month, he refused to submit to each of three psychological evaluations scheduled for him by respondent under §230.37(2), Stats., where respondent reasonably believed that appellant demonstrated performance problems that might be attributable to some disability. If the employer is unable to determine an employe's "fitness to continue in service" or "capacity to continue in employment," the only logical course of action is to discontinue such employment. *Haney v. DOT,* 93-0232-PC, 94-0012-PC, 3/9/95 ; affirmed by Dane County Circuit Court, *Haney v. Wis. Pers. Comm.*, 95-CV-0867, 2/15/96

Just cause existed for imposing discipline for appellant's failure to provide requested medical verification for her continued absences, where the absences contributed to a work backlog and required the temporary reassignment of other staff. A one day suspension was not excessive where it was consistent with respondent's written guidelines as a second category B violation. *Garner v. DOC,* 94-0013-PC, 7/27/94

Just cause existed for imposing discipline for appellant's action of leaving her lock-box key, which must be presented daily to obtain a door key for a high-security area within the correctional institution, at a bus stop outside the institution's secured perimeter. However, a 3 day suspension was modified to 2 days where the relative degree of risk imposed was slight. *Garner v. DOC*, 94-0013-PC, 7/27/94

A ten-day suspension was reduced to three days where respondent failed to prove one of the primary counts of misconduct, and appellant's prior disciplinary record consisted of a minor reprimand, but appellant's negligence had significant implications with respect to institutional

safety. *Reimer v. DOC*, 92-0781-PC, 2/3/94

A 1 day suspension of the appellant, a captain in a maximum security correctional institution who had arranged for and effectuated a shift trade without prior authorization and in knowing violation of policy, was excessive based upon the severity of the offense, prior disciplinary record and a comparison to the absence of any discipline assessed to another employee for an identical offense. The suspension was reduced to a written reprimand. *Larsen v. DOC*, 90-0374-PC, 91-0063-PC-ER, 5/14/92

While the respondent acted prudently when it determined that, at that time, the appellant could not safely be returned to his position of employment, the respondent failed to obtain further medical evaluation before making a decision on appellant's permanent employment status and by not considering positions outside the University of Wisconsin Hospitals and Clinics, respondent failed to discharge its obligation under §230.37(2) of exhausting less drastic measures short of discharge. *Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 11/6/91

There was just cause for the demotion of the appellant from her position as a Property Assessment Supervisor where the appellant's action of making a reduction in a town's assessments for agricultural improvements was shown to have been largely politically motivated rather than having been based on generally accepted principles of equalization. *Sanders v. DOR*, 89-0076-PC, 11/16/90; affirmed by Chippewa County Circuit Court, *Sanders v. Wis. Pers. Comm.*, 90 CV 433, 9/4/91

A five day suspension was upheld where appellant, a supervisor in a correctional institution, allowed two inmates to add a state-owned bedspread and a bathrobe to the list of the inmates' personal property in clear violation of institution policies and procedures and where the appellant made personal use of a state typewriter on state time. Appellant's conduct failed to set a good example for subordinate employes and created a potential security problem. *Hebert v. DHSS*, 89-0093-PC, 6/27/90

A five day suspension was upheld for a male employe who hugged and kissed a female co-worker during a counselling session. The appellant had an excellent work record except that he had been informally counseled for physical contact

with another female co-worker and had been told informally on another occasion by the personnel director to be careful about his physical contact with female employes. The appellant also had attended a sexual harassment training program less than one month before the incident which precipitated the discipline. The Commission rejected the appellant's request that he be treated differently because of his age. The Commission gave little weight to the level of discipline imposed by the respondent to a supervisor who had engaged in a fight with a co-worker, where that incident had occurred nearly two years earlier, where the available evidence suggested that the supervisor should have been more severely disciplined for his conduct and where institution management was dissatisfied with the results of the disciplinary process but recognized there were time problems in reopening the investigation of that matter. *Harron v. DHSS*, 89-0152-PC, 6/27/90

In an appeal from a demotion based on alleged inadequate performance, the question of whether the level of discipline was excessive is effectively answered if the respondent is able to establish that the level of performance was in fact inadequate and continuing. *Barker v. DOR*, 89-0116-PC, 5/16/90

A thirty day suspension was reduced to a letter of reprimand where the respondent failed to establish the existence of the primary allegation against the appellant, the incident which was substantiated was far less serious and the appellant otherwise had a good work record with no previous disciplinary actions. *Powers v. UW*, 88-0029-PC, 5/10/90; affirmed by Dane County Circuit Court, *Powers v. Wis. Pers. Comm.*, 90 CV 3023, 2/12/91

A ten day suspension was reduced to five days, where respondent failed to sustain its burden as to two of the three incidents on which the suspension had been premised, the incident for which the respondent did sustain its burden was the most serious of the three incidents and the person who issued the suspension letter stated she would have reduced the suspension to between 6 and 9 days if one of the three incidents had dropped out. *Showsh v. DATCP*, 89-0043-PC, 4/17/90

The demotion of the appellant from his position as office supervisor was upheld where the preponderance of the evidence supported the charges of insubordination,

inattention and/or negligence in carrying out assigned duties, misuse of case service funds, behavior unbecoming a state employe and failure to provide accurate, complete and/or timely information to supervisors. *Eft v. DHSS*, 86-0146-PC, 11/23/88; rehearing denied, 1/12/89; affirmed by Dane County Circuit Court, *Eft v. Wis. Pers. Comm.*, 89CV644, 5/10/90

Appellant's three day suspension was reduced to two days where the appellant's conduct did not appear to be that egregious and not all of the misconduct relied on by the appointing authority in imposing a three-day suspension was established. Two of the three cited work rules were found not to have been violated. Appellant had made uncomplimentary and caustic remarks about the urban renewal efforts of certain communities and local officials during a speech before a large group of urban development professionals. Appellant's comments violated the work rule which prohibited abusive language toward others. *Stitt v. DOD*, 88-0090-PC, 6/19/89

A one day suspension was not excessive discipline for an office director and long-term employe who violated work rules relating to insubordination and failing to provide accurate and complete information as to 2 incidents. *Monson v. DHSS*, 87-0076-PC, 6/20/88; affirmed by Dane County Circuit Court, *Monson v. Wis. Pers. Comm.*, 88-CV-4059, 4/20/89

There was just cause for suspending the appellant for one day for "failure to carry out assignments or instructions" where appellant, a supervisor, failed to timely complete a new work schedule, and where the appellant had received numerous verbal warnings to improve her work performance and had received a written reprimand for excessive absenteeism. However, the Commission found a subsequent demotion of the appellant to be excessive discipline. *Smith v. UW*, 84-0101, 0108-PC, 5/9/85; clarified on 8/5/85

Respondent's decision to demote the appellant from her supervisory position was modified to a 30 day suspension where appellant had altered the work assignments of certain of her cleaning crew in order to accommodate the handicap of a crew member, despite appellant's supervisor's requirement that he approve all changes. The Commission upheld a prior one-day suspension of the appellant. *Smith v.*

***UW*, 84-0101, 0108-PC, 5/9/85; clarified on 8/5/85**

The Commission reduced appellant's discharge to a 30 day suspension where respondent failed to establish that appellant engaged in certain of the alleged misconduct, where a previous written reprimand was found not to have been warranted and where another employe received a 10 day suspension for related misconduct. *Mitchell v. DNR*, 83-0228-PC, 8/30/84

Respondent's decision to discharge the appellant, a 17 year employe, was upheld where the appellant's performance problems were long-standing and he had failed to make any significant improvements. *Fauber v. DOR*, 82-138-PC, 8/21/84; affirmed by Milwaukee County Circuit Court, *Fauber v. State Pers. Comm.*, 649-551, 10/8/85

Discharge arising from an outburst amounting to insubordination was found to be excessive discipline where the appellant otherwise had a good work record, it was the first such incident in over three years of employment and it did not occur in front of any subordinate employes. The discharge was modified to a 20 day suspension. *Barden v. UW-System*, 82-237-PC, 6/9/83

There was just cause for the 3 day suspension of the appellant, a supervisor, for engaging in loud, disruptive exchanges with a subordinate, and the amount of the discipline imposed was not excessive. *Pagliano v. DVA*, 82-99-PC, 2/7/83

Suspensions of two employes of five and three days were upheld as not excessive, where they were away from a correctional institution without notice for several hours and, on their return, were behaving in what amounts to a drunken manner, but a one day suspension of a third employe was modified to a written reprimand where he had been in the company of his immediate supervisor throughout the episode, and, although he had alcohol on his breath, he had not been acting unusually. *Bender et al. v. DHSS*, 81-382, 383, 384-PC, 3/19/82

The Commission found that there was just cause for the discharge of the head of the state property insurance fund based on major operational problems in the fund for which the appellant was responsible due to inadequate supervision and lack of substantive knowledge. Furthermore, the discharge was not excessive in view of the magnitude of the

problems. *Hogoboom v. Commissioner of Insurance*, 80-107-PC, 10/2/81; affirmed by Dane County Circuit Court, *Hogoboom v. State Pers. Comm.*, 81-CV-5669, 4/23/84; affirmed by Court of Appeals District IV, 84-1726, 12/11/85

The discharge was held not to be excessive when the magnitude of the bureau's problems were weighed against the appellant's generally adequate prior evaluations. *Alff v. DOR*, 78-227,243-PC, 10/1/81; affirmed by Dane County Circuit Court, *Alff v. Pers. Comm.*, 81-CV-5489, 1/3/84; affirmed by Court of Appeals District IV, 84-264, 11/25/85; petition for review by Supreme Court denied 2/18/86

Where the appellant-physician refused to carry out a reasonable assignment to make an on-site evaluation of a potential medical treatment problem and then decide whether he was qualified to judge the propriety of care given to a deceased patient and, if he felt unqualified, to compile the case facts for presentation to others so that an evaluation could be made, a five day suspension was for just cause. Any further discipline was excessive where appellant had a good prior professional record, honestly held a principled belief that the assignment was improper and where he continued to perform all other assigned duties. *Lyons v. DHSS*, 79-81-PC, 7/23/80; affirmed by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm. (Lyons)*, 80-CV-4948, 7/14/81

Where the evidence did not sustain most of the charges against the appellant, but it was found that the appellant had violated DNR purchasing regulations, that he had consumed and had permitted his employes to consume small amounts of camp coffee and cookies, that he had a record of 10 years of continuous promotions and good performance, that the supervision of the camp employes consisted of only about 15% of his work time, it was determined that the discharge would be modified to a 30 day suspension. *Evrard v. DNR*, 79-251-PC, 1/22/80

A one-day suspension was reduced to a written reprimand where the appellant, a state patrol sergeant, had failed to take prompt action with respect to his concerns that a subordinate trooper had been drinking. *Holt v. DOT*, 79-86-PC, 11/8/79

210.5(1) Generally

Respondent's discharge decision was affirmed where appellant, who was responsible for supervising a textile operation employing inmate and other workers to manufacture gloves and other clothing products at a correctional institution in a business partnership between a private corporation and state government, gave gloves to various individuals for their personal use. Theft was regarded as one of the three most serious derelictions in a correctional setting. Appellant had engaged in prior similar conduct, had been disciplined for that conduct and had been warned that similar conduct could result in discharge. Discharge was consistent with the discipline imposed by respondent in other situations involving similar work rule violations. *England v. DOC*, 97-0151-PC, 9/23/98

A five day suspension was excessive for appellant's failure to report to management that he had pleaded no contest to an ordinance violation of issuing a worthless check when he wrote a $20 personal check which bounced due to insufficient funds, because 1)there was no evidence that the five day suspension was commensurate with other cases involving similar work rule violations; 2) there was nothing inherent in the violation from which it could be inferred that as substantial a penalty as a five day suspension was warranted; 3) the warden was of the opinion that, but for concerns that under the Fair Labor Standards Act any suspension had to be at least 5 days in duration, a two to three day suspension would have been appropriate; 4)appellant's immediate supervisor was of the opinion that a two day suspension was appropriate and five days was excessive; and 5) appellant had no prior disciplinary record. The suspension was reduced to a written reprimand. *Jelinek v. DOC*, 96-0161-PC, 7/2/97

A five day suspension was upheld where appellant's acts of misconduct included deception, prevarication and insubordination, all of which had a deleterious effect on his work unit. Appellant had no prior discipline. *Gifford v. DOT*, 94-0034-PC, 7/24/95

A ten-day suspension was reduced to three days where respondent failed to prove one of the primary counts of misconduct, and appellant's prior disciplinary record

consisted of a minor reprimand, but appellant's negligence had significant implications with respect to institutional safety. *Reimer v. DOC*, 92-0781-PC, 2/3/94

A 12 day suspension without pay was upheld for a supervisory employe's conduct of kissing another employe on the neck under circumstances which would have lead a reasonable person to believe that he engaged in unwelcome physical conduct of a sexual nature. The conduct violated a work rule and, in all likelihood, constituted a violation under the FEA. The offending employe previously had been disciplined for similar behavior which resulted in a 5 day suspension. *Harron v. DHSS*, 91-0204-PC, 8/26/92

After rejecting the respondent's entire disciplinary action of probationary termination, 30 day suspension, demotion and reduction in base pay due to a failure to provide an adequate predisciplinary hearing, the Commission, in dicta, noted that where the respondent was only able to sustain 1 of 5 charges and where the appellant had no prior discipline in his 20 year record of state service, a 5 day suspension would be more commensurate with the misconduct. *Arneson v. UW*, 90-0184-PC, 2/6/92

Discharge was not excessive where the complainant had consistently failed to meet reasonable performance standards for her Auditor Specialist 3 position, where the respondent had invested considerable time and effort in counseling and training the appellant and where none of the alternatives to discharge were viable. *Tews v. PSC*, 89-0150-PC, 89-0141-PC-ER, 6/29/90

Discharge was not excessive where the appellant, a shift captain at a correctional institution, had pointed and discharged a firearm at another correctional officer and had known the firearm was loaded with a dummy round. The appellant's work record was clean except for a written reprimand and a written warning. *Paul v. DHSS*, 87-0147-PC, 4/19/90

A 10 day suspension of the appellant, a 16 year employe of the respondent, was not excessive where the appellant's leadworker position as a Property Assessment Specialist 3 required integrity and the upholding of the public trust and where the appellant had forged purloined motel receipts in order to defraud the state for personal gain by filing a fraudulent expense voucher. *Deneen v. DOR*, 88-0093-PC,

3/24/89

The demotion of appellant from her position as a lieutenant in a correctional institution was sustained despite what was basically a good prior work record with the exception of having been counseled with regard to disobedience of a direct order. The demotion was based on disobeying a direct order and a breach of security. Management had a basis for concluding that appellant could not be relied on to perform at the lieutenant's level and that lesser progressive discipline was not appropriate. However, because respondent failed to sustain one of the charges and because its concern about appellant's capacity or willingness to function reliably as a lieutenant was addressed by her demotion, a fifteen day suspension of the appellant was found to be excessive. *Kode v. DHSS*, 87-0160-PC, 11/23/88

Appellant's discharge from his position as chief financial officer of respondent was upheld where his poor work performance, insubordination and other specified shortcomings tended to impair the performance of the agency. Appellant had a good work record with the respondent until the events which were part of the appeal and had no prior discipline. However, he had received numerous verbal warnings to improve his work performance and nothing indicated that the appellant had sought to improve his performance. *Bents v. Office of the Commissioner of Banking*, 86-0193-PC, 7/13/88; modified and remanded by Dane County Circuit Court, *Bents v. Wis. Pers. Comm. & OCB*, 88 CV 4234, 4/3/89; on remand, the Commission affirmed the discharge decision, 10/4/89

Discharge arising form an outburst amounting to insubordination was found to be excessive discipline where the appellant otherwise had a good work record, it was the first such incident in over three years of employment and it did not occur in front of any subordinate employes. The discharge was modified to a 20 day suspension. *Barden v. UW-System*, 82-237-PC, 6/9/83

A five day suspension was reduced to one day in a First Amendment case where appellant had a good record with no prior discipline during 11 years of employment where the appellant's actions had the effect of accusing a judge of unethical conduct and where appellant had represented to a court that he appeared on behalf of his employing agency

when in fact he lacked such authority. *Hess v. DNR*, 79-203-PC, 8/19/80; affirmed by Dane County Circuit Court, *DNR v. Pers. Comm. (Hess)*, 80-CV-5437, 6/24/81

The Commission upheld the imposition of a one day suspension based on four separate incidents of inadequate performance by a lieutenant in the state patrol. The appellant had previously received two written reprimands. *Clark v. DOT*, 79-117-PC, 10/10/80

210.5(5) Progressive discipline

Respondent's decision to demote appellant from his position as captain and shift commander for a correctional institution to a sergeant position was not excessive where appellant had received a 10 day suspension one year earlier and appellant's supervisors had lost their trust in appellant and could no longer rely on the accuracy of his information. Respondent substantiated 10 allegations of misconduct violating four separate work rules, including the failure to carry out instructions and giving false information during an investigation. A number of his subordinates perceived favoritism by him towards a female subordinate officer. His supervisor directed him not to treat the subordinate any differently than the other correctional officers. Nevertheless, appellant continued to spend more time with that particular officer than with the other officers on duty, switched her assignment so she could cook breakfast for him, made numerous telephone calls to her at her home when he was on duty and did not answer truthfully when he was asked, during the disciplinary investigation, how frequently he called her. *Bergh v. DOC*, 98-0018-PC, 1/27/99

The civil service code does not require that lesser specified penalties be applied progressively in ascending order before discharge, and although there may be situations where a discharge would be inappropriate and too harsh a penalty, that is not the case here. *Zehner v. Pers. Bd.*, Dane County Circuit Court, 156-399, 2/20/78)

Respondent was not required to follow progressive discipline against appellant, a supervisor. *Asche v. DOC*, 90-0159-PC, 5/21/97

The imposition of a 1-day and then a 3-day suspension as progressive discipline for the repeated second and third instance of sleeping at work was reasonable and not excessive. *O'Connor v. DHSS*, 94-0339, 0497-PC, 3/31/95

Just cause existed for the decision to discharge appellant, an Inmate Complaint Investigator at a correctional institution, due to an absenteeism violation (for taking leave when appellant had no remaining leave) and two misconduct violations (for not using time off work for the purpose requested, for failing to report to work as previously promised, for failing to notify the institution when she was going to be absent, for being insubordinate when refusing to provide her supervisor with the name of her mental health professional and for refusing to return to her supervisor's office as directed) where appellant had three other misconduct violations in the previous 12 months as well as two other absenteeism violations during the same period. *Garner v. DOC*, 94-0031-PC, 11/22/94; affirmed Milwaukee County Circuit Court, *Garner v. Wis. Pers. Comm.*, 94-CV-013477, 11/28/95

Appellant's 1 day suspension was upheld where, 5 months earlier, he had received a written reprimand, also for failing to follow instructions, and where appellant's conduct was very disruptive to office efficiency. *Breckon v. DOR*, 93-0199-PC, 10/4/94

Appellant's discourteous and abusive actions toward supervisors who issued work order and his refusal to carry out order constituted just cause for discipline. A 3-day suspension was not excessive in view of previous one-day suspension and documented history of similar behavior. *Drewieck v. UW*, 92-0810-PC, 6/25/93

A three day suspension was held to be consistent with the concept of progressive discipline where respondent had previously reprimanded appellant for violating the same work rule and had made numerous efforts to improve appellant's performance before the suspension was imposed. *Roberts v. DHSS*, 80-169-PC, 3/17/83

There is no absolute requirement under the civil service code for progressive discipline. *Alff v. DOR*, 78-227, 243-PC, 10/1/81; affirmed by Dane County Circuit Court, *Alff v. Pers. Comm.*, 82-CV-5489, 1/3/84; affirmed by Court of Appeals District IV, 84-264, 11/25/85; petition for

review by Supreme Court denied 2/18/86

240.1 Definition

A constructive demotion does not exist where there has been a "temporary" change in duties at a lower level from a classification standpoint for a period of five months. It was undisputed that appellant was reassigned pending an investigation and that his reassigned duties were below the level of duties he had performed in his permanent position. However, appellant retained his classification and all related benefits during the "temporary" reassignment. The Commission concluded it lacked jurisdiction over the appeal under §230.44(1)(c). *Stacy v. DOC*, 97-0098-PC, 2/19/98; affirmed by Pierce County Circuit Court, *Stacy v. Wis. Pers. Comm.*, 98-CV-0053, 7/9/98

A demotion does not occur unless there has been a permanent change via appointment to another position in a lower classification. *Stacy v. DOC*, 97-0098-PC, 2/19/98; affirmed by Pierce County Circuit Court, *Stacy v. Wis. Pers. Comm.*, 98-CV-0053, 7/9/98

Not all elements of a demotion, as defined in the administrative code, must literally be present when considering whether a constructive demotion occurs. *Stacy v. DOC*, 97-0098-PC, 2/19/98; affirmed by Pierce County Circuit Court, *Stacy v. Wis. Pers. Comm.*, 98-CV-0053, 7/9/98

Appellant was not demoted where he started working for respondent in an Attorney 13 classified position until he accepted an appointment to an unclassified position in March of 1980, he was making $12.427 at the time he accepted the unclassified position, and in August of 1994, appellant returned to classified service as an Attorney 14 with a wage of $32.466. *Dusso v. DER & DRL*, 94-0490-PC, 7/23/96

A constructive demotion of appellant in lieu of layoff had occurred based upon respondent's creation of a new position through substantial changes in appellant's AA 3 position. Respondent's intent in effecting this constructive demotion had been to discipline appellant because of dissatisfaction with her performance in the AA 3 position.

***Davis v. ECB*, 91-0214-PC, 6/21/94**

No actual change in classification is required as an element of a constructive demotion. *Davis v. ECB*, 91-0214-PC, 6/21/94

Appellant's appointment to a PA2 position after a break in service due to his resignation from a PA1 position in which he had obtained permanent status in class did not meet the definition of demotion set forth in §ER-Pers 1.02(5), Wis. Adm. Code. *Davison v. DPI*, 92-0191-PC, 1/27/93

The Commission has subject matter jurisdiction over an alleged constructive disciplinary demotion. In order to prevail, an employee must establish not only that changes in assigned duties and responsibilities imposed by management reduced the effective classification of the position, but also that the appointing authority had the intent to cause this result and to effectively discipline the employe. *Davis v. ECB*, 91-0214-PC, 6/12/92

Where the appellant alleged 1) that her position was reduced from a 75% to a 50% position, 2) that its duties and responsibilities were substantially reduced in terms of its supervision, the difficulty and responsibility of its functions, the level of initiative and independent judgment required to perform the functions, and the scope or impact of those functions and 3) that as a result of those changes the effective classification level of the position had been reduced, the appellant made allegations sufficient to pursue a constructive demotion claim. *Davis v. ECB*, 91-0214-PC, 5/14/92; explained further in interim decision, 6/21/94

A demotion does not occur unless the employe is assigned responsibilities that cause his (new) position to be classified at a lower level than the position he had held previously. "Demotion" cannot be interpreted so broadly as to include a reduction in salary advancement potential irrespective of whether the two positions involved were classified at the same or comparable classifications. *Cohen v. DHSS*, 84-0072-PC, 85-0214-PC, 86-0031-PC; *Cohen v. DHSS & DER*, 84-0094-PC, 2/5/87

A constructive demotion requires 1) a movement of the affected employe to a position that is ultimately determined to have a lower classification than the employe's original position 2) with the intent to discipline the employe. *Cohen v. DHSS*, 84-0072-PC, 85-0214-PC, 86-0031-PC; *Cohen v.*

250 Suspension

Where petitioner was removed from normal pay status, was no longer allowed to work and to earn a salary, but was not terminated, he in effect was suspended from employment. While respondent's action of suspending the petitioner was less onerous and more favorable to petitioner than outright dismissal, it was not an option permitted by §230.37(2). *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

250.1 Definition

A written reprimand "equal to and carrying the weight of a one day suspension" but resulting in no loss of pay was a constructive suspension and the Commission had jurisdiction to review the discipline pursuant to §§230.44(1)(c) and .45(1)(a), Stats. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

The Commission will look beyond the employer's characterization of an action to determine whether it had the legal effect of an action over which the Commission has jurisdiction pursuant to §230.44(1)(c), Stats. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

A cognizable claim of constructive suspension can exist if the employe demonstrates that the disputed transaction had the same legal effect as a suspension. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

It is not dispositive for appeal purposes whether a personnel transaction fits or does not fit within the definition of a particular type of transaction. The Commission must examine the practical effect the transaction has on the employe's employment status, in the context of the employer's intention in effecting the transaction, and the policy factors which underlie the statutory framework of the civil service, to determine whether the transaction partakes

more of the nominal category of personnel transaction, e.g., a reprimand, or more of the more serious category, e.g., a suspension. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

A disciplinary suspension has three obvious impacts on an employe. First, the employe is relieved of the performance of his or her duties. Second, he or she loses the opportunity to earn wages during the period of the suspension. Third, the employe's disciplinary record is blemished and this record may move the employe up the ladder in terms of progressive discipline in connection with any future disciplinary action. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

Where respondent's disciplinary action blemished appellant's disciplinary record with a suspension rather than with a reprimand, it was considered a constructive suspension that could be appealed under §230.44(1)(c), Stats., even though the discipline resulted in neither any interruption in appellant's performance of his duties nor any interruption in his salary. Respondent's intention was to discipline appellant in a manner that would be as close as possible to a one day suspension without jeopardizing appellant's exempt status under the Fair Labor Standards Act. The discipline imposed had a significantly more severe disciplinary impact on appellant's employment status than a mere reprimand. *Rodgers v. DOC*, 98-0094-PC, 1/27/99

250.3 Statutory limit on duration

The Commission construes §230.34(l)(b), Stats., as limiting the period of any suspensions without pay to 30 calendar (rather than work) days. *Smith v. UW*, 84-0101,0108-PC, 8/5/85; clarifying 5/9/85 decision

270 Relief awarded

The statutory remedy for an improperly demoted employe is restoration to her former position except that absent a showing of obstruction or falsification, restoration shall not result in the removal of the position incumbent. In the absence of obstruction or falsification, the fact that the incumbent would have rights to other positions in state

service does not satisfy the requirement that the incumbent shall not be removed. *Warren v. DHSS*, 92-0750-PC, 92-0234-PC-ER, 5/14/96

In a case arising from an improper demotion, an appropriate remedy was to offer appellant appointment to a position in the same classification as the position from which she was demoted and in which the nature of the assigned duties were equivalent. *Warren v. DHSS*, 92-0750-PC, 92-0234-PC-ER, 5/14/96

Where respondent's action of suspending the appellant was rejected and the matter remanded to respondent for action in accordance with the decision and appellant's request to clarify the order to require the payment of lost pay plus interest was unopposed, the respondent was required to pay appellant the lost pay plus interest. *Rentmeester v. Wis. Lottery*, 91-0243-PC, 7/8/94

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 300 through 310

[Previous material] [Next material]

---

300 LAYOFFS/JOB ABANDONMENTS

301 Standard of judgment [see 501.02(2)]

301.03 The scope of the Commission's inquiry

In an appeal of a layoff decision, the Commission denied respondent's motion to exclude evidence relating to appellant's argument that ostensible program decisions were in fact motivated by an intention to effectuate a layoff decision that would adversely affect the appellant, although the same program decisions may not be reviewed for the purpose of determining if they are defensible from purely a policy standpoint. *Kuter v. DILHR*, 82-0083-PC, 5/23/84

In reviewing a layoff decision, the Commission may examine what is ostensibly a (prior) program decision, not for the purpose of deciding whether the decision is defensible from a purely policy standpoint, but to determine whether it was a pretext for the underlying purpose of effectuating an adverse personnel action (such as a layoff) against a particular employe. In determining whether the layoff was "arbitrary, capricious, or in bad faith", the Commission may also consider a letter that was dated several years prior to he layoff and issued by a division administrator and that arguably made a commitment

regarding the security of appellant's position. *Kuter v DILHR*, 82-0083-PC, 5/23/84

On an appeal of a layoff, the Commission can consider only the question of whether there was just cause for the layoff, and pursuant to *Weaver v. Wis. Pers.* Board, 71 Wis. 2d 46, 52, 237 N.W. 2d 183 (1975), the employing agency sustains its burden of proof when it shows it has acted in accordance with administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious. In this case, the laid off appellant alleged that the respondent over the course of several years slowly eroded his duties and usurped his responsibilities, and the appellant argued that the "respondent should be forced to carry the burden of proof in justifying all of his actions affecting the appellant from the commencement of the respondent's term as Commissioner of Securities…." The Commission held that the language of the Weaver decision limited review of the layoff to the personnel decision itself and precluded review of the numerous decisions relative to the administration of the agency which may have affected the appellant's position during the period of years preceding the layoff. *Oakley v. Comm. of Securities*, 78-66-PC, 4/19/79

302.005 Definition

A permanent reduction of a position's hours from 75% of full time to 50% of full time does not constitute a layoff. *Davis v. ECB*, 91-0214-PC, 5/14/92

302.01 Effective date of the action

Where in a layoff notice to the appellant dated January 10, 1991, the respondent incorrectly referred to an effective date of February 1, 1990, instead of February 1, 1991, and the appellant clearly understood that the effective date of the layoff was to be February 1, 1991, the appellant received the requisite 15 day notice of the layoff. *Keller v. UW*, 91-0006-PC, 11/14/91

302.04 Least efficient and effective

There was just cause for appellant's layoff as the second least senior stenographic reporter, where the least senior reporter and the appellant were monitored for a period of time as to their productivity and based on the production statistics, respondent decided to exempt the least senior reporter from layoff. *Reit v. WERC*, 81-128-PC, 6/25/82; affirmed by Milwaukee County Circuit Court, *Reit v. State Pers. Comm.*, 589-670, 12/15/82

302.05 For fiscal reasons

Where one set of duties had decreased and another set had increased while the funding for the unit remained the same, the lack of funds necessitated the reduction of the work force. *Attoe v. Wis. Pers. Comm.*, Dane County Circuit Court, 91 CV 3587, 5/12/92

The "lack of funds" language of §230.34(2), Stats., was held to be satisfied by a showing that the change in financial condition of the UW Hospitals and Clinics would require substantial reductions in the rate of growth of expenditures due to projected reductions in the rate of growth of revenue. *Behm v. UW*, 93-0212-PC, 3/31/94

Respondent's layoff decision was upheld as neither arbitrary nor capricious where the federal government substantially cut its funding which had previously constituted 90-100% of the program funds. Appellant's layoff was necessary to conform with the reduced budget. Respondent was not estopped, due to a letter written three years earlier which allowed the appellant to retain his title of supervisor, from laying off the appellant. The letter was not meant to immunize the appellant from future layoffs. *Kuter v. DILHR*, 82-83-PC, 7/15/85; rev'd by Fond du Lac County Circuit Court, *Kuter v. State Pers. Comm.*, 85-CV-636, 10/1/86; rev'd by Court of Appeals District 11, 86-1950, 5/20/87.

302.10 Reinstatement and retention rights

Where a laid off employe was recalled to a position that was in a different classification for which it was determined she was not qualified, and which required considerable travel which would have required her to be away from her children, of whom she had sole care, it was held not to be a reasonable offer of re-employment. (Note: this case was decided by the Commission prior to the amendment to §Pers. 22.09, Wis. Adm. Code, which was effective March 1, 1981.) ***McClain v. Comm. of Insurance*****, 79-325-PC, 7/25/80; affirmed by Dane County Circuit Court,** ***Commissioner of Insurance v. State Pers. Comm.*****, 80-CV-5649, 4/4/81**

302.11 Layoff versus other means

The civil service code does not require that an employe be laid off when there is a reduction in the work force, and the employer did not err in transferring the appellant rather than subjecting her to layoff. ***Sheda v. State (Pers. Board)*****, Dane County Circuit Court, 158-117, 11/16/78**

Respondent failed to comply with the provisions of the administrative code when it failed to inform appellant of demotion opportunities. The Commission rejected respondent's contention that certain unfilled positions did not comprise a "vacancy" within the meaning of the demotion in lieu of layoff provisions, §ER-Pers 22.08(2), Wis. Adm. Code. The existence of a vacancy is not determined by the existence of a certification request. Respondent had the authority to initiate an action to fill the positions and the authority to make a permanent appointment, even though such authority was not exercised. The record indicated that the Department of Employment Relations would have approved a layoff plan which offered appellant employment at the positions in question and respondent had not met its burden of establishing that appellant was unqualified to perform the duties of the positions. Respondent also failed to inform appellant of another demotion opportunity that was 7 pay ranges lower than the appellant's existing position. ***Lyons v. WGC*****, 93-0206-PC, 12/5/94**

One purpose of the administrative code chapter covering layoffs is to protect employe rights in layoff situations and

this purpose is not served where the employing unit has a continued need for service and the position is funded and vacant or by other unilateral action or nonaction of the employing unit which declares certain positions unavailable to employes affected by layoff. *Lyons v. WGC*, 93-0206-PC, 12/5/94

Transfers in lieu of layoff offered under §ER-Pers 22.08(1), Wis. Adm. Code, must meet the reasonable offer criteria of §ER-Pers 22.09. *Lyons v. WGC*, 93-0206-PC, 12/5/94

An offer to transfer the appellant to a position 241 miles away from appellant's original work site was not a "reasonable offer" of work as defined in §ER-Pers 22.09, Wis. Adm. Code. *Lyons v. WGC*, 93-0206-PC, 12/5/94

Where none of the circumstances for instituting a layoff under §230.34(2), Stats., were present and the appellant's job was reviewed to determine where it best fit within the state classification plan, the decision to regrade the appellant (after reallocating his position to a lower classification) rather than effectuating a lay off was correct. *Olson v. DER*, 87-0169-PC, 3/21/90

There was no requirement to prepare and use a formal layoff plan as set forth in ch. Pers 22, Wis. Adm. Code, where the appointing authority was able to effect the personnel reductions necessitated by the merger of two highway districts by retirements, voluntary demotions, and transfers. *Harley v. DOT & DP*, 80-77-PC, 11/7/80

302.12 Arbitrary and capricious action

A "rational basis" for the decision to eliminate appellant's position was demonstrated through respondent's showing that it was not necessary or efficient to have two supervisory positions supervising a unit of eight technicians, and that the duties of appellant's position could more easily be assumed by other positions in the unit than the duties of the other supervisory position. When confronted with reduced revenue growth, an employer has not just the prerogative, but the obligation, to make choices among competing priorities; and program changes, necessitated by advances in technology, evolving client and program needs, and fluctuations in financial and other

resources, are not required to be subordinate to maintaining the status quo or to retaining existing employees. *Behm v. UW*, 93-0212-PC, 3/31/94

Appellant's lay off from her Education Services Intern - Supervisor position was the result of a rational process stemming from a decision to computerize a records functions and was not arbitrary and capricious. *Smalley v. UW-Eau Claire*, 86-0128-PC, 4/29/87

Respondent's layoff decision was upheld as neither arbitrary nor capricious where the federal government substantially cut its funding which had previously constituted 90-100% of the program funds. Appellant's layoff was necessary to conform with the reduced budget. Respondent was not estopped, due to a letter written three years earlier which allowed the appellant to retain his title of supervisor, from laying off the appellant. The letter was not meant to immunize the appellant from future layoffs. *Kuter v. DILHR*, 82-83-PC, 7/15/85; rev'd by Fond du Lac County Circuit Court, *Kuter v. State Pers. Comm.*, 85-CV-636, 10/1/86; rev'd by Court of Appeals District 11, 86-1950, 5/20/87.

In an appeal of a layoff decision, the Commission denied respondent's motion to exclude evidence of a written commitment made by appellant's superior that the office organizational structure would remain the same as long as the appellant wished to remain in the office. Such evidence relates to a determination of whether respondent's layoff decision was arbitrary and capricious especially in light of respondent's apparent ability to exempt appellant from layoff. *Kuter v. DILHR*, 82-0083-PC, 5/23/84

Respondent's decision to exempt two persons other than the appellants for special skills was upheld where the recommendation was made by the deputy administrator and was based upon the most recent performance evaluation even though the appellant's direct supervisor would have exempted one of the appellants first and where the deputy administrator and appellant's supervisor had approximately the same number of years of service with the agency. *Newberry & Eft v. DHSS*, 82-98, 100-PC, 8/17/83

Respondent's decision to exempt from layoff a less senior female in the same classification as the appellant was held to be arbitrary and capricious where the only evidence of

respondent considering seniority, special or superior skills, affirmative action or other factors (§Pers 22.035, Wis. Adm. Code) in making its layoff decision was that it applied the affirmative action exemption after determining that the failure to do so would reduce the number of females below the "parity" figure. The Commission also pointed out a number of inconsistencies or inaccuracies in the manner in which the respondent derived its parity figures and how it applied those figures. *Martin v. Transportation Commission,* 80-366-PC, 3/21/83

There was just cause for the appellant's layoff where the decision to exempt pursuant to §Pers 22.06(2), Wis. Adm. Code, someone other than the appellant was not arbitrary and capricious as the exempted employe was handicapped and had made major productivity improvements in her office since her appointment. *Manthei v. DILHR,* 81-394-PC, 10/14/82

The layoff was held to constitute arbitrary and capricious action as set forth in *Weaver v. Pers. Bd.*, 71 Wis 2d 46 (1976), and therefore without just cause, where the appellant was the only remaining qualified person on the certification for the position in question a month prior to his layoff, and the agency head had issued an order that no one else could be appointed to the position other than appellant without his specific approval. *Bjorklund v. DHSS,* 79-327-PC, 2/13/81

302.13 Compliance with rules and statutes

Section 230.34(2)(a), Stats., indicates that management has the prerogative to decide which factors inform the reduction of a workforce; it does not prohibit laying off a person in a position because that position's expertise is less in demand than others. *Attoe v. Wis. Pers. Comm.*, Dane County Circuit Court, 91 CV 3587, 5/12/92

Petitioner, who was facing a layoff and had no transfer opportunities, was entitled to a demotion to the highest level position available via displacement. The reference in §ER-Pers 22.09(2)(b), Wis. Adm. Code, to "highest level position" refers to other criteria as well as to the salary range. An Agricultural Supervisor 5 position, rather than a Veterinarian 3 position, was considered to be the highest

level position where it had a higher level reporting relationship, was supervisory and non-union and had a higher salary potential because the pay scale was controlled by the merit of the employe rather than by the union. *Kumrah v. Wis. Pers. Comm. & DATCP*, Brown County Circuit Court, 88-CV-1543, 3/14/89; affirmed by Court of Appeals, 89-0825, 11/21/89

Respondent failed to comply with the provisions of the administrative code when it failed to inform appellant of demotion opportunities. The Commission rejected respondent's contention that certain unfilled positions did not comprise a "vacancy" within the meaning of the demotion in lieu of layoff provisions, §ER-Pers 22.08(2), Wis. Adm. Code. The existence of a vacancy is not determined by the existence of a certification request. Respondent had the authority to initiate an action to fill the positions and the authority to make a permanent appointment, even though such authority was not exercised. The record indicated that the Department of Employment Relations would have approved a layoff plan which offered appellant employment at the positions in question and respondent had not met its burden of establishing that appellant was unqualified to perform the duties of the positions. Respondent also failed to inform appellant of another demotion opportunity that was 7 pay ranges lower than the appellant's existing position. *Lyons v. WGC*, 93-0206-PC, 12/5/94

One purpose of the administrative code chapter covering layoffs is to protect employe rights in layoff situations and this purpose is not served where the employing unit has a continued need for service and the position is funded and vacant or by other unilateral action or nonaction of the employing unit which declares certain positions unavailable to employes affected by layoff. *Lyons v. WGC*, 93-0206-PC, 12/5/94

The layoff plan was "comprehensive" within the meaning of §ER-Pers 22.05, where the rationale, though brief, accurately and completely represented management's reasons for and goals of the subject organizational change. *Keller v. UW*, 91-0006-PC, 11/14/91

The elimination of a single position may qualify as a "material change in duties or organization" within the meaning of §230.34(2). *Keller v. UW*, 91-0006-PC,

11/14/91

The elimination of a position and the layoff of the position incumbent as the result of a reorganization falls squarely within the scope of those actions authorized by §230.34(2), comparing the Commission's decision in *Givens v. DILHR*, 87-0039-PC, 3/10/88. *Attoe v. UW*, 90-0388-PC, 8/16/91; affirmed by Dane County Circuit Court, *Attoe v. Wis. Pers. Comm.*, 91 CV 3587, 5/12/92

A "reduction in force" must be necessary before a layoff action may be effected by an appointing authority and if an agency has a vacant, authorized, funded position in the classification to which an employe has exercised mandatory restoration rights, a reduction in force is not necessary. A position is "vacant" when the appointing authority has the authority to initiate an action to fill the position and the authority to make a permanent appointment to the position once such an action is initiated. Otherwise, an appointing authority could, simply by refraining from taking action to fill a position, defeat an employe's right to transfer or demote in lieu of layoff. *Givens v. DILHR*, 87-0039-PC, 3/10/88; affirmed Dane County Circuit Court, *DILHR v. Wis. Pers. Comm.*, 88-CV-2029, 1/6/89

Respondent violated the 15 day notice requirement for layoffs where appellant received the notice on July 21 and the effective date of the layoff was July 31. The Commission rejected the layoff decision where appellant's displacement rights were also violated. *Chandler v. DPI*, 81-333-PC, 82-94-PC, 11/17/83

In contrast to the layoff plan, which must be approved by the Administrator, the written layoff notice need not be approved by the Administrator. *Chandler v. DPI*, 81-333-PC, 82-94-PC, 11/17/83

Respondent sought and obtained the requisite approval of its layoff plan where it obtained a letter on the administrator's stationery which bore a signature which could only be assumed to be that of the administrator or someone authorized to sign on his behalf and which stated that the plan was approved. *Chandler v. DPI*, 81-333-PC, 82-94-PC, 11/17/83

Any defect in the original layoff letter received March 18, 1982, in failing to provide 15 days notice of an April 2nd layoff was cured by a subsequent layoff letter of March

25th changing the effective date to April 16th. *Newberry & Eft v. DHSS*, 82-98, 100-PC, 8/17/83

Where the respondent provided only 14 days notice of the layoff, as opposed to the 15 days mandated by §Pers 22.07, Wis. Adm. Code, it failed to establish just cause for the layoff. With respect to a remedy, complete rejection of the action and full reinstatement of the appellant was considered more extensive than necessary to remedy the relatively minor procedural error which had not been shown to have prejudiced the appellant, and therefore the action would be modified by changing its effective date by one day. *Thomas v. UW*, 81-332-PC, 3/25/82

The layoff was held to have been violative of §Pers 22.09, Wis. Adm. Code, and hence without just cause, where the respondent did not obtain the administrator's approval of the layoff plan until two weeks after notifying the appellant of his impending layoff. *Bjorklund v. DHSS*, 79-327-PC, 2/13/81

Where the appellant was laid off due to the exercise of mandatory reinstatement rights by another employe, and where the agency lacked the funds or vacant positions to have retained both employes, the result is a "reduction in force due to … lack of … funds" pursuant to §230.34(2), stats., and this constituted compliance with the applicable rules and statutes and was not illegal nor an arbitrary and capricious action. *Mukamal v. WERC*, 79-16-PC, 10/2/81

Laying to one side the question of whether the Commission has jurisdiction over the terms of any employment contract (non-collective bargaining) between the appellant and the state, the terms of state employment are spelled out in the statutes and tenure in state employment always must be subject to the possibility of layoff due to a reduction in force, and hence there could not have been a violation of any contract of employment by appellant's layoff. *Mukamal v. WERC*, 79-126-PC, 10/2/81

302.14 Payment of unused annual leave

Following the decision to layoff the appellant, it was not improper for the respondent to have paid him for his unused authorized annual leave. *Bjorklund v. DHSS*, 79-327-PC,

302.15 Bumping rights

Appellant, who was laid off from his position as an Administrative Assistant 3 (SRI-11) and had previously earned permanent status as an Education Services Intern (SRI-10), had no right to displace ("bump") into the Educational Services Assistant I (SR 1-11) classification in which he had never obtained permanent status in class. The Commission interpreted §Pers 22.08(2)(a), Wis. Adm. Code, which permits an employe identified for layoff to "induce the layoff process", *inter alia*, ". . . in a class or approved subtitle in a series having the same or lower pay range maximum within the employing unit, in which the employe has previously obtained permanent status in class…" to require the employe to have permanent status in the "class or approved subtitle" rather than merely in the same series. *LaRose v. UW*, 82-153-PC, 1/2/85

The exercise of displacement rights by an employe induces a layoff in those classifications into which the employe has a right to displace. Appellant's displacement rights were unlawfully denied where appellant notified the respondent that he wanted to exercise his displacement rights, where there were lower level positions within his classification within the employing unit and where respondent declined to effectuate the displacement because appellant was alleged to be unqualified. §Pers 22.08, Wis. Adm. Code. *Chandler v. DPI*, 81-333-PC, 82-94-PC, 11/17/83

Appellant was not entitled to transfer or demote in lieu of layoff into positions in a different classification series assigned to a higher pay range and/or into positions in different classification series for which the appellant was not qualified. *Chandler v. DPI*, 81-333-PC, 82-94-PC, 11/17/83

The right of an employe subjected to layoff to demote into certain other positions for which the employe is qualified "after the customary orientation provided for newly hired workers in such positions" does not require the employer to permit demotion by a person without the basic knowledge, training or experience that is necessary and to then provide the person with the basic knowledge, training or experience

while on the job. §ER Pers 22.08, Wis. Adm. Code. *Chandler v. DPI*, 81-333-PC, 82-94-PC, 11/17/83

Pursuant to §230.34(2)(b), Stats., and §Pers 22.08(2)(a), Wis. Adm. Code, an employe involved in the layoff process does not have displacement rights to a classification in which he previously had obtained permanent status in class, if that classification is in a higher pay range than his classification at the time of layoff, and he does not have the right to displace to lower classifications within the AA series rather than being limited to displacement within the AA 5 classification, the only classification within the AA series in which he has obtained permanent status in class, inasmuch as the AA series is not a progression series as required by §Pers 22.08(2)(a), Wis. Adm. Code. *Wiggins v. DOD*, 82-246-PC, 7/21/83

303 Just cause standard applied, generally

Respondent failed to comply with the provisions of the administrative code when it failed to inform appellant of demotion opportunities. The Commission rejected respondent's contention that certain unfilled positions did not comprise a "vacancy" within the meaning of the demotion in lieu of layoff provisions, §ER-Pers 22.08(2), Wis. Adm. Code. The existence of a vacancy is not determined by the existence of a certification request. Respondent had the authority to initiate an action to fill the positions and the authority to make a permanent appointment, even though such authority was not exercised. The record indicated that the Department of Employment Relations would have approved a layoff plan which offered appellant employment at the positions in question and respondent had not met its burden of establishing that appellant was unqualified to perform the duties of the positions. Respondent also failed to inform appellant of another demotion opportunity that was 7 pay ranges lower than the appellant's existing position. *Lyons v. WGC*, 93-0206-PC, 12/5/94

One purpose of the administrative code chapter covering layoffs is to protect employe rights in layoff situations and this purpose is not served where the employing unit has a continued need for service and the position is funded and

vacant or by other unilateral action or nonaction of the employing unit which declares certain positions unavailable to employes affected by layoff. *Lyons v. WGC*, 93-0206-PC, 12/5/94

Where respondent failed in its duty to provide correct information to appellant, appellant's decision to elect voluntary termination was a nullity. *Lyons v. WGC*, 93-0206-PC, 12/5/94

An offer to transfer the appellant to a position 241 miles away from appellant's original work site was not a "reasonable offer" of work as defined in §ER-Pers 22.09, Wis. Adm. Code. *Lyons v. WGC*, 93-0206-PC, 12/5/94

Just cause for layoff existed where there was a rational basis for management's decisions that the program goals of the employer could better be met by eliminating appellant's position than by eliminating certain other vacant positions or by delaying or not undertaking the addition of a new telecommunications system. *Behm v. UW*, 93-0212-PC, 3/31/94

Respondent's layoff action was upheld where respondent presented a rational basis for its decision by showing a factual basis for its conclusion that there was conflict and confusion resulting from the prior organizational structure and by showing that the elimination of one position was an obvious way to end the differences and achieve uniformity. Respondent was not required to show that its management decision was the best possible decision which could have been made under the circumstances, citing *Newberry & Eft v. DHSS*, 82-98, 100-PC, 8/17/83. The Commission rejected the appellant's contention that the layoff decision was effected in retaliation for appellant's grievance where the layoff plan had been prepared before the grievance was filed. *Keller v. UW*, 91-0006-PC, 11/14/91

The process followed by respondent in allocating finite resources was the result of sifting and winnowing and had a rational basis where the reorganization and redeployment of staff resources resulted from the ongoing examination by several management employees of a substantial volume of information regarding a variety of alternatives over a considerable length of time and there was a rational basis for creating a full-time permanent clerical position and assigning certain duties to other positions rather than to the

appellant, even though the newly created clerical position had not been filled on a permanent basis as of the date of hearing. *Attoe v. UW*, 90-0388-PC, 8/16/91; affirmed by Dane County Circuit Court, *Attoe v. Wis. Pers. Comm.*, 91 CV 3587, 5/12/92

Respondent failed to show that its action of treating the appellant as having abandoned her position was authorized by applicable law and was not arbitrary and capricious where the respondent failed to comply with the requirements of §230.37(2), Stats., when it did not consider the option of placing the appellant in another position despite correspondence from the appellant's physician which raised the issue of providing a less arduous position and which could have provided a starting point for a dialogue between the appellant, the respondent and the physician regarding the availability of a less arduous position. *Smith v. DHSS*, 88-0063-PC, 2/9/89

Appellant's layoff from his position as a Purchasing Agent 4 Supervisor was based on a five year old concern about the efficiency of the purchasing department, the hiring of a new acting director of purchasing and the restructuring of the department. Respondent was not motivated to discipline appellant because of previous errors he had made. *Roblee v. UW*, 86-0032-PC, 4/15/87

Respondent's lay off decision was upheld as neither arbitrary nor capricious where the federal government substantially cut its funding which had previously constituted 90-100% of the program funds. Appellant's layoff was necessary to conform with the reduced budget. Respondent was not estopped, due to a letter written three years earlier which allowed the appellant to retain his title of supervisor, from laying off the appellant. The letter was not meant to immunize the appellant from future layoffs. *Kuter v. DILHR*, 82-83-PC, 7/15/85; rev'd by Fond du Lac County Circuit Court, *Kuter v. State Pers. Comm.*, 85-CV-636, 10/1/86; rev'd by Court of Appeals District 11, 86-1950, 5/20/87.

There was just cause for the appellant's layoff where a section was removed from the bureau in question, resulting in a diminution in the duties and responsibilities of the appellant's supervisor and more supervision of the appellant's position, the consequential creation of two new positions at lower levels, and the demotions in lieu of layoff

into those positions. *Kleinschmidt v. DILHR*, 81-395-PC, 6/4/82

Where an employe claims estoppel against his employer, and that he concluded that a job offer would lead to permanent employment, he should have been aware that there was a potential for layoff. *Mukamal v. WERC*, 79-126-PC, 10/2/81

310 Relief awarded

Where the respondent's action of treating the appellant as having abandoned her position was rejected, the appellant was not entitled to back pay where the appellant was unable to work and also failed to diligently seek employment during the relevant period. The appellant also was not entitled to be reinstated because she would only have continued on an unpaid medical leave until she reached the end of the maximum period of such leave, and her medical condition had not, in fact, changed during that entire period. *Smith v. DHSS*, 88-0063-PC, 3/19/92

Where the respondent provided only 14 days notice of the layoff, as opposed to the 15 days mandated by §Pers 22.07, Wis. Adm. Code, it failed to establish just cause for the layoff. With respect to a remedy, complete rejection of the action and full reinstatement of the appellant was considered more extensive than necessary to remedy the relatively minor procedural error which had not been shown to have prejudiced the appellant, and therefore the action would be modified by changing its effective date by one day. *Thomas v. UW*, 81-332-PC, 3/25/82

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 400 through 403.11

[Previous material] [Next material]

---

400 DECISIONS OF THE ADMINISTRATOR/SECRETARY

401 Notice

401.01 Reallocation/reclassification

Where appellant's reclassification was delayed from Officer I to Officer 2 because progression from the I level to 2 level requires a "formal discipline free work record" for six months prior to the reclassification target date, the officer investigating an allegation of misconduct, in recommending discipline, was not required to have advised the appellant in writing that the reclassification of his position would be affected by the imposition of discipline. *Pero v. DHSS & DER*, 83-0235-PC, 4/25/85

In a progression series, given the greater likelihood of constructive notice of a constructive reclassification denial and that a failure of constructive notice would not necessarily lead to a forfeiture of appeal rights, the Commission held that §ER-Pers 3.04, Wis. Adm. Code, should not be interpreted to require written notice of a constructive reclassification denial. *Pero v. DHSS & DER*, 83-0235-PC, 4/25/85

403 Particular actions

403.005 Accretion

Respondent's actions establishing eligibility, pay, employe benefits and status upon accretion (§§230.28 and .35, Stats.) were upheld. *Smith v. DP*, 83-0001-PC, 12/22/83; appeal dismissed by Outagamie County Circuit Court, *Smith v. Bellman et al.*, 84-CV-800, 4/2/90

403.023 Carry-over of benefits from unclassified position

An employe who served in the unclassified service for seven years retained permanent status in class from his previous classified position during this period. The definition of "permanent status in class" does not require the employe to be actually serving in a position to have the rights and privileges associated with holding permanent status in class. When the employe reinstated upon the end of his unclassified appointment, the employing agency was required to calculate his starting pay based on having held permanent status in class in the interim. *Junceau v. DILHR*, 92-0768-PC, 9/30/93

Decision by the respondent denying appellant the carryover of benefits accrued during employment in unclassified position to a project appointment is an abuse of discretion in that it exceeds respondent's authority under §230.27, Stats. *Levy v. DP*, 78-289-PC, 10/12/79

403.035 Employing unit determination

Where appellant failed to show that respondent erred in concluding, prior to the creation of 8 new employing units, that certain existing personnel practices were no longer sound, respondent's decision to change from 1 to 8 employing units for an agency was upheld. Reliance on the existence of geographically separate offices as a basis for establishing multiple employing units is contemplated by

§230.30, Stats., and creation of separate employing units for district offices is consistent with the practice followed in certain other state agencies. *WPEC v. DMRS*, 95-0107-PC, 4/4/96; rehearing denied, 5/14/96

403.04(1) Prerequisites/announcement

Knowledge of adjudication and the Quality Performance Index as prerequisites for Unemployment Benefit Supv. 6, was job related and, therefore, no violation of §230.16(4) or (5) existed. *Lambert v. DILHR & DMRS*, 93-0063-PC, 8/23/93

Respondent DMRS did not violate the civil service code by refusing to give retroactive effect to appellant's attempt to amend her employment application form by adding a city for which she wished to be considered but erroneously had failed to check on the form, resulting in appellant's name not being added to a certification for the position in which she was most interested. Respondent's action was sustained on the basis of its legitimate interests in administrative efficiency, certainty and closure, in processing thousands of applications yearly. Respondent's policy of not attempting to extrapolate information from applications to attempt to determine information that may have been omitted erroneously also was upheld. Respondent had no obligation to have altered its policies because appellant was under stress from serving in a dual capacity at work, at the time she filled out the application. *Moreau v. DMRS*, 93-0043-PC, 8/11/93

Respondent did not violate §230.16(5), Stats., when it did not consider the applicants' resumes and cover letters in screening applicants for admission to the oral portion of the exam, where the applicants were notified that the screening was to be based upon the information provided on a "training/experience questionnaire," there was nothing inherently unfair about relying on the questionnaire and it appeared that all applicants were treated the same. *Chaykowski v. DOD & DMRS*, 91-0136-PC, 10/17/91

Minimum training and experience requirements do not equate with the qualifications needed to perform the job. Merely because minimum training and experience requirements must be job-related does not mean that an

applicant who meets these requirements has to be deemed qualified to perform in the position in question. *Stern v. DMRS*, 89-0144-PC, 8/8/90

There is no requirement that the announcement set forth all of the criteria that will be considered in grading the exam. *Stern v. DMRS*, 89-0144-PC, 8/8/90

Section 230.16(5), which provides that a standard for proceeding to subsequent steps in the exam may be established "provided that all applicants are treated fairly and due notice has been given" was not violated where the form letter notifying the appellant of the *last* step in the exam process did not provide notice that certain qualifications in securities regulation law would be needed in order to pass the exam. *Stern v. DMRS*, 89-0144-PC, 8/8/90

Where the exam announcement very specifically advised the applicants that they would be screened based upon their application materials and those materials were identified as a letter of application and resume, the announcement clearly informed the applicants that they should put their best foot forward when filing their resume and cover letter. *Allen, et al., v. DMRS*, 89-0124-PC, 5/17/90; rehearing denied, 6/14/90; affirmed by Dane County Circuit Court, *Allen, et al., v. Wis Pers. Comm.*, 90-CV-2840, 2/28/91

Respondent had the authority to ignore the application deadline it had itself established for taking an examination. *Spaith v. DMRS*, 89-0089-PC, 4/19/90

Respondent violated §230.16(4), Stats., when it required either a Bachelor of Science in Civil Engineering (BSCE) or certification as an Engineer in Training (EIT) for admission to the Civil Engineer 1 transportation exam where an individual can perform engineering duties under the direct supervision of a licensed professional engineer regardless of whether he or she has been certified as an EIT and a Civil Engineer 1 does not perform any engineering duties without the direct supervision of a professional engineer. By statute, a person can become a licensed professional engineer without either a BSCE or EIT certification. The respondent's requirements would act to exclude such an engineer, notwithstanding that he or she is demonstrably qualified for such employment. *Heikkinen v. DOT & DMRS*, 90-0006-PC, 3/9/90

Respondent violated §230.16(l)(a), Stats., by denying appellant permission to compete in an examination, where respondent established a reasonable deadline for the filing of applications for the exam, appellant's application failed to include the job classification code and civil service title of the position in question but, as to incomplete applications filed on or before the application deadline, respondent does not enforce the deadline consistently and there was no rational basis for the inconsistency. *Escalada-Coronel v. DMRS*, 86-0189-PC, 11/26/86

Respondent did not violate §230.16(l)(a), Stats., requiring persons to file applications "a reasonable time prior to the proposed examination" when it prevented appellant from taking an examination which had an announced application deadline of February 28 and respondent received the appellant's examination on March 3 and respondent has a uniform policy of not processing late job applications. *Marxer v. DMRS*, 86-0070-PC, 8/20/86

403.04(1.5) Recruitment

Respondent did not violate §230.14(2), which only permits recruitment outside the state when there has been a determination that there is a critical shortage of residents, when the retiring incumbent for the position mailed copies of the announcement to educational institutions located out-of-state. The retiring incumbent's action could not be attributed to respondent, which neither authorized it nor was aware of it at the time. The unauthorized mailing was essentially similar to word of mouth or other informal means of communication. *Smith v. DMRS*, 90-0032-PC, 8/3/95; explained further in ruling on request for reconsideration, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96

Individual who received appellant's telephone call, the purpose of which was to inform respondent that appellant wished to participate in a new recruitment, and who failed to properly inform her superiors of the call, was not shown to have willfully attempted to defeat, deceive or obstruct the appellant from participating in the recruitment. Therefore, §230.43(l)(a), Stats., was not violated. *Nelson v. State*

403.04(2) Exam content, job-relatedness

Where the resume screen criteria for filling a vacancy at the Department of Public Instruction as School Administrator Consultant-Private Schools were developed so as to recognize experience and knowledge in either public *or* private school operations, even though the position description required knowledge in *both* public *and* private school operations, the criteria were upheld in light of the appellant's failure to establish that the criteria were not job-related. The appellant had established that an applicant experienced in only home-based educational programs would score poorly under the criteria. *Taylor v. DMRS & DPI*, 90-0279-PC, 9/19/91

Where the appellants failed to offer any evidence to show that the resume screen process is viewed as unreliable by persons in the field of test development and did not point to any language or principles embodied in the civil service code as requiring verification of the information on resumes, the Commission rejected the appellants' contention the resume screen process was inherently unreliable. *Allen, et al., v. DMRS*, 89-0124-PC, 5/17/90; rehearing denied, 6/14/90; affirmed by Dane County Circuit Court, *Allen, et al., v. Wis Pers. Comm.*, 90-CV-2840, 2/28/91

The respondent's decision to use a resume screen process rather than another examination alternative was upheld where the respondent offered various reasons in support of the use of the resume screen and all of the various techniques were shown to have their trade-offs. *Allen, et al., v. DMRS*, 89-0124-PC, 5/17/90; rehearing denied, 6/14/90; affirmed by Dane County Circuit Court, *Allen, et al., v. Wis Pers. Comm.*, 90-CV-2840, 2/28/91

The use of a resume screen process as part of the exam for a supervisory classification was upheld where the appellants failed to offer any expert testimony which placed into question the conclusions of validity testified to by respondent's personnel specialist and failed to call the exam raters in an effort to establish some rating impropriety. The Commission was unwilling, on the record before it, to second guess the judgment of the job experts who adopted

scoring levels which were logical and were all clearly related to five evaluation criteria. *Allen, et al., v. DMRS*, 89-0124-PC, 5/17/90; rehearing denied, 6/14/90; affirmed by Dane County Circuit Court, *Allen, et al., v. Wis Pers. Comm.*, 90-CV-2840, 2/28/91

In the absence of testimony from the job experts who developed the exam scoring system and those who applied it, the scoring system used in a resume screen process was not ridiculous nor did it offend common sense, applying the standard adopted in *York v. DP*, 78-PC, 78-42-PC, 7/18/80.

***Allen, et al., v. DMRS*, 89-0124-PC, 5/17/90; rehearing denied, 6/14/90; affirmed by Dane County Circuit Court, *Allen, et al., v. Wis Pers. Comm.*, 90-CV-2840, 2/28/91**

An exam was upheld where the exam sought information which was job-related and sought skill and knowledge relating to certain areas which were not inconsistent with the job announcement. *Nash v. DNR & DMRS*, 88-0117-PC, 11/18/88

Where the benchmark answers were developed by a panel of well qualified job experts and were not clearly ridiculous or offensive to common sense, they could not be found to be invalid, and it is immaterial whether they accord with the Commission's own ideas of program management. *York v. DP*, 78-42-PC, 7/18/80

When a benchmark for a question was worded so that a candidate could give exactly the same answer and receive either a 6 or a 7, it was not an appropriate measuring device, but there was no indication that that aspect of the benchmark resulted in a low reliability figure for the question or adversely affected the overall exam reliability. *York v. DP*, 78-42-PC, 7/18/80

In evaluating an examination to determine whether it complies with statutory requirements, the entire process must be evaluated. Minor defects in limited portions of the exam may not lead to a finding of invalidity. In this case, there was expert opinion that the exam was developed and administered in accordance with professional testing standards, and mathematical analysis established the reliability of the questions. *York v. DP*, 78-42-PC, 7/18/80

Where changes in the relative weights of various parts of the exam were made by a specialist from the Division of

Personnel, and there was no evidence of collusion or manipulation, but it was argued that manipulation was possible, it was held that there was no violation of §230.16, Stats. *York v. DP*, 78-42-PC, 7/18/80

The exclusion of certain items from an exam was upheld where well-qualified job experts had good reasons for eliminating certain items prior to the exam and the items eliminated after the exam had been determined by statistical analysis to have been unreliable, and the exclusion of the various items contributed to the validity of the exam. It was not erroneous not to have removed from the exam booklet the items previously selected for exclusion where there were sufficient logistical reasons for not doing so and there was plenty of time allowed to complete the entire exam. *York v. DP*, 78-42-PC, 7/18/80

403.04(3) Scope of competition

Respondent's refusal to enforce §230.16(2), Stats., in reliance on an attorney general's opinion calling the statute unconstitutional, had the practical effect of an administrative invalidation of a legislative act. Therefore, respondent's action of permitting an out-of-state resident to compete and be certified for a vacancy was illegal and arbitrary and, to the extent that the concept of abuse of discretion was applicable, the action also constituted an abuse of discretion. Respondent had failed to conclude that a critical need existed for employes in that specific classification or position. *Smith v. DMRS*, 90-0032-PC, 8/3/95; explained further in ruling on request for reconsideration, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96

Where the appellant failed to show 1) that any of the factors considered by respondents in deciding to conduct an agency-wide rather than service-wide promotional competition were inappropriate under §ER-Pers 6.01, 2) that respondent's characterization of the factual situation existing at the time of the decision was inaccurate or misleading or 3) that the respondents did not reach the proper conclusions upon application of such factors to the factual situation, the respondents' action was affirmed.

***Augustin v. DMRS & DOC*, 90-0254-PC, 10/3/91**

In deciding on the scope of competition, the respondents had to exercise their discretion in the attempt to strike a balance between the general imperative of the widest possible scope of recruitment and "sound personnel management practices." There was no basis on which to conclude that the respondents' had violated the civil service code where the record merely showed that both appellants and respondents could identify significant interests that were or would have been affected by the decision as to scope of competition. It was undisputed that while the appellants were qualified candidates, opening competition to a service-wide basis, in order to have included the appellants, could be expected to result in a large increase in the number of unqualified candidates. *Heldt et al. v. DOC & DMRS*, 90-0092-PC, etc., 7/25/90

As indicated by §§230.14(1) and 230.19(2), Stats., the general preference of the civil service code is for the broadest possible base of recruitment to fill vacancies, consistent with "sound personnel management practices," except that promotional competition is favored where the best-qualified candidates are available within the service and it is not necessary to go outside the classified service for affirmative action purposes. The statutes indicate that competition can also be limited to agency-wide or employing unit-wide recruitment for various reasons so long as the makeup of the resultant applicant pool is representative of the state labor pool. *Flottum v. DMRS*, 90-0155-PC, 5/10/90

Respondent's decision to limit competition for the Vocational Rehabilitation Supervisors 2 and 3 exam was properly limited to employes of the Department of Health and Social Services, where past experience showed that the overwhelming majority of people who passed the exam came from within DHSS. One effect of the decision was to exclude the appellant who had previously worked for DHSS but was currently employed by another agency. *Flottum v. DMRS*, 90-0155-PC, 5/10/90

403.04(5) Sex classification in hiring

An examination was upheld where there were no significant

differences in the scores of the male and female examinees and there was no statistically significant difference in the scoring of the raters on the basis of their sex and the sex of the examinees. *Butler et al. v. DILHR & DER*, 79-138-PC, 9/29/80

403.04(8) Exam administration and scoring

Where appellant did not dispute that the examination content was job-related nor did he dispute the standard for proceeding to subsequent steps in an examination but contended the exam results were unreliable because one of the graders had not attained permanent status in the class for which the exam was being conducted, there was insufficient evidence to shift the burden of persuasion to respondents where appellant failed to articulate what matters were unknown to the grader and how such a lack of knowledge could or did impact on the grader's ability to objectively grade the exam. Sutton v. DOC & DMRS, 96-0155-PC, 6/4/97

Respondent's use of three general brackets, each of which had a three point range of numerical scores, and giving the exam graders discretion in deciding on the exact scores within these brackets was upheld where there was no evidence that the procedure conflicted with the requirement that respondent use "appropriate scientific techniques and procedures" in grading examinations or that there was any unreliability in the exam outcome. *Smith v. DMRS*, 90-0032-PC, 8/3/95; explained further in ruling on request for reconsideration, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96

Even though one rater's understanding of how certain experience might be scored was in conflict with the understanding of the other raters and the respondent's personnel specialist who oversaw the exam process, the scoring was upheld where appellant failed to point out how the misunderstanding affected the scoring or the overall reliability of the exam. *Smith v. DMRS*, 90-0032-PC, 8/3/95; explained further in ruling on request for reconsideration, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283,

12/10/96

Where appellant alleged one part of the questionnaire was unclear but presented no evidence other than his own opinion that the exam was not conducted in accordance with the provisions of the civil service code, respondent's actions were affirmed. *Krueger v. DOA & DMRS*, 92-0196-PC, 5/22/92

Respondent's decision to remove the appellant's name from a register was upheld where the appellant was an exam proctor, had agreed not to be a candidate for any exam for which she was a proctor and took the exam in question in the kitchen of another proctor. *Anglin v. DMRS*, 91-0193-PC, 5/1/92

Even though up to 37 of the 54 resumes reviewed by the second rater in a resume screen procedure included markings made by the first rater, there was still no evidence tending to support a conclusion that the second rater's independence was compromised by the markings made by the first rater where the raters had a much higher percentage of disagreement between their scores for the 37 applications with markings on them than for the 17 applications which had no markings. *Allen, et al., v. DMRS*, 89-0124-PC, 5/17/90; rehearing denied, 6/14/90; affirmed by Dane County Circuit Court, *Allen, et al., v. Wis Pers. Comm.*, 90-CV-2840, 2/28/91

Respondent's policy for providing make-up examinations was found not to be arbitrary and capricious where appellant was unable to take an examination due to a temporary illness and the sole make-up opportunity was provided three days later in one location rather than in each local examination center. *Cole v. DMRS*, 84-0013-PC, 4/25/84

Where the instructions for an oral exam included the statement that applicants "… will each have a total of 20 minutes to respond to our questions," this language was found not to be misleading, and the use of the word "our" did not imply that the oral board would be in control of the exam in the sense of asking the next question when it decided that it was appropriate, as opposed to when the examinee finished the preceding question. It was not illegal, given the appellants' complaints following their examination, to add additional instructions to attempt to

clarify the point that they found confusing, the Commission noting that there was no statistical basis for a finding that the examinees on the third day did better than the examinees on the first two days. *Zanck & Schuler v. DHSS & DP*, 80-380-PC, 81-12-PC, 12/3/81

Although it was a marginal situation, it was not illegal to have used on the oral board a supervisor of one of the examinees, where the statistical analysis of the exam scores showed no evidence of a bias on the rater's past, the Commission noting the difficulty in assembling an appropriate oral board for a three day examination. *Zanck & Schuler v. DHSS & DP*, 80-380-PC, 81-12-PC, 12/3/81

Where there were two exam monitors for a 20 minute oral exam and one stopped the exam at the end of 20 minutes while the other allowed one or two minutes to some examinees to permit them to finish answers, and where a member of the panel gave a warning five minutes before the end of the exam to some but not all examinees, there were significantly unequal testing conditions, and this conduct constituted a violation of §230.16, Stats. *Zanck & Schuler v. DHSS & DP*, 80-380-PC, 81-12-PC, 12/3/81

Where a member of an oral exam panel provided non-verbal feedback in response to examinees' answers, this constituted a significant deviation from a standardized exam format and a violation of §230.16, Stats. *Zanck & Schuler v. DHSS & DP*, 80-380-PC, 81-12-PC, 12/3/81

The selection of raters was upheld even though each rater recognized the achievement history questionnaire of the appellant as well as other candidates, where the raters were able to evaluate the responses objectively and were selected in conformance with the staffing manual guidelines. *Ring v. DP*, 79-49-PC, 11/19/81

In evaluating an examination to determine whether it complies with statutory requirements, the entire process must be evaluated. Minor defects in limited portions of the exam may not lead to a finding of invalidity. In this case, there was expert opinion that the exam was developed and administered in accordance with professional testing standards, and mathematical analysis established the reliability of the questions. *York v. DP*, 78-42-PC, 7/18/80

Where changes in the relative weights of various parts of the exam were made by a specialist from the Division of

Personnel, and there was no evidence of collusion or manipulation, but it was argued that manipulation was possible, it was held that there was no violation of §230.16, Stats. *York v. DP*, 78-42-PC, 7/18/80

Where one of the two raters failed to assign a numerical score to one of the appellant's essay questions, and the person recording the scores recorded the other rater's numerical score for this question by interpolation, this was determined not to be erroneous where mathematical analysis showed a high degree of correlation between two raters and the rater who had failed to record a numerical score had written down a comment which was consistent with the interpolated score. *York v. DP*, 78-42-PC, 7/18/80

The exclusion of certain items from an exam was upheld where well-qualified job experts had good reasons for eliminating certain items prior to the exam and the items eliminated after the exam had been determined by statistical analysis to have been unreliable, and the exclusion of the various items contributed to the validity of the exam. It was not erroneous not to have removed from the exam booklet the items previously selected for exclusion where there were sufficient logistical reasons for not doing so and there was plenty of time allowed to complete the entire exam. *York v. DP*, 78-42-PC, 7/18/80

403.04(10) Certification (including veterans points)

A conclusion that an appointment was made outside the 60 day period referenced in §230.25(2)(b), Stats., would not result in an order voiding the certification or the appointment. *Seitter v. DOT & DMRS*, 94-0021-PC, 3/9/95

Multiple certifications and an appointment were neither illegal or an abuse of discretion, even though the ultimate appointment occurred more than 60 days after the initial certification as provided in §230.25(2)(b), Stats., where an initial appointment, made within the 60 day period was invalidated because the successful candidate was certified based upon receiving veterans preference points to which he was not entitled, where the appointing authority then worked with DMRS to obtain additional certifications and the appointing authority at least implicitly requested an extension of the 60 day period or a new 60 day period that

was implicitly granted. DMRS did not abuse its authority when it did not order the appointing authority to make an appointment within the initial 60 day period, from the group of interested candidates who remained interested in the position, because to do so would have been inconsistent with additional time implicitly granted by DMRS and would have forced the appointing authority to forego the opportunity to have a full slate of certified candidates from which to choose. The reasoning process of DMRS which resulted in a conclusion, some time after the initial appointment was invalidated, that a vacancy had been created which required a new appointment and that a reasonable time to complete this was 60 days, was not an abuse of discretion. *Seitter v. DOT & DMRS*, 94-0021-PC, 3/9/95

Where the respondent failed to promulgate criteria for participating in the Handicapped Expanded Certification program as administrative rules, the failure rendered the criteria invalid as they did not fit within any of the rule-making exceptions found in §227.01(13). *Schaub v. DMRS*, 90-0095-PC, 10/17/91

Where the appellant, while employed as an Officer 1 in DHSS, had taken the Officer 3 competitive promotional exam in 1989 and had been placed on the resulting register, he was ineligible for promotion to a position within DOC in 1990 because DOC had been made a separate department in the interim and the appellant's position had remained as part of DHSS. DMRS's decision to remove the appellant's name from the certification list in 1990 in light of his failure to meet a preliminary requirement for appointment was upheld. *Augustin v. DMRS & DOC*, 90-0254-PC, 10/3/91

Respondent's action of using an Instrument Shop Supervisor employment register to certify applicants for vacant Engineering Technician 5 positions was upheld where it was consistent with the requirements of §ER-Pers 12.04(2) and there was no showing that respondent had failed to investigate the factors listed in §ER-Pers 6.01 or failed to properly analyze and balance the information obtained from this investigation. *Ochalla et al. v. DMRS*, 90-0011-PC, 5/31/91

Respondent violated §230.25, Stats., when it failed to certify the appellant for a specific vacancy as a consequence of a processing error. *Rose v. DHSS & DMRS*,

89-0035-PC, 10/25/89

The policy not to supply exam scores and rankings along with the names of the certified eligibles does not violate the civil service code, specifically §230.15(1), Stats., which refers to making appointments "only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination." *Thompson v. DMRS & DNR*, 87-0204-PC, 4/28/89

403.07 List of eligibles (registers), including removal of names

Respondent DMRS did not violate the civil service code by refusing to give retroactive effect to appellant's attempt to amend her employment application form by adding a city for which she wished to be considered but erroneously had failed to check on the form, resulting in appellant's name not being added to a certification for the position in which she was most interested. Respondent's action was sustained on the basis of its legitimate interests in administrative efficiency, certainty and closure, in processing thousands of applications yearly. Respondent's policy of not attempting to extrapolate information from applications to attempt to determine information that may have been omitted erroneously also was upheld. Respondent had no obligation to have altered its policies because appellant was under stress from serving in a dual capacity at work, at the time she filled out the application. *Moreau v. DMRS*, 93-0043-PC, 8/11/93

Where safe lifting and repositioning of residents is one of the primary responsibilities of the position in question, where respondent's physicians concluded that appellant's four surgeries significantly limited appellant's ability to lift and reposition residents in a safe manner, where a physical examination is required of every candidate for the position and where other candidates with physical limitations similar to appellant's have not passed such examination, the respondents' conclusion that appellant failed to satisfy one of the preliminary requirements of the position did not violate either §230.17(1), Stats., or §ER-Pers 6.10(1), Wis. Adm. Code. *Chadwick v. DMRS & DHSS*, 91-0177-PC, 8/26/92

Respondent's action of removing appellant's name from the

register of eligible candidates for the position of State Patrol Trooper/Inspector (Enforcement Cadet) was upheld where appellant failed to disclose 12 convictions including drunk driving, battery and theft and he suffered from a hearing loss that exceeded the previously established standard for the position. Section ER-Pers 6.10(1), Wis. Admin. Code, which allows for removal from a register for failure to meet "preliminary requirements established for the position," does not require advance notice of a preliminary requirement before it may be applied to preclude further consideration of a candidate. *Hoefs v. DMRS*, 91-0244-PC, 7/22/92

Respondent's decision to remove the appellant's name from a register was upheld where the appellant was an exam proctor, had agreed not to be a candidate for any exam for which she was a proctor and took the exam in question in the kitchen of another proctor. *Anglin v. DMRS*, 91-0193-PC, 5/1/92

Where the appellant, while employed as an Officer 1 in DHSS, had taken the Officer 3 competitive promotional exam in 1989 and had been placed on the resulting register, he was ineligible for promotion to a position within DOC in 1990 because DOC had been made a separate department in the interim and the appellant's position had remained as part of DHSS. DMRS's decision to remove the appellant's name from the certification list in 1990 in light of his failure to meet a preliminary requirement for appointment was upheld. *Augustin v. DMRS & DOC*, 90-0254-PC, 10/3/91

Respondent's action of using an Instrument Shop Supervisor employment register to certify applicants for vacant Engineering Technician 5 positions was upheld where it was consistent with the requirements of §ER-Pers 12.04(2) and there was no showing that respondent had failed to investigate the factors listed in §ER-Pers 6.01 or failed to properly analyze and balance the information obtained from this investigation. *Ochalla et al. v. DMRS*, 90-0011-PC, 5/31/91

Respondent's action of removing the appellant's name from a register was upheld where the appellant admitted that he reviewed materials that he had brought with him in his briefcase during the period after he had received a copy of the interview questions immediately prior to an oral exam and where the instructions provided to the candidates were

not vague or ambiguous in prohibiting such review. The respondent was not required to show that the appellant acted with intent to practice fraud or deception. *Kelley v. DMRS*, 88-0151-PC, 1/31/89

Respondent was justified in removing the appellants' names from a register where the greater weight of the credible evidence supported respondent's conclusion that the appellants talked and exchanged answers during the exam *Dugan & Fisher v. DMRS*, 88-0043, 0044-PC, 1/13/89

In deciding whether to remove an applicant's name from an employment register, DMRS is justified in accepting as accurate the information provided by the applicant's references. *Moss v. DMRS*, 87-0015-PC, 10/7/87

The respondent properly removed appellant's name from an employment register where, based on information from each of appellant's references, he had been fired, did not have a positive relationship with co-workers and had poor work performance and where the appellant made false statements of material facts on his application and practiced deception in his application. *Moss v. DMRS*, 87-0015-PC, 10/7/87

The administrator's decision not to submit appellant's name as eligible for a vacant Accountant 4 - Supervisor position was upheld where pursuant to a prior settlement agreement, appellant's name had been placed on the transfer list for a different classification but the appellant had never requested transfer to the Accountant 4- Supervisor classification. The Commission also found there was no violation of the policy provisions of §230.01(2), Stats. *Wing v. DMRS & DPI*, 85-0013-PC, 9/23/87

The respondent violated §230.03(4m), Stats., when it decided to use expanded certification after comparing the proportion of minority incumbents in the ISD-1 classification to the proportion of minorities in the state population as a whole rather than to the percentage of minorities from amongst all those persons who were "qualified and available" for hire in the ISD-l classification. Respondent also violated §§230.01(2) and .03(4m), Stats., when it made a work force analysis based upon job category ("Officers and Administrators") rather than a classification (ISD-1). Therefore, the resulting decision to appoint someone whose name appeared on the list of candidates due

to expanded certification was illegal. *Paul v. DHSS & DMRS*, 82-156-PC & 82-PC-ER-69, 6/19/86

DMRS did not constructively decertify the appellant where a DMRS employe advised an agency that if they wanted to hire a certified applicant other than the appellant, they should do so without requesting decertification due to the effort and time that would be involved. *Pflugrad v. DMRS & DHSS*, 83-0176-PC, 6/6/85

Respondent's decision to remove appellant's name from a register of eligible candidates for a certain classification due to an unsatisfactory work record (§Pers 6.10, Wis. Adm. Code) was upheld where appellant's record included three terminations for unsatisfactory performance from three different state agencies and a reprimand, a suspension and an unsatisfactory performance evaluation. The administrative rule does not provide for the administrator to go beyond the work record to hold a hearing to determine whether the actual facts concerning applicant's employment are as reflected in his or her record. *Pflugrad v. DP*, 82-207-PC, 3/17/83

The respondent's decision to extend an employment register on two occasions within three years was upheld where the action was authorized by §230.25(3), Stats., and there was no suggestion of impropriety. *Pullen-Algee v. DILHR*, 81-84-PC, 5/12/82

Respondent's decision to establish a new register rather than extending the existing register was justified where some of the top candidates had been eliminated from the original register due to its active use and where the original register was small enough that it could not have provided a full certification list for all of the positions that had to be filled. *Nelson v. State Public Defender*, 79-27-PC, 11/19/81

Reactivation of a register after six months have elapsed since its creation is a decision that is within the administrator's discretion. Reactivation was determined to have been reasonable where 1) the register had been created for two specific positions and one position remained unfilled; 2) some candidates on the register had only been competing for the unfilled position; 3) the register was large enough to complete a certification for the unfilled position; 4) the examination that had been used was still job related to an unfilled position; 5) reactivating the register was more

efficient and economical. *Thomas v. DILHR & DP*, 80-298-PC, 10/29/81

Respondents did not violate the civil service code by establishing a new register based on a new examination and by not integrating the new register with previously created registers. *Pullen v. DILHR & DP*, 79-197-PC, 10/2/81

403.104 Project positions

Where the respondent had established a policy concerning project appointments in the Wisconsin Personnel Manual, the policy was in legal affect a rule even though not promulgated as such and was enforceable against the respondent. *WFT v. DMRS*, 84-0154-PC, 8/1/85; rehearing denied, 8/30/85

The characterization of a policy or rule concerning project appointments as being mandatory or directory may, upon finding a violation thereof, affect the remedy but does not affect the underlying question of whether there has been a violation. *WFT v. DMRS*, 84-0154-PC, 8/1/85; rehearing denied, 8/30/85

The decision of DMRS not to order DHSS to fill certain project positions on a permanent appointment basis did not violate the civil service code or §248.03 A.2. of the Wisconsin Personnel Manual Staffing because, under the circumstances, there was no likelihood of the projects or positions continuing either beyond their probable ending date or beyond 4 years. *WFT v. DMRS*, 84-0154-PC, 8/1/85; rehearing denied, 8/30/85

Where appellant had been employed in a project position as a Program Assistant 2 in the Division of Employment and Training Services and as of October, 1981 DETS assumed an additional function and appellant was assigned new duties falling within the Job Service Specialist 2 classification, appellant's project appointment as a PA 2 had terminated and her project appointment as a JSS 2 was a new project appointment and the assignment of her position to the JSS 2 classification was an original allocation of a project position. Pursuant to §230.27(2)(a), Stats., the benefits earned by the appellant in the PA 2 project appointment may not transfer to the JSS 2 project appointment. *Magnuson v. DILHR & DP*, 82-22-PC, 11/9/83

While this digest has been prepared by Personnel Commission staff for the convenience of interested persons, it should be remembered that the decisions themselves are the ultimate source of Commission precedent.

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 403.12(6) through 403.12(13)

[Previous material] [Next material]

403.12(6) Delegation

Where the respondent UW lacked delegated authority from DER to have changed the classification of appellant's position to the PA Supervisor series, the UW's failure to have recommended a supervisory classification was not an appealable action. Where DER had not issued a decision with respect to the PA Supervisor series, the Commission limited its post-hearing order to classifications for which the UW had delegated authority. *Cernohous v. UW & DER*, 89-0131-PC, 9/13/90

403.12(7) Reclassification/reallocation versus demotion or layoff

Where respondent took a personnel action 1) which it denominated a reallocation of appellant's position, 2) the stated basis for which was the correction of an error and 3) which did not affect appellant's then current base pay although the pay range of the new classification was lower than the pay range of the prior classification and the change in the pay range either did or could have had a negative impact on appellant's salary progression, the personnel action was not a demotion and the appellant was not entitled to judgment as a matter of law. *Wilkinson v. DER*, 92-0613-PC, 1/31/96

Where none of the circumstances for instituting a layoff under §230.34(2), Stats., were present and the appellant's job was reviewed to determine where it best fit within the

state classification plan, the decision to regrade the appellant (after reallocating his position to a lower classification) rather than effectuating a lay off was correct. *Olson v. DER*, 87-0169-PC, 3/21/90

In a reallocation appeal, where the issue was one of whether the reallocation decision was correct, the Commission would not consider the appellant's contention that the positions of appellant's co-workers (rather than appellant's own position) should have been selected for a reassignment of duties (which resulted in a downward reallocation). The issue before the Commission was not one of whether there was just cause for a demotion. *Bornfleth v. DER*, 85-0200-PC, 5/29/86

403.12(8) Reclassification versus reallocation [see also 403.12(11)]

Reclassification was inappropriate where the duties that might, as of 1994, justify a higher classification, were responsibilities that also would have justified a higher classification in 1992, when the appellant was hired. Appellant expressly declined to pursue reallocation of his position. *Gunderson v. DER*, 95-0095-PC, 8/5/96

Where the record did not indicate that prior reclassifications of appellants' positions included either a review by DER or a request by appellants for the classification (Parole Board Member) they were now seeking, the appellants' failure to have appealed from previous decisions which granted their requests to intermediate classifications was not a bar to their classification, in the current appeal, to the PBM level, citing *Vesperman et al. v. DOT & DER*, 93-0101-PC, etc., 2/15/94. *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96

Because the key changes to the appellant's position occurred as a result of a reorganization, they could not be considered "gradual" and reclassification was inappropriate, but the changes met the requirements for a reallocation under both §ER 3.01(2)(f) and (g), Wis. Adm. Code. *Phelps v. DOR & DER*, 91-0003-PC, 5/20/93

The change in DER's interpretation of the leadwork requirement in the Facilities Repair Worker 4 classification specifications to include leading the work of inmates was a

change in the concept of the class specifications from the previous interpretation, thereby meeting the definition of reallocation found in §ER 3.01(2)(a), Wis. Adm. Code. Appellants failed to show that their positions had undergone gradual change as required for reclassification. *Nagorsen & Boehrig v. DOC & DER*, 92-0158, 0156-PC, 12/17/92

Management's decision to reassign a Civil Engineer-Transportation Senior to the appellant for supervision resulted in a logical, but not gradual, change in the appellant's duties where the Sup 3 and Sup 4 class specifications differentiated on the basis of whether the employe supervised any senior or advanced civil engineers. At the time of the reassignment, appellant was classified as a Civil Engineer-Transportation Supervisor 3, and had no senior or advanced level engineers assigned to him. *Wacker v. DOT & DER*, 92-0251-PC, 12/17/92

Where the sole material distinction between two classification levels was the size of the section supervised and the appellant's position had not changed in terms of the section size, there had been no "logical and gradual change" upon which to base a reclassification, and any change in the classification of appellant's position due to a different conclusion about the size of appellant's section would have to be effectuated by a reallocation. *Jenkins v. DOR & DER*, 88-0061-PC, 5/31/89

Respondent's action to reallocate the appellant's position (rather than to reclassify the position) was affirmed despite reference in Commission's order in predecessor case *(Marx v. DP*, 78-138-PC, 10/1/81) for respondent to use an "effective date of *reclassification"*, where the reference in the order to reclassification had been in error and reallocation of the appellant's position was consistent with applicable law. *Marx v. DATCP & DP*, 82-0050-PC, 3/18/87

403.12(10) Prior reorganization

Even if the appellant had been assigned new duties when a lead worker position had been eliminated, and even if those responsibilities had resulted in a substantive and significant change in appellant's position, the assignment would not have been gradual and would not have qualified appellant's

position for reclassification. *Murphy v. DHFS & DER*, 98-0013-PC, 3/24/99; affirmed Dane County Circuit Court, 99-CV-0944, 2/16/00

The Commission cannot consider or address, in the context of a reallocation appeal, the propriety of a reorganization, the resulting utilization of personnel and the appellants' contention that a downward reallocation of their positions is contrary to their career development program. *Tuttle, Oinonen, & Delaney v. DATCP & DER*, 85-0153, 0154, 0158-PC, 5/14/86

Appellant was not entitled to reallocation of his position from Administrative Assistant 2 to 3 where, as a result of the consolidation of two divisions within DHSS, appellant was reassigned from his old Area Services Specialist 2 position in the Division of Economic Assistance to an Administrative Assistant position with new duties in the Division of Community Services and where the new duties upon reassignment represented a change of more than 50% of appellant's former duties. Given this abrupt change, a new position was effectively created, requiring competition to fill it. *Chase v. DER*, 85-0033-PC, 3/13/86

The Commission lacks jurisdiction to consider, as part of an appeal of a reclassification denial, issues relative to a reorganization that occurred prior to the denial, or the issue of whether the appellant suffered a functional reduction in grade or reallocation based on the theory that although his position had always been formally classified at the Civil Engineer 4 level, he had been performing duties at the Civil Engineer 5 level and therefore the reorganization must have reduced his position to the Civil Engineer 4 level. *Schiffer v. DOT & DP*, 81-4, 342-PC, 2/18/82

403.12(11) Logical and gradual change

Even if the appellant had been assigned new duties when a lead worker position had been eliminated, and even if those responsibilities had resulted in a substantive and significant change in appellant's position, the assignment would not have been gradual and would not have qualified appellant's position for reclassification. *Murphy v. DHFS & DER*, 98-0013-PC, 3/24/99; affirmed Dane County Circuit Court, 99-CV-0944, 2/16/00

The nature of appellant's duties and responsibilities when she was first appointed to the subject position were essentially irrelevant for purposes of a reclassification appeal when her position had been reallocated in the interim. The relevant changes would be those between the duties of her position at the time of the reallocation and her duties at the time of her subsequent reclassification request. *Murphy v. DHFS & DER*, 98-0013-PC, 3/24/99; affirmed Dane County Circuit Court, 99-CV-0944, 2/16/00

Where appellant began conducting workshops some time in 1991 or 1992 and her responsibilities in this area gradually increased until she filed her reclassification request approximately 4 years later, the addition of the workshop-related duties and responsibilities was gradual. Likewise, it was a logical change for Job Service staff to make greater use of workshops and outreach activities for providing information and instruction to unemployment compensation applicants relating to job-seeking skills and resources rather than relying on one-to-one personal contacts. *Olson v. DILHR [DWD] & DER*, 96-0015-PC, 10/22/96

Appellants' positions underwent a logical but not gradual change when their responsibility to make release decisions for juveniles housed in juvenile facilities was extended by statute to include release decisions for adult juvenile offenders housed in either juvenile or adult facilities, where this extension of their responsibilities constituted duties warranting a higher classification under the class specifications. *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96

While appellant performed the duties and responsibilities of her position by utilizing different procedures as a result of changes in technology and reporting requirements, the essential duties and responsibilities of her position had not changed and reclassification was not warranted. *Johnson v. DER*, 95-0122-PC, 1/31/96

Changes to appellant's duties were not illogical where they represented an expansion of what had already been identified as 20% of his duties in his previous position description, the appellant had a more significant concentration than another employe in the subject area in question and it was a management decision. *McCullough v.*

***DER*, 94-0394-PC, 6/9/95**

Management's decision to downgrade a vacant position and to reassign the position's leadwork responsibilities to the appellant was not gradual. *Dolsen v. UW & DER*, 93-0066-PC, 6/21/94

Where the appellant's two position descriptions merely reworked the same duties, appellant's responsibilities remained essentially the same, and he failed to establish a logical and gradual change in the six-month period before he made his reclassification request. The requirements for reclassification were not met. *Perea v. DHSS & DER*, 93-0036-PC, 3/29/94

Because the key changes to the appellant's position occurred as a result of a reorganization, they could not be considered "gradual" and reclassification was inappropriate, but the changes met the requirements for a reallocation under both §ER 3.01(2)(f) and (g), Wis. Adm. Code. *Phelps v. DOR & DER*, 91-0003-PC, 5/20/93

The change in DER's interpretation of the leadwork requirement in the Facilities Repair Worker 4 classification specifications to include leading the work of inmates was a change in the concept of the class specifications from the previous interpretation, thereby meeting the definition of reallocation found in §ER 3.01(2)(a), Wis. Adm. Code. Appellants failed to show that their positions had undergone gradual change as required for reclassification. *Nagorsen & Boehrig v. DOC & DER*, 92-0158, 0156-PC, 12/17/92

Management's decision to reassign a Civil Engineer-Transportation Senior to the appellant for supervision resulted in a logical, but not gradual, change in the appellant's duties where the Sup 3 and Sup 4 class specifications differentiated on the basis of whether the employe supervised any senior or advanced civil engineers. At the time of the reassignment, appellant was classified as a Civil Engineer-Transportation Supervisor 3, and had no senior or advanced level engineers assigned to him. *Wacker v. DOT & DER*, 92-0251-PC, 12/17/92

It is not required that a certain percentage change be shown, only such change that would take a position's classification from one level to another. *Jesse v. DHSS & DER*, 92-0036-PC, 9/18/92

Appellant's position as a Shipping and Mailing Clerk underwent a logical and gradual change over a 6 year period where the level of supervision over appellant's position was reduced from limited to general. *Ripp v. UW & DER*, 91-0057-PC, 11/14/91

If changes in time percentages result in the majority of the position's time being spent performing higher level duties and responsibilities, then the position satisfies the requirements for classification at the higher level, regardless of whether any change in the substance or function of these duties and responsibilities has occurred and regardless of the actual size of the change in the percentages of time consumed by certain functions. *Austin et al. v. DER*, 90-0285, 0294-PC, 10/31/91

The question of whether there was a significant change in appellant's position must be considered within the meaning of the word "significant" and the facts of the case. "Significant" is a relative term and need not indicate any particular quantum, save that it expresses some meaning of importance. The particular changes and increases in appellant's duties caused her position to be comparable to other positions at the higher classification level. To that degree, the changes in her position were significant. *Gilbert v. DOA & DER*, 90-0397-PC, 8/16/91

Any degree of change can satisfy §ER 3.01(3), Wis. Adm Code, as long as it results in sufficient "strengthening" of a position to elevate it from one classification level to another. *Dombrowski v. UW & DER*, 88-0054-PC, 11/30/88

Where the assignment of new higher level duties to the appellant's position was logical but not gradual, the position was properly reallocated rather than reclassified. *Shorey v. DILHR & DER*, 87-0070-PC, 2/1/88

A logical and gradual change occurred over several years, involving changes in the appellant's duties and in the treatment center's resident care delivery system. During the period since a prior reclassification, the appellant's position expanded as the center made significant organizational and programmatic changes and, the responsibilities extended from one discipline, social services, to all non-medical disciplines, including occupational and physical therapy. *Knight v. DER*, 85-0178-PC, 9/17/86

The Commission found that additional duties were gradually assigned to the appellant (once she acquired greater familiarity with the program) after the death of the person who had previously been responsible for the program. A third employe had assumed the responsibilities for the program immediately following the co-worker's death. *Maher (Eisely) v. DHSS & DER*, 85-0192-PC, 9/4/86

No logical and gradual change was found where there was a lack of sufficient information regarding the specific percentages of time assigned to the various changes in the appellant's duties and responsibilities and where there were certain conflicts between the testimony of the appellant and her supervisor as to when new duties were assumed. *Haak v. DHSS & DER*, 85-0130-PC, 4/30/86

In determining whether there has been a logical and gradual change, restricting the analysis to written position descriptions is neither warranted by, nor compatible with, the civil service code. While, in a particular case, it may be impossible for the secretary of DER to accurately determine the proper classification or whether changes have been logical and gradual, these decisions are to be made if the evaluation of the position may be determined from reasonably reliable sources. *Haak v. DHSS & DER*, 85-0130-PC, 4/30/86

Appellant was not entitled to reallocation of his position from Administrative Assistant 2 to 3 where, as a result of the consolidation of two divisions within DHSS, appellant was reassigned from his old Area Services Specialist 2 position in the Division of Economic Assistance to an Administrative Assistant position with new duties in the Division of Community Services and where the new duties upon reassignment represented a change of more than 50% of appellant's former duties. Given this abrupt change, a new position was effectively created, requiring competition to fill it. *Chase v. DER*, 85-0033-PC, 3/13/86

Appellant's duties and responsibilities in an inmate property officer position underwent a logical and gradual change after appellant first filled the newly created position via a job posting process and there was no dispute that at the time it was filled the position was properly classified at the Officer 2 level. The Commission compared the duties and responsibilities of the appellant's position at the time of his reclassification request with those duties and responsibilities

performed at the time he first began to fill the new position rather than with his duties and responsibilities in his former position. *Engebregsten v. DHSS & DER*, 85-0155-PC, 3/13/86

Appellant's position developed logically and gradually between 1980 and 1982 where the functions were new at the time they were hired, the appellants were given more and more discretion and responsibility to make decisions concerning the functioning of the program and with respect to their contacts. *Arndt v. Goehring v. DP*, 82-251-PC, 9/13/85

Where appellant's responsibilities over an 11 month period changed so that instead of performing 10% at the higher level he performed over 50% at that level, the change was not gradual in light of the respondent's "waiting period" guideline requiring him 1) to perform all of the duties for at least six months prior to the reclass request and 2) to perform the duties constituting the "base for final change" for at least six months before the final change. *Usabel v. DER*, 84-0005-PC, 12/6/84

There was no logical and gradual change where the assumption of the responsibility for cooperative raising of walleyes by DNR's north central district was sudden, there was not a great deal of lead time, it was not possible to integrate the project with the regular programs of the district and appellant was assigned to coordinate the program. *Dobratz v. DNR & DP*, 82-40-PC, 2/9/83

Logical and gradual change was found in a minimum-security correctional setting where the number of residents increased, the staffing and reporting relationships changed and program aspects of the shaft supervisor increased and despite an overnight change in organizational structure from a correctional camp to a correctional institution. *Eschenfeldt v. DP & DHSS*, 78-257-PC, 7/22/81; affirmed except as to remedy by Dane County Circuit Court, *DHSS & DP v. Wis. Pers. Comm. (Eschenfeldt)*, 81-CV-5126, 4/27/83

Where the duties and responsibilities of appellants' positions changed as a result of certain distinct program changes implemented by management, it was held that there was no logical and gradual change pursuant to Pers. 3.02(4), Wis. Adm. Code. *Blood v. DP*, 78-278-PC, 12/17/79

403.12(12) Class specifications as binding

Where a rating panel convened after new class specifications had been adopted did not rely on the relevant specifications as written and approved, the classification decisions reached by the panel had limited utility as far as proving guidance on the proper interpretation of the specification language or the proper classification of appellant's positions. The basic authority for classifying positions is the classification specifications as they are written and approved by DER and actions taken by DER which are inconsistent with the classification specifications are not binding on the Commission. *Aslakson et al. v. DER*, 91-0135-PC, etc., 10/22/96

Where a degree of leeway was necessary to justify the conclusion that certain positions continued to be correctly classified under an outdated position standard, the appellants were entitled to the same degree of interpretive leeway when considering whether their positions met the requirements of the same position standard. DER's analyst was aware that the other positions did not meet the position standard yet there was no indication that she reported this discrepancy to anyone else at DER or at the employing agency. *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96

It is inconsistent for an appellant to concede a class specification was written for a particular position and then to argue that a different specification is a better fit. *Hertel v. DER*, 94-0348-PC, 10/16/95

In a progression series, where positions were initially reallocated into a progression series based upon a proposed chart for converting the prior classifications into the new classifications based on length of service of the incumbents in positions, but where the length of service criteria were not included in the new class specifications, the language of the class specifications controlled in the event of any conflict between the length of service and the criteria in the class specification. *Cutts v. DER*, 92-0472-PC, 7/24/95

Equitable considerations, such as an alleged statement by the survey coordinator that the appellant's position would remain at its previous classification, do not prevail over the

requirements of the class specifications. *Doemel v. DER*, 94-0146-PC, 5/18/95; *Pockat v. DER*, 94-0148-PC, 5/18/95; *Strey v. DER*, 94-0150-PC, 5/18/95

Identification of a position as a representative position in a class specification is not binding if it does not fit within the definitional language of the class specification. *Holton v. DER & DILHR*, 92-0717-PC, 1/20/95

Where the classification of supervisory positions based on the pay ranges of their subordinate positions was prevalent throughout the state classification system and was explicitly written into the relevant class specification, the Commission lacked the authority to essentially rewrite those specifications on the basis of perceptions of equity. *Costa & Hollister v. DER*, 92-0459, 0460-PC, 5/16/94

In a reallocation appeal, the appellant must identify an alternative classification which s/he feels better describes the position than the class level assigned by respondent. The Commission dismissed an appeal for lack of subject matter jurisdiction where the appellant agreed that he was reallocated to the most appropriate classification, but felt the class specifications were flawed. *Kiefer v. DER*, 92-0634-PC, 5/2/94

The Commission is limited to applying the class specifications as written by the Department of Employment Relations and lacks the authority to rewrite the specifications. *Edwards v. DER*, 92-0423-PC, 11/29/93

The classification process requires consistency in the application of clearly defined and stated standards and does not permit informal modification of the language of the definition section of the classification specifications, either by the Commission or by DER. *Lautz v. DER*, 91-0091-PC, 6/23/93

The discretionary decisions made by the rating panel in the survey process to apply the 10 WQES factors, match positions and establish allocation patterns will not be second-guessed by the Commission. *Schmidt v. DER*, 90-0246-PC, 3/10/93

Based on the definitions of Architect/Engineer Manager 2 and 3 contained in the class specifications and a comparison to other positions, the Commission concluded that appellant's position was incorrectly reallocated to the 2

level even though appellant's position was identified as a "representative" 2 level position in the class specifications. A reallocation decision with respect to a specific position is not insulated from any meaningful review under §230.44(1)(b) because DER decided to include the position in the class specification as a representative position. *Eagon v. DER*, 90-0398-PC, 3/23/92

Language in the specifications cannot be ignored when making a classification decision. The Commission rejected the appellant's suggestion that if one word would be ignored, his position would fit the specifications at at the higher level. The appellant's position was specifically identified at the lower level. *Mertens v. DER*, 90-0237-PC, 8/8/91

Survey job content questionnaires were discoverable on reallocation appeals, even though the Commission lacks authority to review "survey methodology" per se, because the questionnaires were relevant to the evaluation of appellant's positions on the basis of the classification factors in question. Also, based on the record of the motion to compel discovery, it appeared respondent used the survey rating panel scores to determine the relative ranking of the positions surveyed, and then classification specifications were developed directly from the position descriptions of the positions so evaluated. Therefore, to the extent that the information sought on this discovery request ran to an attempt by appellants to show that the panel's factor evaluation was erroneous and resulted in their positions being placed in the wrong cluster and hence at the lower class level than should have been the case, it fell within the boundaries of relevance to a reallocation appeal and was properly discoverable. *Mincy et al. v. DER*, 90-0229, 0257-PC, 2/21/91 (ruling by examiner); rehearing denied, 3/12/91

Where the Storekeeper 2 class specification specifically required leadwork responsibilities and subsequent to the denial of appellant's reclassification request by DNR, DER changed its application of the specification so that leadwork responsibility was no longer required, the Commission upheld the DNR decision and refused to apply DER's new interpretation where the rationale for DER's decision was completely undeveloped on the record and the leadwork requirement in the class specification was unambiguous. *Crary v. DNR & DER*, 89-0133-PC, 6/1/90

Classification specifications should prevail over equitable considerations or instances of improper application of the specifications. *Lulling & Arneson v. DER*, 88-0136, 0137-PC, 9/13/89

Where, in the opinion of the Commission, the absence of a word in the classification definition was due to an oversight, the omission was remedied by supplying the missing word, in keeping with principles of statutory construction and to avoid an absurd result. It is appropriate to use a relatively more liberal approach to construction of a provision in an administrative enactment such as class specifications which have not been promulgated with the formality required of a statute or administrative rule. *Jenkins v. DOR & DER*, 88-0061-PC, 5/31/89

The Commission does not have the authority to rewrite a position standard to create a new category of state park or forest not recognized in the standard, but must apply the existing standard to the duties and responsibilities of a position to determine the correctness of the decision it is reviewing, citing *Zhe et al. v. DHSS & DP*, 80-285-PC, 11/19/81; affirmed by Dane County Circuit Court, *Zhe et al. v. PC*, 81-CV-6492, 11/2/82. There are cases where parts of a position standard become outmoded over the course of time and as circumstances change, and then classification decisions may be based on the more general concepts reflected in the position standard, as opposed to outmoded specific sections, such as allocation patterns. No sections of the 1985 position standard in question were found to be outmoded. *Brandt v. DNR & DER*, 87-0155-PC, 11/3/88; *Eldred v. DNR & DER*, 87-0158-PC, 11/3/88; *Leith v. DNR & DER*, 87-0154-PC, 11/3/88

The pay levels of subordinate positions do not set a classification minimum for a supervisory position. *Critchley v. UW & DER*, 86-0037-PC, 1/8/87

Where a series is specifically designed to encompass positions such as the appellants, it would be inappropriate to substitute a "catch-all" series used only in the absence of a specific classification describing the position. *Danielski et al. v. DER*, 85-0196-PC, 9/17/86

The Commission lacks the authority to consider the appellant's argument, raised in his reclassification appeal, that the position standards adopted as a consequence of a

personnel survey should have recognized the duties of nursery superintendents as being at a higher level than where they were explicitly allocated in the positions standards that were adopted. *Borkenhagen v. DER*, 85-0076-PC, 5/15/86

The Commission rejected the respondent's contention that advancement from the Officer 2 to Officer 3 level cannot be accomplished by means of reclassification in the absence of specific authority in the specifications rules or statutes to support that contention. *Engebregsten v. DHSS & DER*, 85-0155-PC, 3/13/86

The appellant was not entitled to reclassification based upon seven position descriptions alleged by appellant to be comparable positions classified at the higher level, where the overwhelming evidence was that the seven positions failed to meet the classification specifications for the higher level. *McCord v. DER*, 85-0147-PC, 3/13/86

In determining which duties were required for classification at different levels within a series, the Commission focused on the position standards of the new classification rather than on the standard position descriptions that had been developed to describe duties actually assigned by management. *DOT et al. v. DER*, 84-0071,etc.-PC, 9/20/85; reversed by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 85-CV-5383, 7/9/86; reversed by Court of Appeals District IV, 86-1483, 1/22/87

The Commission must apply existing class specifications and position standards as they have been approved by the personnel board and lacks the authority to reclassify a position or regrade an employe merely on a theory that such an action would compensate for problems or inequities in the class specifications. *Kennedy et al. v. DP*, 81-180,etc-PC, 1/6/84

The Commission lacks the authority to consider, on an appeal of a reclassification denial, the appropriateness of the language found in position standards. *Wambold v. DILHR & DP*, 82-161-PC, 1/20/83

Even though the appellants showed that the current class specifications were outdated and created salary inequities, the Commission has no authority to update the class specifications but is bound by those currently in effect. *Zhe et al. v. DHSS & DP*, 80-285-PC, 11/19/81; affirmed by

Dane County Circuit Court, *Zhe et al. v. PC*, 81-CV-6492, 11/2/82

403.12(13) Effective date

Because the Commission could not apply the doctrine of *res judicata* with respect to a settlement agreement entered into by the previous position incumbent and the respondent, the proper effective date was in 1983. The position in question had been reallocated in 1979 to the Natural Resources Administrator 3 classification. That decision was appealed and the appeal was held in abeyance pending the results of a second survey that covered two peer positions in other agencies. The second survey resulted in the issuance of a new Research and Analysis position standards with an announced effective date in 1983 and the two peer positions were reallocated to a higher level upon the adoption of the new position standard. The Commission held that the Research and Analysis position standard was intended to be prospective only and not to have a retroactive effect and, therefore, concluded that the correct effective date for reallocating the position in question to the NRA 3 level was also 1983, rather than 1979. This result would have been different if, instead of establishing a new position standard in 1983, the respondent had merely reinterpreted existing positions standards and concluded that based on those standards the two peer positions were better classified at a higher level. *DER v. Wis. Pers. Comm. (Klepinger)*, Dane County Circuit Court, 85-CV-3022, 12/27/85; reversing in part, *Klepinger v. DER*, 83-0197-PC, 5/9/85

Where it was undisputed that respondent central personnel office received the reclassification request on May 22nd, the effective date of the request was the beginning of the first pay period following receipt of the request rather than two years earlier, when he was assigned certain responsibilities. Respondent did not preclude appellant from preserving an effective reclassification date where it was undisputed that respondent provided appellant with an employe handbook which contained information about determining reclassification effective dates and appeal rights relating to reclassification requests. *Abdulghani v. DOT & DER*, 96-0143-PC, 11/7/97

In order for material to qualify as a supervisor-initiated request for a classification review, the documentation supporting the request must be approved by the supervisor. A submission by appellant's supervisor to the personnel unit was not characterized by the supervisor as a request for reclassification of appellant's position, the accompanying documentation did not indicate that either the position description or the supporting memorandum had been approved by the supervisor and the personnel unit interpreted the submission as merely a request for an informal classification review. Appellant failed to show that she was misled by respondents as to the status of the review of the classification of her position. *Weber v. DOCom & DER*, 95-0168-PC, 4/24/97

Where the requirements for reclassification from Youth Counselor 1 to 2 included employment for a minimum of 2 years as a YC 1 and passing an open book exam conducted under the auspices of the American Correctional Association, appellant was first employed as a YC 1 on July 6, 1993 and took the ACA exam in late June or early July of 1995 but did not receive a passing grade, appellant's position was properly reclassified to the YC 2 level effective October 29, 1995, which was the beginning of the pay period following notification on October 16th that appellant had passed the ACA exam on his second attempt. Appellant could have requested the ACA course and exam materials on an earlier date, such as six months prior to July of 1995, so that if he did fail the exam on the first attempt and passed it on the second, he still could have completed all of the reclassification requirements by July 6th, the two year anniversary of his hire date. *Steber v. DHSS & DER*, 96-0002-PC, 6/25/96

The appellant was properly held to compliance with his employing agency's written requirements relating to the processing of employe-initiated reclassification requests, where there had been no showing that the employing agency's requirements were inconsistent or ambiguous in any relevant respect. *Carlin v. DHSS & DER*, 94-0207-PC, 6/22/95 and *Spilde v. DER*, 86-0040-PC, 10/9/86 were distinguished. *Enghagen v. DPI & DER*, 95-0123-PC, 4/4/96

Even though the effective date of a 1994 reclassification of the appellant's position was several pay periods after the

date appellant submitted his reclass request to his supervisor, in contrast to his 1991 reclassification request which was effective the pay period immediately following the submission of the request to his supervisor, the appellant did not rebut respondents' assertion that both effective dates were consistent with the agency's policy to key the effective date to the receipt, by the agency's personnel unit, of the necessary reclassification request materials, including a position description signed by the supervisor. *Enghagen v. DPI & DER*, 95-0123-PC, 2/15/96; rehearing denied, 4/4/96

Equitable estoppel was not present where appellant made certain assumptions based on the experience he had in 1991 in submitting a reclassification request, he relied on those assumptions in filing his 1994 request and the assumptions turned out to be incorrect. The assumptions were not attributable to respondents but were attributable to appellant and respondents were not held accountable for them. *Enghagen v. DPI & DER*, 95-0123-PC, 2/15/96; rehearing denied, 4/4/96

Appellant was not entitled to reclassification in a progression series merely by satisfying the minimum requirement of 24 months in an entry level position, where he transferred from one institution to a second institution within the initial 24 month period, the criteria for reclassification also required the employe to have completed necessary training and to be functioning at an adequate level of performance, administrative rule requires an employe to perform at the higher level for a minimum of 6 months and the programs and populations at the two institutions differed so that the second position was not equivalent to the initial position. Respondent's policy not to count the initial 12 weeks spent in new employe orientation and on-the-job training at the second institution was reasonable because during this period, the appellant was not performing under general supervision. *Mayer et al. v. DHSS & DER*, 95-0002-PC, 12/7/95

Even if a supervisor had informed the appellant that he would receive a reclassification after he passed his six month permissive probation, such a statement could not have nullified a contrary policy of the agency that was consistent with both the civil service code and the requirements of the classification specifications. *Mayer et al. v. DHSS & DER*, 95-0002-PC, 12/7/95

Generally, the Commission will not hold an employe to procedural details related to filing a reclassification request which are not reasonably known to the employe. *Carlin v. DHSS & DER*, 94-0207-PC, 6/22/95

Respondent established that the effective date of a reclassification request was determined by the date the request was received by the employing unit's personnel office, where this measurement of the effective date was recited both in the agency's employe manual and its supervisory manual. *Carlin v. DHSS & DER*, 94-0207-PC, 6/22/95

An effective date earlier than would be established under general policies was accepted where it had been recommended by the employing agency as a means to compensate for a delayed referral by the agency to DER. *Burnson v. DER*, 92-0096, 0847-PC, 10/24/94

The proper effective date of appellant's regrade after reallocation was the 1991 date he became the incumbent in the position via a transfer where the previous incumbent appealed a 1990 reallocation decision that was not decided in his favor until 1993, after he vacated the position and appellant was serving in the position. The Commission rejected respondent's contention that the higher class level of the position would invalidate the appellant's transfer in 1991 and would require him to compete for the higher classified position. The reallocation decision in 1993 did not have a retroactive effect with respect to the transfer, a different type of personnel transaction. *Zentner v. DER*, 93-0032-PC, 6/23/94

Where the record established that the appellant had not begun fully performing the higher level duties until January 1, 1991, the appellant's position was correctly reclassified effective June 30, 1991. *Bernier v. DNR & DER*, 92-0792-PC, 4/19/94

Until the appellant had satisfied the training requirements specified to gain reclassification as part of a progression series, she was not entitled to reclassification. The Commission did not address appellant's contentions that the training requirements were unnecessary in light of her work experience. *Barkus v. DHSS & DER*, 91-0254-PC, 92-0205-PC, 6/25/93

Although the key changes to the appellant's position occurred as a result of a reorganization in 1985, the respondents' decision establishing an effective date in 1990 was affirmed where that date was based upon the respondents' receipt of the appellant's reclass request. Even though the appellant did not receive a copy of the certification request/report which was prepared for his position at the time of the 1985 reorganization, he did sign a revised position description in 1986 which reflected both his new duties and a classification level the same as before the reorganization. Appellant could have initiated a reclassification or reallocation request at any time once he was assigned the new responsibilities in order to freeze the effective date. *Phelps v. DOR & DER*, 91-0003-PC, 5/20/93

The effective date for the reclassification of the appellants' positions was properly based upon receipt of their reclass request rather than on the effective date applied to two other positions performing similar duties, citing *Popp v. DER*, 88-0002-PC, 3/8/89. *Regan & Blumer v. DOT & DER*, 92-0211, 0256-PC, 4/23/93

Appellant failed to establish that she was induced not to file a reclass request where she was well aware of the steps required to get a request formally recognized and reviewed and was well aware that her supervisors were not pursuing the reclassification of her position. *Vollmer v. UW & DER*, 89-0056-PC, 3/19/93

It was unrealistic to impose on program managers or campus personnel directors the duty to maintain up-to-date knowledge of each new interpretation of a position standard made by DER. The failure to acquire such knowledge and communicate it to the appellant did not constitute fraud or a manifest abuse of discretion. *Vollmer v. UW & DER*, 89-0056-PC, 3/19/93

Section 230.09(2)(a), Stats., does not require DER to notify appointing authorities whenever an alternative allocation pattern is developed. An alternative allocation pattern results from an interpretation by DER of the existing language of classification specifications where such language does not literally describe the duties and responsibilities of a given position. In contrast, a change in the language of the classification specifications would clearly require formal action and notice by DER pursuant to

§230.09, Stats. *Vollmer v. UW & DER*, 89-0056-PC, 3/19/93

Actions and inactions by appellant's supervisor and personnel manager led appellant to believe that his reclassification request was pending in the personnel office and that no further action by him was necessary. Equitable estoppel elements were established. *Mergen v. UW & DER*, 91-0247-PC, 11/13/92

The preponderance of the evidence supported appellant's contention that he was responsible for a medium rather than a small computer system by January 1, 1987, thereby meeting the classification requirements at the higher level. Pursuant to §ER 3.015(3)(b), Wis. Adm. Code, the actual effective date for the reclassification of appellant's position and his regrade for salary purposes was set at six months thereafter. *Mergen v. UW & DER*, 91-0247-PC, 11/13/92

Appellant was not entitled to an effective date based upon his verbal request to his supervisor concerning reclassification of his position. Appellant was repeatedly told by his supervisor during a two-year period that his position was not at the higher level but the supervisor never advised the appellant that he needed to file a written request to preserve his desired effective date. The personnel manager for the unit explained to appellant the process for filing a reclass request on his own, said nothing about the need to file a written request to preserve an effective date and said a request initiated by the supervisor had a better chance of approval. The elements of equitable estoppel were not present. *Jones v. DHSS & DER*, 90-0370-PC, 7/8/92

While management has a duty not to mislead an employe, it does not have a general obligation to inform an employe of his or her rights. Management failed to inform appellant of the implications as to effective date if he failed to submit a written reclass request, but management was not under a mandatory obligation to have done so. *Jones v. DHSS & DER*, 90-0370-PC, 7/8/92

Respondents' decision setting the effective date as the first day of the first pay period following approval of the class specifications by the Secretary of DER, was upheld. *Lange et al. v. DOT & DER*, 90-0118-PC, etc., 6/11/92

Where changes which resulted in the reclassification of the

appellants' positions were changes in the duties and responsibilities of appellants' positions, not changes in the applicable position standard and where such changes in the duties and responsibilities of appellants' positions occurred prior to November of 1989, the operative date for determining the effective date of the reclassification of appellants' positions should have been the date the appellants filed their request for reclassification in April of 1990. *Pflug et al. v. DNR & DER,* 90-0414-PC, etc., 11/6/91

Respondents were equitably estopped from utilizing an effective date based on when appellants submitted their formal written reclassification requests where appellants established that for several years prior thereto, respondent DHSS had induced the appellants to take no action on their own behalf by representing that management was taking care of their reclassification concerns. Management was actively engaged in trying to stall the appellants in their efforts to obtain the higher classification in order to attempt to protect certain federal funding which was understood by management to be tied to the number of positions in the lower classification. *Locke et al. v. DHSS & DER,* 90-0384-PC, 7/11/91

Where, on January 26th, a union representative had raised the question of the classification of the appellant's position to the UW Classified Personnel Office and had been advised that it was not necessary for the appellant to follow up the representative's classification request with a letter, the appellant was entitled to rely on the statement made by the Classified Personnel Office and the Commission concluded that the effective date of the request was January 26th. However, the appellant's prior discussions with his supervisor were not specific enough to constitute a formal request for reclassification review under the respondent's effective date policy. *Seay v. DER,* 89-0117-PC, 1/24/91

Appellant was entitled to rely on the language of a memo from her employing agency which indicated that the effective date would be no later than 30 days from the date the supervisor received the appellant's written request, even though the memo was, in part, inconsistent with the effective date policy established by DER. *Schmidt v. Sec. of State & DER,* 89-0129-PC, 1/11/91

Appellant's discussions with her supervisor about updating

her position description were not specific enough to constitute a formal request for a classification review because they did not comply with DER's effective date policy or with a memo from the appellant's employing agency which also discussed the procedure for obtaining reclassification. *Schmidt v. Sec. of State & DER*, 89-0129-PC, 1/11/91

Respondents' stipulated effective date was upheld where appellants' reclassification request was in fact being acted upon by the appellants' first and second level supervisors during the period in question and where, due to the very involved internal procedure for reviewing requests and the pendency of a new programmatic responsibility during the same period, 6 and 1/2 months to process the transaction was not excessive. The effective date policy in ch. 332 of the Wisconsin Personnel Manual, on which the respondents relied, has a rational basis in administrative certainty and convenience and does not constitute an abuse of discretion. *Nesse & Cleary-Hinz v. UW & DER*, 90-0126, 0127-PC, 10/4/90

Although the letter granting the reclassification of the appellant's position to Program Assistant 3 in 1987 explicitly stated that a decision in 1985 to reclassify the position to the PA 2 level was erroneous and that the position should have been made a PA 3 at that time, the respondent's decision establishing the effective date in 1987 rather than in 1985 was not an abuse of discretion where it relied on a policy which is premised on administrative convenience and which places the onus on the employe to come forward with a reclassification or reallocation request if he or she believes such action is warranted and sees nothing forthcoming from the appointing authority or DER. The respondent's decision had the same rational basis in administrative convenience as did the overall policy. The fact that the respondent did not explicitly advise the appellant of her appeal rights in 1985 did not estop the respondent from applying its general policy because the respondent did not mislead the appellant as to her appeal rights and the respondent did not have a legal obligation to advise the appellant of her appeal rights. *Popp v. DER*, 88-0002-PC, 3/8/89

The appellant was not entitled to rely, for the purpose of establishing the proper effective date for reclassifying appellant's position, on a settlement agreement entered into

by other employes and by the respondents. Even if he could rely on the settlement, appellant was not on the same footing as the employes who had signed the settlement agreement because appellant never had received certain formal training given the other employes to permit them to perform at the higher classification level, even though those employes received the training after the effective date of their reclassification. *Thompson v. DOT & DER*, 88-0037-PC, 11/23/88

Respondent was estopped from arguing that an earlier effective date for appellant's reclassification/regrade was precluded by the fact she did not submit a written reclassification request to UW-M personnel office before March 9, 1987, where appellant had repeatedly voiced her concerns about the classification of her position, including a letter to her department head, and management gave every indication that appellant's concerns would be addressed and never suggested a need to submit a written request. The employe handbook failed to identify a requirement that requests be filed in writing to the personnel office. *Warda v. UW-Milwaukee & DER*, 87-0071-PC, 6/2/88

There was insufficient credible evidence on which to base a finding that the duties and responsibilities of appellant's position were at the higher level on any date prior to the date established by respondent. *Warda v. UW-Milwaukee & DER*, 87-0071-PC, 6/2/88

Where an initial reclass request was followed over a year later by a second reclass request that was accompanied by a substantially revised position description and by reclassification analysis forms, there were very substantial changes in the position between the two reclass requests and there was no basis for a finding that the first request, standing alone, would have supported the higher classification, the agency's decision to use the date of the second request as the basis for calculating the effective date for reclassification was a proper application of ch. 332, Wis. Personnel Manual. Even if the provisions of the Personnel Manual were ignored, there was an inadequate record for concluding that appellant actually began to perform at the higher level on a date that would warrant an effective date earlier than that actually established, especially in light of the requirement of §ER-Pers 3.01(3), Wis. Adm. Code, that permanently assigned duties be performed by the incumbent for at least six months prior to

a regrade. *Smart v. UW & DER*, 87-0215-PC, 5/12/88

Language in the DNR Manual Code was directory and, therefore, did not require a supervisor to initiate a reclassification request for a subordinate position. *Baggott v. DNR & DER*, 87-0012-PC, 12/23/87; aff'd by Dane County Circuit Court, *Baggott v. Wis. Pers. Comm.*, 88-CV-0366, 8/11/88

There was no fraud or manifest abuse of discretion as to advice given by respondent's personnel specialist to appellant's supervisor not to initiate reclassification requests for appellant's position. Therefore, equitable estoppel did not lie with respect to respondent's decision setting a later effective date for the reclassification of appellant's position. *Baggott v. DNR & DER*, 87-0012-PC, 12/23/87; aff'd by Dane County Circuit Court, *Baggott v. Wis. Pers. Comm.*, 88-CV-0366, 8/11/88

The proper effective date for the reclassification of the appellant's position was September of 1986 which arose from the only written reclassification request he had initiated. The appellant had made previous verbal requests for reclassification but respondent had notified appellant that these requests would not be processed or acted upon and appellant failed to appeal respondent's action. *Baggott v. DNR & DER*, 87-0012-PC, 12/23/87; aff'd by Dane County Circuit Court, *Baggott v. Wis. Pers. Comm.*, 88-CV-0366, 8/11/88

Respondents were required to reclassify the appellant's positions more than two years earlier than when respondent received appellant's written reclassification request where appellants were mislead by management's conduct into assuming their verbal reclassification requests were adequate. *Guzniczak & Brown v. DHSS & DER*, 83-0210, 0211-PC, 5/13/87; petition for rehearing granted and decision reaffirmed, 6/11/87

The failure of respondent's employes to have informed the appellants they were required to submit their reclassification requests in writing, under circumstances which suggested their verbal requests were being acted upon, could be characterized as a ministerial error attributable to management and provided a basis for rejecting the effective date established by the respondent based on the ultimate receipt of written reclass requests. *Guzniczak & Brown v.*

***DHSS & DER*, 83-0210, 0211-PC, 5/13/87; petition for rehearing granted and decision reaffirmed, 6/11/87**

Respondent had effective receipt of appellant's reclassification request where appellant submitted written request for same, notwithstanding it was submitted to her supervisor as opposed to the personnel office and did not have attached to it all the desired supporting documentation, where she was not told that she had to do anything else, and there is nothing in the civil service code or even in written agency policy requiring same. *Spilde v. DER*, 86-0040-PC, 10/9/86

Where appellant requested reclassification of her position in 1981 and left the position in 1983 prior to any action on her request or the establishment of an effective date for reclassification, tile transaction was not rendered moot by the operation of §ER-Pers 3.03(4), Wis. Adm. Code, since this only operates if an employe leaves the position prior to the effective date of the transaction. *Spilde v. DER*, 86-0040-PC, 10/9/86

Where the appellant had transferred to position "A", and the duties she performed were only assigned to her on a temporary basis, and then transferred to position "B", where she subsequently (June 1, 1984) performed work at a higher level, appellant could only be regraded after performing the higher level permanently assigned duties for at least six months, i.e., on December 1, 1984, and the appellant's position was properly reclassified with an effective date of December 1, 1984. §ER-Pers. 3.015(3), Wis. Adm. Code. *Mund v. DILHR & DER*, 84-0213-PC, 11/7/85

Where the appellant showed that respondent's performance analysis that served as the basis for respondent's reclassification decision was incorrect, the effective date of her reclassification should be the date the appellant would have been reclassified if she had not been given a failing score on the performance analysis. *Foust v. DILHR & DER*, 84-0218-PC, 5/22/85; affirmed by Dane County Circuit Court, *DILHR & DER v. Wis. Pers. Comm.*, 85-CV-3206, 7/29/86

Where appellant's reclassification was delayed from Officer I to Officer 2 because progression from the I level to 2 level requires a "formal discipline free work record" for six

months prior to the reclassification target date, the officer investigating an allegation of misconduct, in recommending discipline, was not required to have advised the appellant in writing that the reclassification of his position would be affected by the imposition of discipline. *Pero v. DHSS & DER*, 83-0235-PC, 4/25/85

Where the issue for hearing in an appeal arising from the decision establishing the effective date for reclassification referred to whether September 16, 1984 was proper or, if not, whether it should have been October 30, 1983, the Commission established December 12, 1983 as the correct effective date, concluding that it fell within the range of dates that were implicit within the issue for hearing. The issue for hearing was found to provide adequate notice to the parties. *Wentz v. DER*, 84-0068-PC, 3/5/85

The determining factor in deciding the appropriate effective date for the reclassification of the appellant's position was the date he was given total responsibility for coordinating a specific department-wide program. That responsibility was assigned during a meeting with the department secretary. The fact that written confirmation from the secretary was not obtained until three months later and that the duty did not show up on appellant's position description until sometime later is not determinative. *Wentz v. DER*, 84-0068-PC, 1/17/85

Where appellants submitted reclassification requests along with supporting documentation in November and December of 1982, where in February of 1982, respondent determined that the materials did not support reclassifications and facilitated the submission of revised materials, and where the revised materials were submitted on May 12, 1983, resulting in the reclassification of the appellant's positions, the Commission held that the effective date of the reclassification was late in 1982 rather than May of 1983. The respondent's policy setting the reclassification effective date as the start of the first pay period following "effective receipt" of the request does not mean the receipt of the request accompanied by supporting materials sufficient in themselves to warrant reclassification. *Tiffany et al. v. DHSS & DER*, 83-0225-PC, 7/6/84

The administrator of the Division of Personnel had the authority to reallocate the appellant's position retroactively to the date of his original decision reallocating the position

to a different classification. *Beane v. DP*, 82-140-PC, 81-84-PC, 7/21/83

The respondents' determination of the effective date of the reclassification from Trooper II - Trooper III was rejected when it was affected by the decision of the deputy administrator of the State Patrol to delay approval of the action until the employe met the Measurable Standard of Activity (MSA), sole reliance on that criterion having been disapproved in earlier commission and court decisions. The Commission also held that it was within its province to examine the handling of the request at that level since even though the deputy administrator did not have the authority to finally approve the request, he could effectively delay the effective date by refusing to forward it to personnel, so his action was cognizable pursuant to §230.44(l)(b), Stats., as part of the overall reclassification action, and found that the amount of time taken to actually process the reclassification was not excessive. *Michalski v. DOT*, 82-228-PC, 6/9/83

The administrator's decision not to give his effective date policy of November 1, 1980, a retroactive effect so as to make a request for reclassification filed at the UW-Eau Claire campus on May 27, 1980, effective that date, was upheld as not violative of the civil service code as interpreted. *Rumpel v. DP*, 81-396-PC, 11/15/82

Appellants established that respondent administrator erred in establishing the effective date for reclassification of their position by failing to take into consideration the ministerial error committed by respondent DHSS while handling the reclassification requests pursuant to Pers. 3.03(2), Wis. Adm. Code, wherein the requests were lost and their processing delayed accordingly. *Ulanski et al. v. DHSS & DP*, 82-2,6,7,9-PC, 9/7/82

The Commission rejected the employe's arguments that the effective date policy violated §§230.01(2) and 230.09, Stats., inasmuch as it constitutes a reasonable promotion of administrative convenience and uniformity. *Grinnell v. DP*, 81-101-PC, 4/29/82

Where appellants' positions were reclassified with a certain effective date pursuant to ch. 334 (attachment #2), of the Wis. Personnel Manual, which calls for reclassifications to be effective at the start of the second pay period following receipt of the request within the agency at a level which has

the authority to approve the request, and the parties agreed to the issue of whether this policy was correct, the Commission held that it could not consider the second issue, proposed by the appellants, of whether as a matter of public policy the positions should have been reclassified at an earlier date, as there had been no earlier request for reclassification. *Loy et al. v. UW & DP*, 81-421, 422, 423, 424, 425-PC, 3/19/82

Where the appellant completed the requisite training and experience for reclassification to Registered Nurse 2 but her supervisor did not report this on the correct form, the report was misfiled, and the resultant reclassification was delayed approximately one month, the Commission held that the appellant would be entitled to have the effective date of her reclassification adjusted accordingly in order to correct an error pursuant to §Pers 5.037, Wis. Adm. Code. *Kimball v. DP & DHSS*, 79-236-PC, 4/23/81

Where the appellant had notice on August 10, 1978, that no reclassification request was being processed, but took no action until August 14, 1979, when he filed a grievance which was treated as a request for reclassification which subsequently was denied and appealed to the Commission, the Commission would not consider an effective date earlier than August 14, 1979. *Meinholz v. DOR & DP*, 79-352-PC, 6/30/80

Where the appellant appealed a reclassification with an effective date of March 25, 1979, and sought an effective date of November 3, 1977, the Commission held in a prehearing order that it could not rule out in advance of hearing her entitlement to such an earlier date where based on certain documents she had submitted it was conceivable that she submitted her reclassification request on November 3, 1977, and did not receive a final disposition until March 1979, and where it could not be concluded that her failure to appeal a 1978 transfer was significant because there was no indication that the transfer involved an evaluation of the proper classification level of her position. *Ebert v. DILHR & DP*, 79-119-PC, 3/24/80

Where the appellant's position was reallocated effective July 2, 1978, and this was not appealed, and subsequently the appellant's reclassification request was denied and the appellant timely appealed that on August 1, 1979, the Commission could not consider his request for an effective

date of July 2, 1978, notwithstanding appellant's argument that he only learned of facts that led him to believe the reallocation was improper some time after the date of the reallocation. *Donahue v. DATCP & DP*, 79-189-PC, 3/21/80

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 403.12(1) through 403.12(3)

[Previous material] [Next material]

403.12(1) Existence of request for reclassification/reallocation [see also 403.12(13)]

No reclassification request was made where neither of the two reclassification request procedures listed in the employe handbook was followed, i.e. appellant's supervisor did not initiate a request nor did appellant file a written request. In addition, appellant was never lead to believe her supervisor had filed a request for reclassification of appellant's position. *Johnson v. DOT & DER*, 94-0442-PC, 11/27/95

A mere allegation that a series of meetings was held over a four year period of time to discuss the classifications of several positions, including appellant's, was insufficient justification for appellant to believe that a classification review was being conducted on the appellant's position so that appellant did not file a formal reclass/reallocation request on his own. *Bauer v. DATCP & DER*, 91-0128-PC, 6/25/93

The existing framework of the state's classification system makes it clear that the primary burden is on an employe to initiate a request for a change in the classification of his or her position. *Bauer v. DATCP & DER*, 91-0128-PC, 6/25/93

Where appellant submitted a reclassification request to her supervisor and, upon the supervisor's approval, forwarded it to appellant's personnel unit in Madison where the request was either not received or misplaced and despite repeated inquiries by appellant, neither her supervisors nor the

personnel unit ever attempted to finally resolve questions as to the location or status of the request, the respondent constructively denied appellant's request for reclassification. *Miller v. DHSS & DER*, 91-0129-PC, 5/1/92

The proper effective date for the reclassification of the appellant's position was September of 1986 which arose from the only written reclassification request he had initiated. The appellant had made previous verbal requests for reclassification but respondent had notified appellant that these requests would not be processed or acted upon and appellant failed to appeal respondent's action. *Baggott v. DNR & DER*, 87-0012-PC, 12/23/87; aff'd by Dane County Circuit Court, *Baggott v. Wis. Pers. Comm.*, 88-CV-0366, 8/11/88

Respondents were required to reclassify the appellant's positions more than two years earlier than when respondent received appellant's written reclassification request where appellants were mislead by management's conduct into assuming their verbal reclassification requests were adequate. *Guzniczak & Brown v. DHSS & DER*, 83-0210, 0211-PC, 5/13/87; petition for rehearing granted and decision reaffirmed, 6/11/87

The failure of respondent's employes to have informed the appellants they were required to submit their reclassification requests in writing, under circumstances which suggested their verbal requests were being acted upon, could be characterized as a ministerial error attributable to management and provides a basis for rejecting the effective date established by the respondent based on the ultimate receipt of written reclassification requests. *Guzniczak & Brown v. DHSS & DER*, 83-0210, 0211-PC, 5/13/87; petition for rehearing granted and decision reaffirmed, 6/11/87

The Commission directed respondent agency to consider appellant's request to reclassify his position to the Environmental Specialist 6 level. Respondent had granted reclassification of the position from the ES 4 to ES 5 level but had given no prior consideration to the ES 6 level. The appellant had clearly requested consideration of both the ES 5 and ES 6 levels in memos to his supervisors initiating the reclassification review. Also, the portion of the reclassification request/report form setting forth the "Proposed Class Title and Pay Range" was completed by

someone other than the person indicated in respondent's written policy. *Baggott v. DNR & DER*, 87-0012-PC, 4/29/87

Appellant sustained her burden of showing that her request for an "audit" of her position should have been considered by respondents as a request for reclassification where she referred to her request as a "reclassification request" in a conversation with the chief of respondent's classification section and she explained that the rationale for her request was her unhappiness in regard to the recent reclassification of certain other positions. Respondent's failure to respond to the reclassification request as required by §ER-Pers 3.04, Wis. Adm. Code, was construed as a constructive denial of that request. *Sersch v. DILHR & DER*, 86-0075-PC, 4/1/87

Where appellant submitted a written reclassification request in 1981 and subsequently received a verbal denial without any information as to how to appeal and appellant later requested a review of the matter in 1985 and received a written denial after that, as required by §ER-Pers 3.03(3), Wis. Adm. Code, her 1986 appeal was timely filed. *Spilde v. DER*, 86-0040-PC, 10/9/86

Respondent had effective receipt of appellant's reclassification request where appellant submitted written request for same, notwithstanding it was submitted to her supervisor as opposed to the personnel office and did not have attached to it all the desired supporting documentation, where she was not told that she had to do anything else, and there is nothing in the civil service code or even in written agency policy requiring same. *Spilde v. DER*, 86-0040-PC, 10/9/86

Where appellant requested reclassification of her position in 1981 and left the position in 1983 prior to any action on her request or the establishment of an effective date for reclassification, the transaction was not rendered moot by the operation of §ER-Pers 3.03(4), Wis. Adm. Code, since this only operates if an employe leaves the position prior to the effective date of the transaction. *Spilde v. DER*, 86-0040-PC, 10/9/86

403.12(2) Listing of cases by classifications involved [see also 403.12(15),

(16) and (17)]

Accountant – Journey *Stein v. DER*, 92-0474-PC, 8/18/94 (and Financial Specialist 3)

Account Specialist I *Fritchen v. DP*, 79-PC-CS-269, 4/29/82 (see also Fiscal Clerk 3)

Account Specialist I and 2 *Benish & Volden v. DILHR & DP*, 82-184-PC, 11/23/83; *Smith v. UW-Madison & DER*, 85-0090-PC, 11/7/85

Account Specialist 3 *Falk v. DP*, 81-23-PC, 12/29/82 (see also Accountant 3)

Account Specialist 3 – Supervisor *Haberman v. DP*, 81-334-PC, 11/11/82 (see also Accountant 3-Supervisor)

Accountant 3 *Falk v. DP*, 81-23-PC, 12/29/82 (see also Account Specialist 3)

Accountant 3 – Supervisor *Haberman v. DP*, 81-334-PC, 11/11/82 (see also Account Specialist 3-Supervisor)

Administrative Assistant I *Newton v. DHSS & DP*, 79-42-PC, 12/4/79 (see also Administrative Secretary 2)

Administrative Assistant 2 *Johnson v. DP*, 79-45-PC, 9/4/79 (see also Personnel Assistant 1)

Administrative Assistant 3 *Buchen v. DP*, 82-151-PC, 8/17/83; *Chase v. DER*, 85-0033-PC, 3/13/86 (see also Area Services Specialist 2); *Christensen v. DNR & DER*, 90-0368-PC, 5/16/91 (also Program Assistant Supervisor 2 and Program Assistant 3-Confidential and 4-Confidential); *Gums & Snart v. DP*, 79-PC-CS-299, 695, 1/2/81 (see also Program Assistant 4 & Program Assistant Supervisor 3); *Kirchesh v. DP*, 80-356-PC, 2/18/82 (see also Payroll & Benefits Assistant 4); *Klein v. UW & DER*, 91-0208-PC, 2/8/93 (also Program Assistant 3 and 4); *Krueger v. DP*, 80-308-PC, 9/3/81; *Meschefske v. DP*, 80-37-PC, 1/8/81 (see also Program Assistant 4); *Saindon v. DER*, 85-0212-PC, 10/9/86 (see also Purchasing Agent 2, Educational Services Assistant I and 2, and Purchasing Assistant); *Lathrop v. DER*, 97-0004-PC, 3/11/98 (also Program Assistant 4)

Administrative Assistant 3 – Confidential *Wedul v. DOT & DER*, 85-0118-PC, 2/6/86 (see also Program Assistant

Supervisor 2)

Administrative Assistant 3 and 4 *LaRose v. DP*, 82-205-PC, 12/23/83 (see also Safety Coordinator 1); *Nehls v. DP*, 82-169-PC, 10/31/83; *O'Brien v. DOT & DER*, 91-0221-PC, 6/25/93 (also Public Information Officer 4, Community Services Specialist 1 and 2)

Administrative Assistant 3 and 4 – Supervisor *Biba v. DP*, 79-367-PC, 4/23/81 (see also Management Information Supervisor 3)

Administrative Assistant 3-Confidential, 4-Confidential and 5-Confidential *Christensen v. DOC & DER*, 91-0210-PC, 4/17/92

Administrative Assistant 3-Supervisor and 4-Supervisor *Johnson v. DER*, 95-0122-PC, 1/31/96

Administrative Assistant 4 *Schlitz v. DP*, 81-165-PC, 10/14/82 (see also Educational Services Assistant 3); *Young v. DP*, 81-7-PC, 12/16/81 (see also Administrative Assistant 5)

Administrative Assistant 4-Confidential/Supervisor

***Christensen v. DNR & DER*, 89-0097-PC, 90-0125-PC, 11/16/90 (also Purchasing Agent 1 Supervisor)**

Administrative Assistant 4 – Supervisor *Breitzman v. DP*, 81-61-PC, 1/27/82 (see also Educational Services Assistant 2 and 3-Supervisor); *Carpenter v. DOC & DER*, 97-0115-PC, 11/18/98 (also Corrections Program Supervisor 1)

Administrative Assistant 4 and 5 *Kluesner v. DER*, 95-0224-PC, 7/5/96; *Fay v. DER*, 92-0438-PC, 7/7/94; *Van Wyhe & WCC v. DOA & DER*, 91-0195, 0196-PC, 9/22/92

Administrative Assistant 4 - Supervisor and 5 - Supervisor

***Amble v. DOA & DER*, 92-0705-PC, 11/23/93 *Broady-Dietz v. DOA & DER*, 92-0563-PC, 1/25/94; *Galbraith v. DP*, 82-55-PC, 3/31/83; *Hillestad v. DOA & DER*, 92-0823-PC, 3/29/94**

Administrative Assistant 5 *Fullmer, Mastricola & Belshe v. DP*, 83-0008-PC, 1/4/84 (see also Community Services Specialist 2); *Hillner v. DP*, 79-238-PC, 11/24/80 (see also Administrative Officer l-Confidential); *Robbins v. DHSS &*

***DER*, 92-0795–PC, 1/25/94 (also Administrative Officer 1); *Svensson v. DER*, 86-0136-PC, 7/22/87 (see also Tourist Promotion Representative 3); *Young v. DP*, 81-7-PC, 12/16/81 (see also Administrative Assistant 4)**

Administrative Assistant 5 – Confidential *Pilster-Pearson v. DER*, 84-0078-PC, 12/6/84 (see also Social Services Specialist 2 and 3 - Confidential)

Administrative Assistant 5 – Supervisor *Anderson et al. v. DER*, 86-0098-PC, 9/27/87 (see also Administrative Officer 1 - Supervisor); *Doyle v. DER*, 89-0016-PC, 6/15/90 (also Administrative Officer 1 and 2)

Administrative Officer 1 *DOT (Potts) v. DP*, 80-362-PC, 6/25/82 (see also Planning Analyst 4); *Lawton v. DP*, 81-47-PC, 12/16/81 (see also Personnel Specialist 5) (see also Personnel Administrative Officer 1 and 2); *Schermetzler v. DER*, 94-0342-PC, 4/17/95 (also Archivist-Senior); *Robbins v. DHSS & DER*, 92-0795–PC, 1/25/94 (also Administrative Assistant 5); *Prust & Sauer v. Wis. Pers. Comm.*, Dane County Circuit Court, 97-CV-3328, 7/8/98 (also Agricultural Program Specialist-Senior and Attorney 13)

Administrative Officer I – Confidential *Hillner v. DP*, 79-238-PC, 11/24/80 (see also Administrative Assistant 5)

Administrative Officer 1 – Supervisor *Anderson et al. v. DER*, 86-0098-PC, 9/27/87 (see also Administrative Assistant 5 - Supervisor)

Administrative Officer 1 and 2 *Doyle v. DER*, 89-0016-PC, 6/15/90 (also Administrative Assistant 5 - Supervisor); *Seidel v. DER*, 95-0081-PC, 7/23/96; *Usabel v. DER*, 84-0005-PC, 12/6/84; *Vanden Wymelenberg/DOJ v. DER*, 85-0099, 0100-PC, 3/13/86

Administrative Officer 2 *DOJ (Dowd & Linssen) & Linssen v. DER*, 85-0101, 0102, 0116-PC, 1/13/87; *Hamele v. DER*, 85-0172-PC, 8/6/86 (see also Chief, Protective Services)

Administrative Officer 2 and 3 *Henert v. DP*, 82-134-PC, 9/16/83

Administrative Officer 3 *Dorsey et al. v. DER*, 94-0471-PC, etc., 1/23/96 (also Transportation District Business Supervisor)

Administrative Officer 3 and 4 *Jerrick v. DER*, 90-0392-PC, 6/12/91; *Banoul v. DER*, 90-0158-PC, 12/13/90

Administrative Officer 4 and 5 *Boeding v. DER*, 95-0144-PC, 10/22/96

Administrative Secretary I *Lloyd v. UW*, 78-127-PC, 8/30/79 (see also Stenographer 3)

Administrative Secretary 2 *Newton v. DHSS & DP*, 79-42-PC, 12/4/79 (see also Administrative Assistant 1)

Agricultural Program Specialist-Senior *Prust & Sauer v. Wis. Pers. Comm.*, Dane County Circuit Court, 97-CV-3328, 7/8/98 (also Administrative Officer 1 and Attorney 13)

Agricultural Specialist 2 and 4 *Neher v. DATCP & DP*, 80-190-PC, 7/8/82

Agricultural Supervisor 1, 2 and 3 *Marx v. DP*, 78-138-PC, 10/1/81; reversed by Dane County Circuit Court, *DP v. State Pers. Comm. & Marx*, 81-CV-5798, 11/8/83; reversed by Court of Appeals District IV, 84-1024, 11/21/85

Air Management Engineer - Advanced 1 and Advanced 2 *Vakharia v. DNR & DER*, 95-0178-PC, 12/20/96; *Harder v. DNR & DER*, 95-0181-PC, 8/5/96; *Hubbard v. DER*, 91-0082-PC, 3/29/94; affirmed by Dane County Circuit Court, *Hubbard v. Wis. Pers. Comm.*,, 94-CV-1408, 11/27/96; *Roushar v. DER*, 91-0069-PC, 2/21/92

Air Management Specialist-Entry, Developmental and Objective *Cutts v. DER*, 92-0472-PC, 7/24/95

Air Management Specialist-Senior and Advanced *Haidinger v. DNR & DER*, 95-0038-PC, 6/13/96; *Trochta et al. v. DER*, 92-0616-PC, etc., 5/2/94; *Carter v. DNR & DER*, 97-0052-PC, 2/11/98

Architect 5 and 6 *Paulson v. DP*, 80-257-PC, 8/5/81

Architect 6 and 7 *Nestingen & Alfano v. DP*, 80-369, 371-PC, 3/19/82 (see also Civil Engineer 6 and 7)

Architect-Advanced 1 and Advanced 2 *Sanders v. DER*, 90-0346-PC, 3/29/94; affirmed by Dane County Circuit Court, *Sanders v. Wis. Pers. Comm.*, 94-CV-1407, 11/27/96

Architect-Advanced 2-Management *Germanson et al. v. DER*, 91-0223-PC, etc., 5/20/93 (also Architect/Engineer Manager 1 and 2, Civil Engineer-Advanced 2-Management, Architect Supervisor 5, Civil Engineer Supervisor 5)

Architect Supervisor 5 *Germanson et al. v. DER*, 91-0223-PC, etc., 5/20/93 (also Architect/Engineer Manager 1 and 2, Civil Engineer-Advanced 2-Management, Civil Engineer Supervisor 5, Architect-Advanced 2-Management)

Architect/Engineer Manager 1 *Murray v. Wis. Pers. Comm.*, Dane County Circuit Court, 93-CV-2661, 4/29/94 (also Civil Engineer Supervisor 4)

Architect/Engineer Manager 1 and 2; *Germanson et al. v. DER*, 91-0223-PC, etc., 5/20/93 (also Civil Engineer Supervisor 5, Civil Engineer-Advanced 2-Management, Architect Supervisor 5, Architect-Advanced 2-Management)

Architect/Engineer Manager 2 and 3 *Eagon v. DER*, 90-0398-PC, 3/23/92

Archivist-Senior *Schermetzler v. DER*, 94-0342-PC, 4/17/95 (also Administrative Officer 1)

Area Services Specialist 2 *Chase v. DER*, 85-0033-PC, 3/13/86 (see also Administrative Assistant 3)

Area Services Specialist 4 and 5 *Walbridge v. DER*, 88-0062-PC, 5/18/89

Area Services Specialist 5 and 6 *Arndt & Goehring v. DP*, 82-0251-PC, 9/13/85

Attorney 13 *Prust & Sauer v. Wis. Pers. Comm.*, Dane County Circuit Court, 97-CV-3328, 7/8/98 (also Administrative Officer 1 and Agricultural Program Specialist-Senior)

Attorney 12, 13, 14 and 15 *Theobald v. DP*, 78-82-PC, 1/8/82

Attorney 13 and 14 *Austin et al. v. DER*, 90-0285, 0294-PC, 10/31/91; *Ghilardi & Ludwig v. DER*, 87-0026, 0027-PC, 4/14/88

Attorney 14 and 15 *Zink v. DER*, 90-0391-PC, 2/21/92

Auditor 3 *Johnson v. DOR & DP*, 80-360-PC, 8/5/82 &

9/2/82 (see also Audit Specialist 4 and 5); *Kleinert v. DER*, 87-0206-PC, 8/29/88 (also Audit Specialist 4)

Audit Specialist 4 *Kleinert v. DER*, 87-0206-PC, 8/29/88 (also Auditor 3)

Audit Specialist 4 and 5 *Johnson v. DOR & DP*, 80-360-PC, 8/5/82 & 9/2/82 (see also Auditor 3)

Audit Supervisor 1 and 2 *Dorn v. DER*, 90-0154-PC, 4/5/91

Automotive/Equipment Technician-Senior and Master *Weber v. DER*, 94-0066-PC, 11/22/94; *Runyan v. DER*, 94-0052-PC, 9/21/94

Automotive Mechanic 2 and 3 *Dolsen v. UW & DER*, 93-0066-PC, 6/21/94; *Runyan v. DNR & DER*, 90-0234-PC, 12/13/90

Bricklayer & Mason *Bricklayers & Allied Craftsmen Union #8 and Radish v. DHSS*, 81-367-PC, 5/28/82 (see also Facility Repair Worker 3)

Budget and Management Analyst 4, 5 and 6 *Wing v. DP*, 77-63, 6/11/81

Budget and Policy Analyst – Division – Senior *Zielesch v. DER*, 96-0028-PC, 8/30/96 (also Financial Specialist 5)

Building Maintenance Helper 2 *Thompson v. DER*, 86-0138-PC, 12/23/87 (see also Youth Counselor 1)

Carpenter *Landphier v. DER*, 90-0373-PC, 8/21/91 (also Facilities Repair Worker 3)

Chemist Supervisor 2 and 3 *Miller v. DP*, 82-236-PC, 12/22/83

Chief, DMV Program Section and Administrative Officer 2 – Supervisor *Sunstad v. DER*, 94-0472-PC, 5/28/96

Chief, Protective Services *Hamele v. DER*, 85-0172-PC, 8/6/86 (see also Administrative Officer 2)

Civil Engineer 3 – Transportation *Kennedy et al. v. DP*, 81-180, etc.-PC, 1/6/84 (see also Planning Analyst 3, 4, 5, 6 (Mgmt.), and 7 (Mgmt.)

Civil Engineer 4 and 5 - Transportation Supervisor *Schiffer v. DP*, 81-342-PC, 7/21/83

Civil Engineer 5 and 6 - Transportation Supervisor *Novak v.DER*, 83-0104-PC, 1/17/85 (see also Research Analyst 6)

Civil Engineer 6 and 7 *Nestingen & Alfano v. DP*, 80-369, 371-PC, 3/19/82 (see also Architect 6 and 7)

Civil Engineer 6 and 7 - Transportation Management *Pamperin v. DER*, 83-0191-PC, 4/25/85; affirmed by Dane County Circuit Court *Pamperin v. State Pers. Comm.*, 85-CV-2700, 10/30/85) (see also Planning and Analysis Administrator 2 and Research Administrator 1)

Civil Engineer-Advanced 1 and 2 *Smith v. DER*, 91-0162-PC, 11/29/93; *Marx v. DER*, 91-0087-PC, 2/5/93

Civil Engineer-Advanced 2-Management *Germanson et al. v. DER*, 91-0223-PC, etc., 5/20/93 (also Architect/Engineer Manager 1 and 2, Civil Engineer Supervisor 5, Architect Supervisor 5, Architect-Advanced 2-Management)

Civil Engineer Supervisor 4 *Murray v. Wis. Pers. Comm.*, Dane County Circuit Court, 93-CV-2661, 4/29/94 (also Architect/Engineer Manager 1)

Civil Engineer Supervisor 5 *Germanson et al. v. DER*, 91-0223-PC, etc., 5/20/93 (also Architect/Engineer Manager 1 and 2, Civil Engineer-Advanced 2-Management, Architect Supervisor 5, Architect-Advanced 2-Management)

Civil Engineer-Transportation-Advanced 1 *Mueller v. DOT & DER*, 94-0567-PC, 11/14/95 (also Engineering Specialist-Transportation-Advanced 1)

Civil Engineer-Transportation-Advanced 1 and 2 *Lautz v. DER*, 91-0091-PC, 6/23/93

Civil Engineer-Transportation-Journey and Senior *Heidari v. DER*, 92-0029-PC, 3/19/93

Civil Engineer-Transportation-Journey and Advanced 1 *Vesperman v. DOT & DER*, 93-0101-PC, 12/7/95

Civil Engineer-Transportation-Senior and Advanced *Gutierrez v. DOT & DER*, 96-0096-PC, 4/11/97; *Obenberger v. DOT & DER*, 93-0114-PC, 6/9/95

Civil Engineer-Transportation-Supervisor 3 and 4 *Von Ruden et al. v. DER*, 91-0149-PC, etc., 8/31/95; *Wacker v. DOT & DER*, 92-0251-PC, 12/17/92; *Jones v. DER*, 91-0145-PC, 11/13/92; *Wehrle v. DER*, 91-0170-PC,

6/24/92; *Brandenburg v. DER*, 91-0063-PC, 3/19/92

Civil Engineer-Transportation-Supervisor 4 and 5 *Felsner et al. v.DER*, 91-0197-PC, etc., 7/8/92; *Von Ruden et al. v. DER*, 91-0149-PC, etc., 7/8/92

Civil Engineer-Transportation-Supervisor 4 and Manager 1 *Pamperin v. DER*, 90-0321-PC, 7/25/94

Clerical Assistant 1 *Taylor v. DOR & DER*, 90-0387-PC, 6/27/91 (also Program Assistant 1)

Clerical Assistant 1 and 2 *Foster v. DOT & DER*, 89-0008-PC, 10/25/89 (also Program Assistant 1); *Peil v. DILHR & DER*, 85-0062-PC, 11/7/85 (see also Job Service Assistant 1)

Clerical Assistant 2 *Billingsley & Williams et al. v. DP*, 79-PC-CS-62,etc., 10/2/81 (see also Program Assistant 1) (see also Typist); *Botz v. UW & DP*, 83-0063-PC, 12/7/83; *Haak v. DHSS & DER*, 85-0130-PC, 4/30/86; *Hellenbrand v. DNR & DER*, 87-0188-PC, 6/15/88 (see also Program Assistant 1); *Kundiger et al. v. DP*, 79-PC-CS-327, 329, 703, 10/2/81; *Nickel & Standish v. DP*, 79-PC-CS-774, 629, 2/17/81 (see also Program Assistant 1); *Schmitz v. DP*, 79-PC-CS-767, 10/2/81 (see also Offset Press Operator 1); *Showers v. DP*, 79-PC-CS-699, 9/23/82 (see also Program Assistant 1)

Clerical Supervisor 2 *Cuff v. DP*, 79-PC-CS-100, 12/17/80

(see also Program Assistant Supervisor 1)

Community Services Specialist 1 and 2 *O'Brien v. DOT & DER*, 91-0221-PC, 6/25/93 (see also Public Information Officer 4, Administrative Assistant 3 and 4)

Community Services Specialist 2 *Fullmer, Mastricola & Belshe v. DP*, 83-0008-PC, 1/4/84 (see also Administrative Assistant 5)

Community Services Specialist 2 and 3 *Alme v. DNR & DER*, 93-0129-PC, 9/21/94; *Cirilli & Lindner v. DP*, 81-39-PC, 8/4/83; *Weber v. DOCom & DER*, 95-0168-PC, 4/24/97

Community Services Technician 2 *Piotrowski v. DER*, 84-0010-PC, 12/20/84 (see also Program and Planning Analyst 3)

Computer Operator 3 *Lee v. DP*, 79-371-PC, 11/24/80 (see also Data Processing Operations Technician 1. 2 and 3)

Computer Operator 3 and 4 *Nehring et al. v. UW & DER*, 89-0066-PC, etc., 11/16/90

Construction Representative-Journey and Senior *Story et al. v. DER*, 92-0811-PC, etc., 10/24/94

Cook 2 *Collins v. UW & DER*, 85-0165-PC, 8/20/86 (see also Food Production Assistant 1)

Corrections Program Supervisor 1 *Carpenter v. DOC & DER*, 97-0115-PC, 11/18/98 (also Administrative Assistant 4-Supervisor)

Custodial Supervisor 2 *Keller v. UW & DER*, 86-0168-PC, 4/15/87 (see also Housekeeping Services Supervisor 2)

Custodian 3 *Perea v. DHSS & DER*, 93-0036-PC, 3/29/94 (also Youth Counselor 1)

Data Entry Operator 1 and 2 *Peters v. UW & DP*, 82-234-PC, 7/7/83

Data Processing Operations Technician 1, 2 and 3 *Lee v. DP*, 79-371-PC, 11/24/80 (see also Computer Operator 3)

Data Processing Operations Technician 2 *Ellsworth & Parrell v. DP*, 83-0021, 0022-PC, 8/23/83; *Whitmore v. DP*, 82-10, 188-PC, 3/31/83 (see also Management Information Specialist I and 2)

Data Processing Operations Technician 2, 3 and 4 *Koch/DOT v. DP*, 81-19-PC, 9/21/83

Data Processing Operator 3 *Martin v. UW & DER*, 85-0092-PC, 1/9/86 (see also Management Information Specialist 5)

Educational Consultant I *Moy v. DPI & DP*, 79-125-PC, 8/21/81 (see also Equal Opportunity Specia ist 4)

Educational Consultant I and 2 *Skeway v. DPI*, 80-83-PC, 2/9/82

Educational Services Assistant 1 and 2 *Patterson v. DER*, 87-0212-PC, 5/5/88

Educational Services Assistant 2 and 3 Supervisor *Breitzman v. DP*, 81-61-PC, 1/27/82 (see also

Administrative Assistant 4 - Supervisor)

Educational Services Assistant 3 *Schlitz v. DP*, 81-265-PC, 10/14/82 (see also Administrative Assistant 4)

Educational Administrative Officer 2 and 3 *Spraggins v. DER*, 90-0390-PC, 9/22/92; *Johnson v. DER*, 88-0139-PC, 1/10/90; *Saindon v. DER*, 85-0212-PC, 10/9/86 (see also Administrative Assistant 3, Purchasing Agent 2, and Purchasing Assistant)

Educational Services Intern *Darland v. UW & DER*, 89-0160-PC, 7/12/90 (also Program Assistant 2)

Education Consultant *Daniels/Johnson v. DP*, 81-285, 286-PC, 7/5/84 (see also Education Specialist)

Education Specialist 4 and 5 *Fredrick v. DER*, 84-0204-PC, 4/17/86

Education Specialist 5 *Lindas v. DER*, 93-0102-PC, 5/26/95 (and Education Program Specialist)

Education Specialist 6 *Daniels/Johnson v. DP*, 81-285, 286-PC, 7/5/84 (see also Education Consultant)

Education Program Specialist *Lindas v. DER*, 93-0102-PC, 5/26/95 (and Education Specialist 5)

Electronics Supervisor 3 and 4 *Card v. UW & DER*, 83-0198-PC, 2/2/84

Employment Security Assistant I and 2 *Christensen v. DER*, 86-0103-PC, 3/18/87; *Rutkowski v. DER*, 86-0072-PC, 1/8/87

Employment Security Assistant 1, 2 and 3 *Olson v. DER*, 87-0169-PC, 3/21/90

Employment Security Assistant 2 and 3 *Hildebrandt v. DER*, 87-0139-PC, 6/11/92

Employment Security Assistant 3 *Vyas et al. v. DILHR & DER*, 94-0241-PC, 2/6/95 (also Unemployment Compensation Associate 1)

Engineering Specialist *Coequyt v. DER*, 92-0189-PC, 8/11/93 (also Engineering Technician-Transportation-4, Traffic Signal Mechanic-Entry and Journey)

Engineering Specialist-Senior *Holton v. DER & DILHR*,

92-0717-PC, 1/20/95 (also Engineering Technician 5); *Bloom v. DER*, 92-0088-PC, 8/25/93 (also Instrument Maker-Advanced); *Randall v. DER*, 92-0084-PC, 8/23/93 (also Instrument Maker-Advanced); *Sailor v. DER*, 92-0086-PC, 8/23/93 (also Instrument Maker-Advanced)

Engineering Specialist-Senior and Advanced 1 *Ksicinski v. DER*, 92-0798-PC, 6/21/94; *Kubala v. DER*, 90-0338-PC, 92-0107-PC, 2/23/94 (also Instrument Maker-Advanced)

Engineering Specialist-Transportation-Advanced 1 *Mueller v. DOT & DER*, 94-0567-PC, 11/14/95 (also Civil Engineer-Transportation-Advanced 1)

Engineering Specialist - Transportation-Advanced 1 and 2 *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

Engineering Specialist-Transportation-Advanced 2 *Hartling v. DER*, 94-0275-PC, 7/24/95 (also Surveyor Advanced 2)

Engineering Specialist-Transportation-Developmental *Peck v. DER*, 92-0130-PC, 11/18/93 (also Engineering Technician-Transportation-3)

Engineering Specialist-Transportation-Journey *Sanford v. DOT & DER*, 94-0548-PC, 11/17/95; rehearing denied, 12/20/95 (also Program Assistant 3)

***Yttri v. DER*, 92-0261-PC, 3/9/94 (also Engineering Technician-Transportation 4); *Pope v. DER, 92-0131-PC*, 8/23/93 (also Traffic Signal Mechanic-Journey)**

Engineering Specialist-Transportation-Journey and Senior *Orvis v. DOT & DER*, 93-0119-PC, 11/3/94; *Lee v. DER*, 90-0301-PC, 3/29/94; *Kerr v. DER*, 92-0195-PC, 5/20/93

Engineering Specialist-Transportation-Senior and Advanced 1 *Feeney v. DER*, 92-0025-PC, 6/13/96; *Ratty v. DOT & DER*, 95-0106-PC, 5/14/96; *Ellis v. DER*, 92-0548-PC, 3/9/94 (also Engineering Technician-Transportation-3)

Engineering Specialist-Transportation-Senior, Advanced 1 and Advanced 2 *Gerstmann v. DER*, 92-0147-PC, 2/25/93 (also Engineering Technician-Transportation 4)

Engineering Technician I and 2 *Heikkinen v. DOT & DER*, 85-0055-PC, 3/13/86

Engineering Technician 3 and 4 *Lien & Marsden v. DP*, 80-27,30-PC, 4/3/81 (see also Engineering Technician 5);

***Millard, Eckes & Peterson v. DOT & DER*, 84-0076, 0077, 0079-PC, 6/6/85; *Riepl v. DOT & DP*, 78-99-PC, 3/9/79; *Theel v. DOT & DER*, 84-0074-PC, 11/8/84**

Engineering Technician 4 *Doran & Kelm v. DER*, 94-0277, 0278-PC, 3/7/96 (also Graphic Reproduction Technician-Senior); *Pettit v. DER*, 92-0145-PC, 10/24/94 (also Maintenance Mechanic 3); *Burnson v. DER*, 92-0096, 0847-PC, 10/24/94 (also Heating, Ventilating, Air Conditioning/Refrigeration Specialist and Maintenance Mechanic 3); *Miller v. DER*, 92-0095, 0851-PC, 9/9/94 (also Heating, Ventilating, Air Conditioning/Refrigeration Specialist and Maintenance Mechanic 3); *Riley v. DER*, 92-0097, 0849-PC, 9/9/94 (also Heating, Ventilating, Air Conditioning/Refrigeration Specialist and Maintenance Mechanic 3)

Engineering Technician 4 and 5 *Braun & Merila v. DOT & DP*, 82-144-PC, 82-159-PC, 6/9/83; *Weimer v. DOT & DER*, 84-0064-PC, 12/6/84

Engineering Technician 5 *Holton v. DER & DILHR*, 92-0717-PC, 1/20/95 (also Engineering Specialist-Senior); *Lien & Marsden v. DP*, 80-27,30-PC, 4/3/81 (see also Engineering Technician 3 and 4)

Engineering Technician 5 and 6 *Sutton v. DP*, 79-175-PC, 2/17/80

Engineering Technician-Transportation-3 *Ellis v. DER*, 92-0548-PC, 3/9/94 (also Engineering Specialist-Transportation-Senior and Advanced 1); *Peck v. DER*, 92-0130-PC, 11/18/93 (also Engineering Specialist-Transportation-Developmental)

Engineering Technician-Transportation-3 and 4 *Creviston & Anderson v. DER*, 92-0099-PC, 12/17/92

Engineering Technician-Transportation 3 and 5 *Mertz v. DER*, 92-0747-PC, 8/18/94

Engineering Technician-Transportation 4 *Yttri v. DER*, 92-0261-PC, 3/9/94 (also Engineering Specialist-Transportation-Journey); *Coequyt v. DER*, 92-0189-PC, 8/11/93 (also Engineering Specialist, Traffic Signal Mechanic-Entry and Journey); *Golde v. DER*, 92-0162-PC, 8/11/93 (also Traffic Signal Mechanic-Journey); *Gerstmann v. DER*, 92-0147-PC,

2/25/93 (also Engineering Specialist-Transportation-Senior, Advanced 1 and Advanced 2)

Environmental Analysis and Review Manager *McKnight v. DER*, 92-0493-PC, 5/2/94 (also Environmental Analysis and Review Specialist-Advanced and Environmental Analysis and Review Supervisor); *Morrissey et al. v. DER*, 92-0525, 0559-PC, 5/2/94 (also Environmental Analysis and Review Supervisor)

Environmental Analysis and Review Specialist-Advanced *McKnight v. DER*, 92-0493-PC, 5/2/94 (also Environmental Analysis and Review Supervisor and Environmental Analysis and Review Manager)

Environmental Analysis and Review Supervisor *Morrissey et al. v. DER*, 92-0525, 0559-PC, 5/2/94 (also Environmental Analysis and Review Manager); *McKnight v. DER*, 92-0493-PC, 5/2/94 (also Environmental Analysis and Review Specialist-Advanced and Environmental Analysis and Review Manager)

Environmental Enforcement Specialists-Senior and Advanced *Roszak and Gerlat v. DER*, 92-0540, 541-PC, 9/9/94

Environmental Engineer 3 and 4 *Schaefer v. DNR & DP*, 83-0025-PC, 8/4/83

Environmental Engineer – 6 *Hockmuth v. DP*, 81-76-PC, 10/27/82; affirmed by Dane County Circuit Court, *Hockmuth v. Pers. Comm.*, 82-CV-6130, 6/27/84; affirmed by Court of Appeals District IV, 84-1603, 9/19/85 (see also Natural Resources Administrator 3)

Environmental Engineer-Senior *Kaminski et al. v. DER*, 91-0121-PC, 9/30/93 (also Environmental Specialist 6)

Environmental Engineer-Senior and Advanced 1 *Miller et al. v. DER*, 92-0122-PC, etc., 5/5/94 (also Plumbing Plan Reviewer 2)

Environmental Engineer-Senior and Plumbing Plan Reviewer 2 *Swim & Wilkinson v. DER*, 92-0576, 0613-PC, 1/16/97 (also Plumbing Plan Reviewer 2)

Environmental Specialist 4 and 5 *Czeshinski v. DP*, 80-6-PC, 4/10/81; *Doelger v. DNR & DER*, 85-0011-PC, 9/26/85; *Eslien v. DER*, 84-0020-PC, 8/l/84; *Mugan v.*

***DNR & DER*, 84-0236-PC, 10/15/85; *Rasman v. DNR & DER*, 85-0002-PC, 8/l/85; *Reif, Russo & Sevener v. DNR & DER*, 85-0005, 0006, 0012-PC, 10/23/85; *Young v. DNR & DER*, 84-0251-PC, 11/21/85**

Environmental Specialist 5 and 6 *Baggott v. DNR & DER*, 87-0012-PC, 12/23/87; aff'd by Dane County Circuit Court, *Baggott v. Wis. Pers. Comm.*, 88-CV-0366, 8/11/88; *Weister v. DNR & DER*, 85-0075-PC, 6/12/86

Environmental Specialist 6 *Kaminski et al. v. DER*, 91-0121-PC, 9/30/93 (also Environmental Engineer-Senior)

Equal Opportunity Specialist 4 *Moy v. DPI & DP*, 78-135-PC, 8/21/81 (see also Educational Consultant 1)

Facilities Repair Worker 1 *Seay v. DER*, 89-0117-PC, 1/24/91 (also Painter)

Facilities Repair Worker 3 *Landphier v. DER*, 90-0373-PC, 8/21/91 (also Carpenter)

Facilities Repair Worker 3 and 4 *Nagorsen & Boehrig v. DOC & DER*, 92-0158, 0165-PC, 12/17/92

Facility Repair Worker 1 and 2 *Borowski v. DP & DOA*, 79-278-PC, 3/2/81

Facility Repair Worker 2 and 3 *Curtis v. UW*, 79-84-PC, 1/15/79

Facility Repair Worker 3 *Bricklayers & Allied Craftsmen Union #8 and Radish v. DHSS*, 81-367-PC, 5/28/82 (see also Bricklayer & Mason)

Financial Specialist 2 and 4 *Costa & Hollister v. DER*, 92-0459, 0460-PC, 5/16/94 (also Financial Specialist Supervisor 3 and 5 and Financial Supervisor 2)

Financial Specialist 3 *Stein v. DER*, 92-0474-PC, 8/18/94 (and Accountant - Journey)

Financial Specialist 3 and 4 *McCullough v. DER*, 94-0394-PC, 6/9/95

Financial Specialist Supervisor 3 and 5 *Costa & Hollister v. DER*, 92-0459, 0460-PC, 5/16/94 (also Financial Specialist 2 and 4 and Financial Supervisor 2)

Financial Specialist 5 and Budget *Zielesch v. DER*, 96-0028-PC, 8/30/96 (also Budget and Policy

Analyst-Division-Senior)

Financial Supervisor 2 *Costa & Hollister v. DER*, 92-0459, 0460-PC, 5/16/94 (also Financial Specialist Supervisor 3 and 5 and Financial Specialist 2 and 4)

Fiscal Administrative Officer 2 *Phelps v. DOR & DER*, 91-0003-PC, 5/20/93 (also Fiscal Supervisor 2 and 3)

Fiscal Clerk 1 and 2 *Matthews v. UW & DER*, 92-0820-PC, 1/25/94

Fiscal Clerk 3 *Darnell v. DP*, 79-PC-CS-225, 6/3/81 (see also Program Assistant 1); *Fagan v. DOC & DER*, 92-0756-PC, 11/29/93 (also Program Assistant 3); *Fritchen v. DP*, 79-PC-CS-269, 4/29/82 (see also Account Specialist 1)

Fiscal Supervisor I and 2 *Anderson v. DER*, 86-0173-PC, 6/11/87

Fiscal Supervisor 2 and 3 *Phelps v. DOR & DER*, 91-0003-PC, 5/20/93 (also Fiscal Administrative Officer 2); *Skibba v. DP*, 79-242-PC, 7/28/80

Fisheries Biologist-Senior and Advanced *Welch v. DER*, 92-0630-PC, 5/16/94

Fisheries Management Technician 4 and 5 *Coffaro & Thompson v. DER*, 92-0348, 0352-PC, 7/27/94; *Jahns v. DER*, 92-0239-PC, 3/9/94

Fish Propagation Technician 3 and 4 *Steinke v. DER*, 92-0322-PC, 7/22/93

Food Inspector 2 *Broske v. DER*, 84-0171-PC, 1/2/85 (see also *Marketing* Inspector 3)

Food Production Assistant *Collins v. UW & DER*, 85-0165-PC, 8/20/86 (see also Cook 2)

Food Service Administrator 3 and 4 *Moritz v. DHSS & DER*, 92-0039-PC, 3/10/93

Food Service Worker 2 and 3 *Pittz v. DHSS & DP*, 79-116-PC, 1/13/81

Forester-Objective and Senior *Kildow v. DER*, 92-0582-PC, 7/7/94; *Farr v. DER*, 92-0512-PC, 5/2/94

Forester-Senior and Advanced *Hujanen v. DER*,

92-0314-PC, 12/5/94; *Hensley v. DER*, 92-0377-PC, 9/21/94

Forest Fire Control Assistant I and 2 *Leer v. DNR & DER*, 85-0125-PC, 10/1/86; *Morgan v. DNR & DP*, 83-0028-PC, 11/23/83

Forestry Manager *Roberts & DeLaMater v. DER*, 92-0481, 0638-PC, 3/9/94 (also Natural Resources Manager 2)

Forestry Supervisor 1 and 2 *Hewett v. DER*, 92-0594-PC, 9/21/94

Forestry Technician 4 and 5 *Briggs v. DNR & DER*, 95-0196-PC, 7/5/96; *Severtson v. DNR & DER*, 95-0052-PC, 10/16/95; *Stensberg et al. v. DER*, 92-0325-PC, etc., 2/20/95; *Bernier v. DER*, 92-0342-PC, 4/19/94; *White v. DER*, 92-0371-PC, 8/11/93; *Cramey v. DER*, 92-0268-PC, 6/4/93

Gardener *Thomas v. DER*, 94-0070-PC, 12/22/94 (also Groundskeeper)

Gardener 2 *Higgins v. DOA & DER*, 91-0216-PC, 8/26/92 (also Groundskeeper)

Graphic Reproduction Technician-Senior *Doran & Kelm v. DER*, 94-0277, 0278-PC, 3/7/96 (also Engineering Technician 4))

Groundskeeper *Thomas v. DER*, 94-0070-PC, 12/22/94 (also Gardener); *Higgins v. DOA & DER*, 91-0216-PC, 8/26/92 (also Gardener 2)

Health Services Supervisor 1 and 3 *Morgan v. DER*, 96-0137-PC, 8/13/97

Heating, Ventilating, Air Conditioning (HVAC) and/or Refrigeration Specialist *Burnson v. DER*, 92-0096, 0847-PC, 10/24/94 (also Engineering Technician 4 and Maintenance Mechanic 3); *Miller v. DER*, 92-0095, 0851-PC, 9/9/94 (also Engineering Technician 4 and Maintenance Mechanic 3); *Riley v. DER*, 92-0097, 0849-PC, 9/9/94 (also Engineering Technician 4 and Maintenance Mechanic 3); *Olson et al. v. DER*, 92-0071-PC, etc., 9/9/94 (also Maintenance Mechanic 2 and 3); *Peters v. DER*, 92-0159-PC, 2/3/94 (also Maintenance Mechanic 3)

Housekeeping Services Supervisor 1 and 2 *La Savage v.*

***UW & DER*, 90-0378-PC, 5/14/92**

Industries Specialist 1, 2 and 3 *Holubowicz et al. v. DHSS & DER*, 88-0039-PC, 1/25/89

Housekeeping Services Supervisor 2 *Keller v. UW & DER*, 86-0168-PC, 4/15/87 (see also Custodial Supervisor 2)

Human Services Administrator I *Sielaff v. DP*, 78-2-PC, 9/5/79 (see also Social Services Supervisor 3)

Industry and Labor Training Coordinator 1 and 2 *Pasqualucci v. DILHR & DP*, 81-237-PC, 4/15/82

Institution Aide I and 2 *Hayes v. DHSS & DP*, 83-0039-PC, 9/28/83; *Newbury v. DHSS & DP*, 83-0018-PC, 1/6/84

Institution Aide 3 *Adasiewicz v. DER*, 84-0046-PC, 2/14/85 (see also Officer 2 and 3)

Institution Business Administrator 3 *Gauthier v. DHSS & DER*, 93-0207-PC, 7/5/96 (also Institution Management Services Director); *Grams v. DOC & DER*, 92-0762-PC, 6/23/93 (and Institution Management Services Director)

Institution Management Services Director *Gauthier v. DHSS & DER*, 93-0207-PC, 7/5/96 (also Institution Business Adminstrator 3); *Grams v. DOC & DER*, 92-0762-PC, 6/23/93 (and Institution Business Administrator 3)

Institution Treatment Director 2 and 3 *Knight v. DER*, 85-0178-PC, 9/17/86; *Zoltak v. DER*, 83-0239-PC, 11/8/84

Instrument Maker-Advanced *Kubala v. DER*, 90-0338-PC, 92-0107-PC, 2/23/94 (also Engineering Specialist-Senior and Advanced 1); *Bloom v. DER*, 92-0088-PC, 8/25/93 (also Engineering Specialist-Senior); *Randall v. DER*, 92-0084-PC, 8/23/93 (also Engineering Specialist-Senior); *Sailor v. DER*, 92-0086-PC, 8/23/93 (also Engineering Specialist-Senior)

Instrument Maker-Journey and Advanced *Sannes v. DER*, 92-0085-PC, 8/23/93; *Wigglesworth v. DER*, 92-0150-PC, 8/23/93

IS Enterprise Consultant/Technical Services/Enterprise Technical Consultant

***Hsu v. DER*, 97-0047-PC, 8/26/98 (also IS Enterprise Consultant/Technical Services/Enterprise Technical Project**

Manager and IS Professional/ Technical Services/Systems Software/Production Support Professional-Senior)

IS Enterprise Consultant/Technical Services/Enterprise Technical Project Manager *Hsu v. DER*, 97-0047-PC, 8/26/98 (also IS Enterprise Consultant/Technical Services/Enterprise Technical Consultant and IS Professional/Technical Services/Systems Software/Production Support Professional-Senior)

IS Professional/Technical Services/Systems Software/Production Support Professional-Senior *Hsu v. DER*, 97-0047-PC, 8/26/98 (also IS Enterprise Consultant/Technical Services/Enterprise Technical Consultant or IS Enterprise Consultant/Technical Services/Enterprise Technical Project Manager)

Job Service Assistant I *Peil v. DILHR & DER*, 85-0062-PC, 11/7/85 (see also Clerical Assistant I and 2)

Job Service Assistant I and 2 *Kastel et al. v. DILHR & DP*, 82-16, 17, 18-PC, 3/17/83

Job Service Assistant 2 and 3 *Kortright v. DP*, 81-454-PC, 10/7/82; *Block v. DILHR & DP*, 78-48-PC, 79-104-PC, 5/15/79 (see also Job Service Assistant 4)

Job Service Assistant 3 and 4 *DeMarb v. DILHR & DP*, 81-391-PC, 1/10/83; *Kerndt v. DP*, 81-151-PC, 1/10/83; *Proft & Grant v. DP*, 78-145,147-PC, 11/8/79; *Saviano v. DP*, 78-49-PC, 6/22/79; affirmed by Dane County Circuit Court, *DER v. PC (Saviano)*, 79-CV-3720, 12/2/81; *Sersch v. DILHR & DER*, 86-0075-PC, 4/1/87; *Wojciechowski v. DP*, 79-PC-CS-907, 10/14/82

Job Service Assistant 4 *Block v. DILHR & DP*, 78-48-PC, 79-104-PC, 5/15/79 (see also Job Service Assistant 2 and 3)

Job Service Specialist 2 *Magnuson v. DILHR & DP*, 82-22-PC, 11/9/83 (see also Program Assistant 2)

Job Service Specialist 2 and 3 *Carroll v. DER*, 86-0112-PC, 1/8/87; *Markert v. DILHR & DER*, 89-0029-PC, 6/29/89; *Pedersen v. DILHR & DP*, 82-209-PC, 10/28/83

Job Service Specialist 3 and 4 *Koeller v. DER*, 86-0099-PC, 3/18/87

Job Service Supervisor I and 2 *Wambold v. DILHR & DP*, 82-161-PC, 1/20/83

Job Service Supervisor 2 and 3 *Kuick v. DP*, 81-68-PC, 1/27/82

Job Service Supervisor 2, 3 and 4 *Conrady & Janowski v. DILHR & DP*, 80-363-PC, 81-PC-ER-9 & 19, 11/9/83

Job Service Supervisor 5 and 6 *Utyneck v. DP*, 81-83-PC, 1/7/83

Landscape Architect Senior and Advanced 1 *Aslakson et al. v. DER*, 91-0135-PC, etc., 10/22/96

Laundry Worker 2 and 3 *Minton v. DVA & DER*, 94-0002-PC, 11/22/94; *Nessler & Heineman v. DHSS & DER*, 93-0004-PC, 10/20/93

Librarian I *Badsha v. DP*, 81-135-PC, 5/29/86; *Morris v. DP*, 81-0088-PC, 5/29/86; *Monk v. DP*, 81-0118-PC, 6/4/86; *Wager v. DP*, 81-0134-PC, 6/18/86; *Wentworth v. DP*, 81-0178-PC, 9/4/86

Librarian 1 and 2 *Dayton v. DHSS & DER*, 85-0021-PC, 6/11/87

Librarian 1, 2 and 3 *Beane v. DP*, 82-140-PC, 81-184-PC, 7/21/83; *Duesterhoeft v. DER*, 90-0343-PC, 12/17/92; *Radovich v. DP*, 81-117-PC, 7/6/83 (see also Library Associate 2 and Library Services Assistant 4)

Librarian 2 *Boldt v. DP*, 81-96-PC, 9/28/83; affirmed by Dane County Circuit Court; *Boldt v. State Pers. Comm.*, 83-CV-2733, 3/6/84; affirmed by Court of Appeals District 111, 84-864, 2/5/85 (see also Teacher 5)

Library Associate and Library Associate 2 *Beane v. DP*, 82-140-PC, 81-184-PC, 7/21/83; *Radovich v. DP*, 81-117-PC, 7/6/83 (see also Librarian 1, 2, 3 and Library Services Assistant 4)

Library Associate 2 and Librarian I; *Badsha v. DP*, 81-135-PC, 5/29/86; *Beane v. DP*, 82-140-PC, 81-184-PC, 7/21/83; *Morris v. DP*, 81-0088-PC, 5/29/86; *Monk v. DP*, 81-0118-PC, 6/4/86; *Radovich v. DP*, 81-117-PC, 7/6/83; *Wager v. DP*, 81-0134-PC, 6/18/86; *Wentworth v. DP*, 81-0178-PC, 9/4/86

Library Services Assistant 1 and 2 *Manning v. UW & DER*, 89-0102-PC, 12/13/90

Library Services Assistant 2 and 3 *Klemmer v. UW & DER*, 85-0134-PC, 9/4/86

Library Services Assistant 3 and 4 *Langteau v. UW & DER*, 83-0246-PC, 2/13/85; *Lewis & Myers v. DP*, 81-154,156-PC, 7/26/82; *McClements v. DP*, 81-167-PC, 5/26/82; *Wasick v. DP*, 81-125-PC, 10/14/82

Library Services Assistant 4 *Beane v. DP*, 82-140-PC, 81-184-PC, 7/21/83; *Radovich v. DP*, 81-117-PC, 7/6/83 (see also Librarian 1, 2, 3 and Library Associate)

Library Services Assistant 5 *Curtis v. DP*, 81-192-PC, 4/15/82 (see also Program Assistant 3 and 4)

Library Services Assistant-Senior and Advanced *Doyle v. DER*, 94-0191-PC, 5/26/95; *Sandow v. DER*, 94-0180-PC, 3/8/95

Licensing and Vehicle Representative I and 2 *Krewson et al. v. DP*, 78-23-PC, 5/18/79

Maintenance Mechanic 1 and 2 *Baker et al. v. DER*, 92-0087-PC, 1/8/93; *Conkle v. DOA & DP*, 81-100-PC, 12/16/81

Maintenance Mechanic 2 and 3 *Olson et al. v. DER*, 92-0071-PC, etc., 9/9/94 (also Heating, Ventilation, Air Conditioning/Refrigeration Specialist)

Maintenance Mechanic 3 *Pettit v. DER*, 92-0145-PC, 10/24/94 (also Engineering Technician 4); *Peters v. DER*, 92-0159-PC, 2/3/94 (also Heating, Ventilating, Air Conditioning (HVAC) and/or Refrigeration Specialist)

Maintenance Mechanic 3 *Burnson v. DER*, 92-0096, 0847-PC, 10/24/94 (also Engineering Technician 4 and Heating, Ventilation, Air Conditioning/Refrigeration Specialist); *Miller v. DER*, 92-0095, 0851-PC, 9/9/94 (also Engineering Technician 4 and Heating, Ventilation, Air Conditioning/Refrigeration Specialist) *Riley v. DER*, 92-0097, 0849-PC, 9/9/94 (also Engineering Technician 4 and Heating, Ventilation, Air Conditioning/Refrigeration Specialist)

Maintenance Supervisor I and 2 *Coffey v. UW & DER*, 86-0141-PC, 7/22/87; *Critchley v. UW & DER*, 86-0037-PC, 1/8/87

Management Information Manager 3 *Neuman v. DP*,

79-373-PC, 6/3/81 (see also Management Information Supervisor 6 - Management)

Management Information Specialist *Ellsworth & Parrell v. DP*, 83-0021, 0022-PC, 8/23/83 (see also Data Processing Operations Technician 2)

Management Information Specialist 1 and 2 *Whitmore v. DP*, 82-10, 188-PC, 3/31/83 (see also Data Processing Operations Technician 2)

Management Information Specialist 2 and 3 *Mergen v. UW & DER*, 91-0247-PC, 11/13/92

Management Information Specialist 3 and 4 *Inkmann v. UW & DER*, 85-0187-PC, 1/9/86

Management Information Specialist 4 and 5 *Poore v. DILHR & DER*, 88-0007-PC, 9/8/88

Management Information Specialist 5 *Martin v. UW & DER*, 85-0092-PC, 1/9/86 (see also Data Processing Operator 3)

Management Information Specialist 5 and 6 *Cepress v. DP*, 80-16-PC, 6/3/81; *Holmblad v. DP*, 79-334-PC, 12/8/80

Management Information Supervisor 3 *Biba v. DP*, 79-367-PC, 4/23/81 (see also Administrative Assistant 3 and 4 - Supervisor)

Management Information Supervisor 5 and 6 *Ballhorn v. DILHR & DER*, 87-0012-PC, 12/23/87; *Nell v. DP*, 78-224-PC, 6/29/79; *Polenz v. DP*, 79-377-PC, 11/4/80

Management Information Supervisor 6 – Management *Neuman v. DP*, 79-373-PC, 6/3/81 (see also Management Information Manager 3)

Management Information Supervisor 6 and 7 *Ford v. DER*, 84-0032-PC, 10/1/84

Management Information Supervisor 2 and 3 *Mergen v. UW & DP*, 83-0064-PC, 2/15/84

Management Information Technician 2 and 3 *Lulling & Arneson v. DER*, 88-0136, 0137-PC, 9/13/89 (also Typesetting Input Operator 2)

Management Information Technician 3 *Taylor v. DER*, 91-0232-PC, 2/8/93 (and Program Assistant 4)

Management Information Technician 3 and 4 *Davidson v. DP*, 81-291-PC, 1/20/83

Marketing Inspector 3 *Broske v. DER*, 84-0171-PC, 1/2/85 (see also Food Inspector 2)

Mechanical Engineer-Advanced 1 and 2 *Tilley v. DER*, 90-0334-PC, 1/8/93

Media Supervisor 1 *Andrewjeski v. DER*, 90-0212-PC, 5/16/91 (also Media Technician 4)

Media Technician 2 and 3 *Medora, et al. v. DER*, 90-0324-PC, etc., 9/18/92; *Gerseth & Crisp v. DER*, 90-0205, 0206-PC, 6/12/91; *Gosz v. DER*, 90-0192-PC, 5/29/91; *Zastrow v. DER*, 90-0208-PC, 5/29/91

Media Technician 3 and 4 *Hecox & Hillestad v. DER*, 96-0043, 0045-PC, 1/16/97; *Boetcher v. DER*, 90-0204-PC, 5/16/91

Media Technician 4 *Andrewjeski v. DER*, 90-0212-PC, 5/16/91 (also Media Supervisor 1)

Medical Technologist 2 and 3 *Hayford v. UW & DER*, 90-0103-PC, 4/5/91; *Olson v. UW & DER*, 90-0114-PC, 1/11/91

Medical Technologist-Objective and Senior *Fosshage v. DER*, 92-0395-PC, 3/31/94

Medical Technologist-Senior and Advanced *Gallagher v. DER*, 92-0335-PC, 4/19/94

Motor Vehicle Inspector I and 2 *Kotecki et al. v. DOT & DP*, 83-34,etc.-PC, 8/4/82

Motor Vehicle Representative 4 *Oestreicher et al. v. DP*, 83-0077-PC, 4/11/84 (see also Program Assistant 4)

Motor Vehicle Representative 4 and 5 *Zerbel et al. v. DOT & DER*, 87-0032-PC, 2/11/88

Natural Resource Administrator 2 and 3 *Moore v. DNR & DER*, 92-0761-PC, 5/2/94; *Batha v. DER*, 90-0134-PC, 6/12/91; *Moore v. DER*, 90-0142-PC, 1/24/91; *Priegel v. DER*, 90-0135-PC, 11/1/90

Natural Resources Administrator 3 *Hockmuth v. DP*, 81-76-PC, 10/27/82; affirmed by Dane County Circuit

Court, *Hockmuth v. Pers. Comm.*, 82-CV-6130, 6/27/84; affirmed by Court of Appeals District IV, 84-1603, 9/19/85 (see also Environmental Engineer 6)

Natural Resources Assistant 2 *Cody et al. v. DNR & DER*, 82-214,etc.-PC, 6/26/84; *Dobratz v. DNR & DP*, 82-40-PC, 2/9/83 (see also Natural Resources Technician 1)

Natural Resources Assistant 2 *Dobratz v. DNR & DP*, 82-40-PC, 2/9/83; *Johnson v. DNR & DER*, 85-0206-PC, 5/16/86 (see also Natural Resources Technician 1)

Natural Resources Educator-Objective and Senior *Kurowski v. DER*, 92-0441-PC, 4/19/94

Natural Resources Engineer-Advanced 1 and Advanced 2 *Mangardi v. DER*, 90-0335-PC, 3/29/94

Natural Resources Manager 2 *Roberts & DeLaMater v. DER*, 92-0481, 0638-PC, 3/9/94 (also Forestry Manager)

Natural Resources Patrol Officer 1 and 2 *Harpster v. DNR & DER*, 83-0216-PC, 5/9/84; *Tiser v. DNR & DER*, 83-0217-PC, 10/10/84

Natural Resources Specialist 2 *Duerst v. DNR & DER*, 90-0188-PC, 1/11/91 (also Natural Resources Technician 2 and 3)

Natural Resources Specialist 3 and 4 *Jones v. DNR & DER*, 85-0217-PC, 1/24/86

Natural Resources Specialist 4 and 5 *Lochner v. DNR & DER*, 88-0094-PC, 9/8/89; *Hansen v. DNR*, 85-0119-PC, 3/19/86; *Hess v. DNR & DER*, 85-0104-PC, 11/23/88; *Trapp v. DNR & DER*, 87-0196-PC, 6/8/88

Natural Resources Specialist 6 and 7 *Hensley v. DER*, 85-0074-PC, 12/19/85

Natural Resources Specialist 7 and 8 *Miller v. DER*, 85-0066-PC, 4/16/86

Natural Resources Specialist Administrator 2 *Ellingson v. DNR & DER*, 93-0057-PC, 5/28/96 (also Natural Resources Specialist 7-Management)

Natural Resources Specialist 7-Management *Ellingson v. DNR & DER*, 93-0057-PC, 5/28/96 (also Natural Resources Specialist Administrator 2)

Natural Resources Supervisor I and 2 *Horstman v. DER*, 85-0085-PC, 3/13/86

Natural Resources Supervisor 2 and 3 *Borkenhagen v. DER*, 85-0076-PC, 5/15/86; *Mertz v. DNR & DER*, 90-0250-PC, 5/1/91

Natural Resources Supervisor 3 and 4 *Bever v. DNR & DER*, 92-0749-PC, 3/10/93

Natural Resources Technician 1 *Cody et al. v. DNR & DER*, 82-214,etc.-PC, 6/26/84; *Dobratz v. DNR & DP*, 82-40-PC, 2/9/83; *Johnson v. DNR & DER*, 85-0206-PC, 5/16/86 (see also Natural Resources Assistant 2)

Natural Resources Technician I and 2 *Siegler v. DNR & DP*, 82-206-PC, 12/7/83

Natural Resources Technician 2 and 3 *Ketter v. DNR & DER*, 90-0342-PC, 4/5/91; *Duerst v. DNR & DER*, 90-0188-PC, 1/11/91 (also Natural Resources Specialist 2); *Smetana v. DNR & DER*, 89-0055-PC, 2/12/90

Nurse Clinician 2 and 3 *Christofferson et al. v. DER & UW*, 90-0058-PC, etc., 11/27/90

Nurse Clinician 3 and 4 *Leahy-Gross & Langhoff v. UW & DER*, 90-0035, 0086-PC, 8/26/92

Nursing Consultant 1 and 2 *Brink v. DHSS & DER*, 91-0061-PC, 8/26/92

Nursing Instructor 2 *Whiting v. DHSS & DER*, 90-0066-PC, 1/24/92 (also Nursing Specialist 2)

Nursing Specialist 2 *Foris v. DHSS & DER*, 90-0065-PC, 1/24/92 (also Public Health Nurse 2) *Whiting v. DHSS & DER*, 90-0066-PC, 1/24/92 (also Nursing Instructor 2)

Nursing Supervisor 1 and 2 *Siewert v. DER*, 91-0235-PC, 9/18/92

Officer 2 and 3 *Adasiewicz v. DER*, 84-0046-PC, 2/14/85 (see also Institution Aide 3)

Officer 2 and 3 *Engebregsten v. DHSS & DER*, 85-0156-PC, 3/13/86

Officer 4 and 5 *Eschenfeldt v. DP & DHSS*, 78-257-PC, 7/22/81; affirmed except as to remedy by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm.*, 81-CV-5126,

4/27/83

Officer 5 and 6 *Bleich v. DHSS & DP*, 79-274-PC, 6/3/81; *Fredisdorf et al. v. DP*, 80-300-PC, 3/19/82; *Karlen v. DHSS & DP*, 82-204-PC, 3/31/83; *Nitschke v. DP & DHSS*, 80-293-PC, 9/23/82; *Zhe v. DP*, 80-285, 286, 292, 296-PC, 11/19/81; affirmed by Dane County Circuit Court, *Zhe et al. v. Pers. Comm.*, 81-CV-6492, 11/2/82

Offset Press Operator I *Schmitz v. DP*, 79-PC-CS-767, 10/2/81 (see also Clerical Assistant 2)

Offset Press Operator 2 and 3 *Post v. DER*, 83-0213-PC, 5/24/84

Painter *Seay v. DER*, 89-0117-PC, 1/24/91 (also Facilities Repair Worker 1)

Park Manager 2 and 3 *Leiterman v. DER*, 92-0557-PC, 9/9/94

Park Superintendent 1 and 2 *Olson v. DNR & DER*, 89-0007-PC, 9/20/89 (also Ranger 3)

Park Superintendent 2 and 3 *Miller v. DNR & DER*, 90-0202-PC, 12/13/90; *Brandt v. DNR & DER*, 87-0155-PC, 11/3/88; *Eldred v. DNR & DER*, 87-0158-PC, 11/3/88

Park Superintendent 4 and 5 *Leith v. DNR & DER*, 87-0154-PC, 11/3/88

Park Supervisor I and 2 *Farrar v. DNR & DER*, 84-0127-PC, 1/17/85

Parole Board Member *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96 (also Social Services Specialist 2-Juvenile Review Specialist)

Payroll and Benefits Assistant *Taylor & Edge v. DER*, 92-0070-PC, 4/30/93 (and Payroll and Benefits Specialist 2)

Payroll and Benefits Assistant 1 and 2 *Katzmark v. DNR & DER*, 91-0073-PC, 4/17/92

Payroll and Benefits Assistant 3 and 4 *Kingzett v. UW & DER*, 90-0417-PC, 1/24/92

Payroll & Benefits Assistant 4 *Kirchesh v. DP*, 80-356-PC, 2/18/82 (see also Administrative Assistant 3)

Payroll and Benefits Specialist I and 2 *Sowle v. DP*, 79-118-PC, 11/7/80

Payroll and Benefits Specialist 2 *Taylor & Edge v. DER*, 92-0070-PC, 4/30/93 (and Payroll and Benefits Assistant)

Payroll and Benefits Specialist 2 and 3 *Bauhs & Lilley v. DP*, 78-188, 189-PC, 1/15/79; *Haasl v. DER*, 92-0125-PC, 9/8/93

Payroll and Benefits Specialist 3 and 4 *Albedyll v. DER*, 95-0087-PC, 5/21/97

Payroll and Benefits Specialist 3 and 4-Confidential *Langkamp et al. v. DER*, 92-0160-PC, etc., 12/17/92

Payroll and Benefits Specialist 3-Confidential and 4-Confidential *Reithmeyer v. DER*, 92-0136-PC, 12/10/92

Personnel Administrative Officer I and 2 *Lawton v. DP*, 81-47-PC, 12/16/81 (see also Administrative Officer 1) (see also Personnel Specialist 5)

Personnel Assistant I and 2 *Johnson v. DP*, 79-45-PC, 9/14/79

Personnel Assistant 2 *Gold v. UW & DER*, 91-0032-PC, 6/11/92 (also Personnel Manager 2 and 3 and Personnel Specialist 1, 2 and 3); *Mann v. DP*, 79-PC-CS-612, 11/14/80 (see also Program Assistant 3 - Confidential)

Personnel Manager 2 and 3 *Gold v. UW & DER*, 91-0032-PC, 6/11/92 (also Personnel Assistant 2 and Personnel Specialist 1, 2 and 3)

Personnel Manager 3 and 4 *Shepard et al. v. DP*, 80-234,237,239-PC, 6/3/81

Personnel Manager 4 and 5 *Barry v. DP*, 80-346-PC, 11/19/81

Personnel Specialist 1, 2 and 3 *Gold v. UW & DER*, 91-0032-PC, 6/11/92 (also Personnel Assistant 2 and Personnel Manager 2 and 3)

Personnel Specialist 5 *Lawton v. DP*, 81-47-PC, 12/16/81 (see also Administrative Officer 1) (see also Personnel Administrative Officer I and 2)

Personnel Specialist 5 and 6 *Belongia v. DP*, 79-263-PC, 6/30/81

Planning and Analysis Administrator 2 *Pamperin v. DER*, 83-0191-PC, 4/25/85; affirmed by Dane County Circuit Court, *Pamperin v. State Pers. Comm.*, 85-CV-2700, 10/30/85 (see also Civil Engineer 6 and 7 - Transportation Management and Research Administrator 1)

Planning Analyst 2 and 3 *Chatfield v. DOT & DER*, 83-0171-PC, 3/14/84

Planning Analyst 3 and 4 *Byrd v. DP*, 81-350-PC, 11/24/82

Planning Analyst 3, 4, 5, 6 (Mgmt.), and 7 (Mgmt.) *Kennedy et al. v. DP*, 81-180,etc.-PC, 1/6/84 (see also Civil Engineer 3 - Transportation)

Planning Analyst 4 *DOT (Potts) v. DP*, 80-362-PC, 6/25/82; *Jacobs v. DER*, 83-0123-PC, 4/23/85 (see also Research Analyst 4); *Oghalai v. DER*, 83-0161-PC, 11/8/84 (see also Program and Planning Analyst 6 and Social Services Specialist 2)

Plant Industry Specialist 3 and 4 *Kramer v. DATCP & DP*, 80-197-PC, 3/4/83

Police Captain *Bauer v. DER*, 84-0116-PC, 4/12/85 (see also Police Lieutenant)

Police Officer 2 *Thomsen et al. v. DER*, 84-0202-PC, 6/18/85 (see also Security Officer 4)

Police Lieutenant *Bauer v. DER*, 84-0116-PC, 4/12/85 (see also Police Captain)

Plumbing Plan Reviewer 2 *Swim & Wilkinson v. DER*, 92-0576, 0613-PC, 1/16/97 (also Environmental Engineer – Senior); *Miller et al. v. DER*, 92-0122-PC, etc., 5/5/94 (also Environmental Engineer-Senior and Advanced 1)

Power Plant Operator 2 and 3 *Mares et al. v. DOC & DER*, 91-0002-PC, 12/12/91

Private Sewage Plan Reviewer 2 *Stanlick v. DER*, 94-0157-PC, 10/16/97 (also Wastewater Engineer-Senior)

Procurement Specialist-Senior *Sutton et al. v. DER*, 94-0556-PC, etc., 11/14/95 (also Purchasing Agent-Senior); *McMullen v. DER*, 97-0110-PC, 7/1/98

Program Assistant 1 *Billingsly & Williams et al. v. DP*, 79-PC-CS-62,etc., 10/2/81 (see also Clerical Assistant 2)

(see also Typist); *Botz v. UW & DP*, 83-0063-PC, 12/7/83; *Brazeu & Johnson v. DP*, 79-PC-CS-357, 9/4/81; *Burkhalter v. DP*, 80-389-PC, 11/19/81 (see also Typist); *Clover et al. v. DP*, 79-PC-CS-165,etc., 1/27/82 (see also Program Assistant 2 and 3); *Darnell v. DP*, 79-PC-CS-225, 6/3/81 (see also Fiscal Clerk 3); *Foster v. DOT & DER*, 89-0008-PC, 10/25/89 (also Clerical Assistant 1 and 2); *Haak v. DHSS & DER*, 85-0130-PC, 4/30/86; *Harris v. UW & DER*, 87-0046-PC, 9/26/88 (also Typist); *Hellenbrand v. DNR & DER*, 87-0188-PC, 6/15/88 (see also Clerical Assistant 2); *Kundiger et al. v. DP*, 79-PC-CS-327, 329, 703-PC, 10/2/81 (see also Clerical Assistant 2); *Lyons v. DP*, 79-PC-CS-468, 12/3/81 (see also Program Assistant 2); *Marty v. DP*, 79-PC-CS-587, 12/8/80 (see also Typist); *McIntosh v. DP & UW*, 81-442-PC, 8/5/82 (see also Program Assistant 2 and 3); *Nickel & Standish v. DP*, 79-PC-CS-774, 629, 2/17/81 (see also Clerical Assistant 2); *Praninskas v. DP*, 79-PC-CS-653, 4/23/81; *Rotter v. DP*, 79-PC-CS-749, 4/23/81 (see also Typist); *Showers v. DP*, 79-PC-CS-699, 9/3/82 (see also Clerical Assistant 2); *Smart v. UW & DER*, 87-0002-PC, 11/4/87 (see also Program Assistant 2 and 3); *Taylor v. DOR & DER*, 90-0387-PC, 6/27/91 (also Clerical Assistant 1)

Program Assistant 1 and 2 *Boldon v. DATCP & DER*, 89-0141-PC, 10/4/90; *Crary v. DNR & DER*, 89-0133-PC, 6/1/90 (also Storekeeper 1 and 2); *Dombrowski v. UW & DER*, 88-0054-PC, 11/30/88; *Dunn-Herfel v. DOJ & DER*, 94-0043-PC, 12/14/94; *Ferguson v. DP*, 80-386-PC, 2/18/82; *Gebhart v. UW & DER*, 84-0023-PC, 12/20/84; *Hopwood v. UW & DP*, 83-0013-PC, 5/25/83 (see also Secretary 1); *LeBoeuf v. DNR & DER*, 93-0026-PC, 11/23/93; *Ratchman v. UW-Oshkosh & DER*, 86-0219-PC, 11/18/87; *Shaffer v. UW & DER*, 88-0106-PC, 1/12/89; *Voltz v. DP*, 82-171-PC, 1/18/84

Program Assistant 2 *Darland v. UW & DER*, 89-0160-PC, 7/12/90 (also Educational Services Intern); *Kirkeeng v. DP*, 79-PC-CS-531, 12/8/82 (see also Secretary I & Typist); *Klitzke v. UW (Whitewater)*, 85-0022-PC, 6/18/85 (see also Secretary I and Typist); *Lyons v. DP*, 79-PC-CS-468, 12/3/81 (see also Program Assistant 1); *Magnuson v. DILHR & DP*, 82-22-PC, 11/9/83 (see also Job Service Specialist 2); *Schroth v. DP*, 79-PC-CS-935, 11/19/81 (see also Typist - Lead)

Program Assistant 2 and 3 *Baldwin v. UW & DER*, 82-87-PC, 1/20/83; *Clover et al. v. DP*, 79-PC-CS-165,etc., 1/27/82 (see also Program Assistant 1); *Gilbert v. DOA & DER*, 90-0397-PC, 8/16/91; *Havel-Lang v. DHSS & DER*, 91-0052-PC, 8/26/92; *Johnson v. UW-Eau Claire & DER*, 85-0198-PC, 9/17/86; *McGrew v. UW & DP*, 81-443-PC, 1/7/83; *McIntosh v. DP & UW*, 81-442-PC, 8/5/82 (see also Program Assistant 1); *Olbrantz v. DHSS & DER*, 84-0065-PC, 9/12/84; *Pedretti v. UW & DER*, 88-0070-PC, 5/3/89; *Schermerhorn v. DP*, 79-PC-CS-778, 11/24/80; *Smart v. UW & DER*, 87-0002-PC, 11/4/87 (see also Program Assistant 1)

Program Assistant 2 and 4 *Walker v. DER*, 85-0020-PC, 11/25/85

Program Assistant 2, 3 and 4 *Sopher v. UW & DER*, 89-0112-PC, 5/4/90

Program Assistant 3 *Crocker v. DOT*, 81-28-PC, 12/18/81 (see also Storekeeper 2); *Fagan v. DOC & DER*, 92-0756-PC, 11/29/93 (also Fiscal Clerk 3); *Sanford v. DOT & DER*, 94-0548-PC, 11/17/95; rehearing denied, 12/20/95 (also Engineering Specialist-Transportation-Journey)

Program Assistant 3 – Confidential *Mann v. DP*, 79-PC-CS-612, 11/14/80 (see also Personnel Assistant 2)

Program Assistant 3 and 4 *Akey v. DNR & DER*, 92-0843-PC, 6/21/94; *Beaumier v. DNR & DER*, 90-0203-PC, 1/24/91; *Cernohous v. UW & DER*, 89-0131-PC, 9/13/90; *Curtis v. DP*, 81-192-PC, 4/15/82 (see also Library Services Assistant 5); *Klein v. UW & DER*, 91-0208-PC, 2/8/93 (also Administrative Assistant 3); *Lehr v. DILHR & DER*, 93-0006-PC, 8/23/93; *MacKenzie v. UW & DER*, 91-0028-PC, 1/24/92; *Miller v. DHSS & DER*, 91-0129-PC, 5/1/92; *Olson v. DOA & DER*, 92-0731-PC, 2/3/94; *Schmidt v. Sec. of State & DER*, 89-0129-PC, 1/11/91; *Spilde v. DOA & DER*, 92-0155-PC, 7/22/93

Program Assistant 3-Confidential and 4-Confidential *Mann v. DER*, 83-0245-PC, 8/1/84; *Marks v. DOA & DER*, 90-0421-PC, 10/31/91 (also Secretary 2); *Christensen v. DNR & DER*, 90-0368-PC, 5/16/91 (also Administrative Assistant 3 and Program Assistant Supervisor 2)

Program Assistant 4 *Buchen v. DP*, 82-151-PC, 8/17/83 (see also Administrative Assistant 3); *Fonte v. UW & DP*, 82-131-PC, 4/15/83 (see also Secretary 3); *Gums & Snart v. DP*, 79-PC-CS-299, 695, 1/27/81 (see also Administrative Assistant 3) (see also Program Assistant Supervisor 3); *Krueger v. DP*, 80-308-PC, 9/3/81 (see also Administrative Assistant 3); *Meschefske v. DP*, 80-37-PC, 1/8/81 (see also Administrative Assistant 3); *Oestreicher et al. v. DP*, 83-0077-PC, 4/11/84 (see also Motor Vehicle Representative 4); *Taylor v. DER*, 91-0232-PC, 2/8/93 (and Management Information Technician 3); *Lathrop v. DER*, 97-0004-PC, 3/11/98 (also Administrative Assistant 3)

Program Assistant Supervisor 1 *Cuff v. DP*, 79-PC-CS-100, 12/17/80 (see also Clerical Supervisor 2)

Program Assistant Supervisor I and 2 *Forbush v. DP*, 79-PC-CS-270, 1/27/82

Program Assistant Supervisor 2 *Christensen v. DNR & DER*, 90-0368-PC, 5/16/91 (also Administrative Assistant 3 and Program Assistant 3-Confidential and 4-Confidential); *Wedul v. DOT & DER*, 85-0118-PC, 2/6/86 (see also Administrative Assistant 3 - Confidential)

Program Assistant Supervisor 2 and 3 *Carroll v. DHSS & DER*, 93-0012-PC, 5/27/94

Program Assistant Supervisor 3 *Gums & Snart v. DP*, 79-PC-CS-299, 695, 1/27/81 (see also Administrative Assistant 3) (see also Program Assistant 4); *Holzbauer v. DILHR & DER*, 87-0074-PC, 1/13/88 (see also Shipping and Mailing Supervisor 2)

Program and Planning Analyst 3 *Piotrowski v. DER*, 84-0010-PC, 12/20/84 (see also Community Services Technician 2

Program and Planning Analyst 4 and 5 *Maher (Eiseley) v. DHSS & DER*, 85-0192-PC, 9/4/86

Program and Planning Analyst 6 *Oghalai v. DER*, 83-0161-PC, 11/8/84 (see also Planning Analyst 4 and Social Services Specialist 2)

Property Assessment Specialist 4 and 2 *Bornfleth v. DER*, 85-0200-PC, 5/29/86

Property Assessment Supervisor 1 and 2 *Behling v. DOR &*

***DER*, 88-0060-PC, 12/14/89**

Psychologist 5-Doctorate (Management) and 6-Doctorate (Management) *Miller v. DHSS & DER*, 92-0840-PC, 1/25/94

Psychologist Supervisor 1-Doctorate and 2-Doctorate *Hagan v. DHSS & DER*, 92-0803-PC, 10/27/95

Public Health Nurse 2 *Foris v. DHSS & DER*, 90-0065-PC, 1/24/92 (also Nursing Specialist 2)

Public Health Nurse 2 and 3 *Bartko v. DHSS & DP*, 81-341-PC, 4/2/82

Public Information Officer 4 *O'Brien v. DOT & DER*, 91-0221-PC, 6/25/93 (also Community Services Specialist 1 and 2, Administrative Assistant 3 and 4)

Public Service Engineer 4 and 5 *Arny v. PSC & DER*, 86-0200-PC, 10/27/87

Public Service Engineer-Journey and Senior *Stemrich v. DER*, 91-0058-PC, 6/4/93

Purchasing Agent 1 and 2 *Kilbreth v. UW & DP*, 81-463-PC, 1/2/85 (see also Purchasing Assistant); *Saindon v. DER*, 85-0212-PC, 10/9/86 (see also Administrative Assistant 3, Educational Services Assistant I and 2 and Purchasing Assistant)

Purchasing Agent 1 Supervisor *Christensen v. DNR & DER*, 89-0097-PC, 90-0125-PC, 11/16/90 (also Administrative Assistant 4 Confidential/Supervisor)

Purchasing Agent-Objective and Senior *Berg v. UW & DER*, 96-0110-PC, 5/7/97

Purchasing Agent-Senior *Sutton et al. v. DER*, 94-0556-PC, etc., 11/14/95 (also Procurement Specialist-Senior)

Purchasing Agent Supervisor 2 and 3 *Miller v. DER*, 95-0077-PC, 4/4/96

Purchasing Assistant *Kilbreth v. UW & DP*, 81-463-PC, 1/2/85 (see also Purchasing Agent I and 2); *Saindon v. DER*, 85-0212-PC, 10/9/86 (see also Administrative Assistant 3, Educational Services Assistant I and 2 and Purchasing Agent I and 2)

Ranger 1 and 2 *Foss v. DER*, 95-0048-PC, 2/10/97; *Lane v.*

***DER*, 95-0064-PC, 2/10/97; *Nordstrom v. DER*, 95-0061-PC, 2/10/97; *Olson v. DER*, 95-0062-PC, 2/10/97; *Ostrowski v. DER*, 95-0049-PC, 2/10/97; *Ripp v. DER*, 95-0047-PC, 12/7/95**

Ranger 3 *Olson v. DNR & DER*, 89-0007-PC, 9/20/89 (also Park Superintendent 1 and 2)

Real Estate Agent 2, 3 and 4 *Johnson v. DOT & DER*, 81-326-PC, 3/17/83; *Raup v. DOT & DP*, 80-153-PC, 82-0172-PC, 8/4/83

Real Estate Agent 4 and 5 *Jobelius & Herald v. DP*, 80-306, 250-PC, 1/8/82

Real Estate Specialist-Journey and Senior *Johnson v. DER*, 94-0332-PC, 12/20/95

Real Estate Specialist-Senior and Advanced *Mortensen v. DER*, 94-0276-PC, 12/7/95

Regulation and Compliance Investigator 3 and 4 *Augustine & Brown v. DATCP [& DER]*, 84-0036, 0037-PC, 9/12/84; *Blair v. DER*, 84-0098-PC, 11/8/84; *Dolphin v. DATCP & DP*, 79-64-PC, 7/26/82

Regulation Compliance Investigation Supervisor I *Froh & Lach v. DER*, 84-0130, 0136-PC, 2/13/85

Regulation Compliance Investigation Supervisor 2 and 3 *Rhodes v. DOT & DER*, 96-0024-PC, 8/5/96

Research Administrator I *Pamperin v. DER*, 83-0191-PC, 4/25/85; affirmed by Dane County Circuit Court, Pamperin v. State Pers. Comm., 85-CV-2700, 10/30/85 (see also Civil Engineer 6 and 7 - Transportation Management and Planning and Analysis Administrator 2)

Research Analyst 1 *Braith v. DER*, 83-0105-PC, 4/25/84 (see also Research Technician 2)

Research Analyst 2 and 3 *Schultz v. DER*, 83-0119-PC, 84-0252-PC, 85-0029-PC-ER,; *Schultz v. DER & DILHR*, 84-0015-PC-ER, 8/5/87; *Vranes v. DER*, 83-0122-PC, 7/19/84 (see also Research Technician 3)

Research Analyst 4 *Jacobs v. DER*, 83-0123-PC, 4/23/85 (see also Planning Analyst 4)

Research Analyst 4 and 5 *Brassington v. DHSS & DER*,

92-0038-PC, 2/8/93; *Kelekovich v. DER*, 83-0112-PC, 10/26/84; *Powers v. DP*, 80-270-PC, 9/23/81

Research Analyst 6 *Novak v. DER*, 83-0104-PC, 1/17/85 (see also Civil Engineer 5 and 6 - Transportation Supervisor)

Research Technician 2 *Braith v. DER*, 83-0105-PC, 4/25/84 (see also Research Analyst 1)

Research Technician 3 *Schultz v. DER*, 83-0119-PC, 84-0252-PC, 85-0029-PC-ER,; *Schultz v. DER & DILHR*, 84-0015-PC-ER, 8/5/87; *Vranes v. DER*, 83-0122-PC, 7/19/84 (see also Research Analyst 2 and 3)

Resident Care Supervisor *Steinhauer et al. v. DER*, 90-0216-PC, 3/30/93 (and Social Services Supervisor 1)

Revenue Administrator 1 and 2 *Jenkins v. DOR & DER*, 88-0061-PC, 5/31/89

Revenue Administrator 2 and 3 *Davison et al. v. DER*, 90-0243,0263-PC, 5/1/91

Revenue Agent 2 and 3 *Frisch v. DOR& DER*, 92-0744-PC, 1/20/95 (also Tax Conferee 1)

Revenue Agent 3 and 4 *Schmidt v. DER*, 90-0246-PC, 3/10/93; *Mertens v. DER*, 90-0237-PC, 8/8/91

Revenue Auditor 2, 3, 4 and 5 *Mincy v. DER*, 90-0229-PC, 8/28/91; rehearing denied 10/3/91 (also Revenue Tax Specialist 1 and 2)

Revenue Auditor 3 *Wenzel v. DOR & DER*, 96-0037-PC, 11/14/96 (also Revenue Tax Specialist 1)

Revenue Auditor 4 and 5 *Reppen v. DER*, 90-0239-PC, 4/5/91

Revenue Tax Specialist 1 *Wenzel v. DOR & DER*, 96-0037-PC, 11/14/96 (also Revenue Auditor 3)

Revenue Tax Specialist 1 and 2 *Mincy v. DER*, 90-0229-PC, 8/28/91; rehearing denied 10/3/91 (also Revenue Auditor 2, 3, 4 and 5)

Safety Coordinator 1 *LaRose v. DP*, 82-205-PC, 12/23/83 (see also Administrative Assistant 3 and 4)

Secretary I *Hopwood v. UW & DP*, 83-0013-PC, 5/25/83

(see also Program Assistant 1 and 2); *Kirkeeng v. DP*, 79-PC-CS-531, 12/8/82 (see also Program Assistant 2 and Typist)

Secretary 1 – Confidential *Lowe v. DP*, 79-PC-CS-591, 9/30/82 (see also Program Assistant 4)

Secretary 2 *Fonte v. UW & DP*, 82-131-PC, 4/15/83 (see also Program Assistant 4); *Marks v. DOA & DER*, 90-0421-PC, 10/31/91 (also Program Assistant 3-Confidential and 4-Confidential)

Security Officer 2 and 3 *Voigt v. DER*, 84-0113-PC, 6/6/85

Security Officer 3 *Cox v. DER*, 92-0806-PC, 11/3/94 (also Police Officer 2)

Security Officer 4 *Thomsen et al. v. DER*, 84-0202-PC, 6/18/85 (see also Police Officer 2)

Shipping and Mailing Clerk 1 and 2 *Anderson & Parrish v. DER*, 94-0075, 0076-PC, 8/8/95; *Bender v. DOA & DP*, 80-210-PC, 7/1/81; *McCord v. DER*, 85-0147-PC, 3/13/86; *Ripp v. UW & DER*, 91-0057-PC, 11/14/91

Shipping and Mailing Supervisor 1 and 2 *Patterson v. DER*, 94-0098-PC, 12/7/95

Shipping and Mailing Supervisor 2 *Holzbauer v. DILHR & DER*, 87-0074-PC, 1/13/88 (see also Program Assistant Supervisor 3)

Shipping and Mailing Supervisor 2 and 3 *Burgus v. DP*, 81-38-PC, 7/21/81

Social Services Specialist 1 *Meyer-Grover et al. v. DER*, 94-1011-PC, etc., 1/23/96 (also Social Worker-Senior)

Social Services Specialist 1 and 2 *Moran & Kaeske v. DER*, 90-0372, 0382-PC, 1/11/94; *Murphy v. DHFS & DER*, 98-0013-PC, 3/24/99; affirmed Dane County Circuit Court, 99-CV-0944, 2/16/00

Social Services Specialist 2-Juvenile Review Specialist *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96 (also Parole Board Member)

Social Services Specialist 2 *Oghalai v. DER*, 83-0161-PC, 11/8/84 (see also Planning Analyst 4 and Program and Planning Analyst 6)

Social Services Specialist 2-Juvenile Review Specialist *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96 (also Parole Board Member)

Social Services Specialist 2 and 3 *Conroy & Nelson v. DER*, 84-0047, 0048-PC, 11/21/84

Social Services Specialist 2 and 3 – Confidential *Pilster-Pearson v. DER*, 84-0078-PC, 12/6/84 (see also Administrative Assistant 5 - Confidential)

Social Services Supervisor 1 *Steinhauer et al. v. DER*, 90-0216-PC, 3/30/93 (and Resident Care Supervisor)

Social Service Supervisor 3 *Sielaff v. DP*, 78-2-PC, 9/5/79 (see also Human Services Administrator 1)

Social Worker-Senior *Meyer-Grover et al. v. DER*, 94-1011-PC, etc., 1/23/96 (also Social Services Specialist 1)

State Patrol Inspector I and II *DOT et al. v. DER*, 84-0071, etc.-PC, 9/20/85; reversed by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 85-CV-5383, 7/9/86; reversed by Court of Appeals District IV, 86-1483, 1/22/87

Steamfitter-Supervisor, Lead Craftsworker *Doan v. DP*, 78-11-PC, 4/15/82

Stenographer 3 *Lloyd v. UW*, 78-127-PC, 8/30/79 (see also Administrative Secretary 1)

Stock Clerk *Jacobson v. DER*, 94-0147-PC, 4/20/95 (and Storekeeper)

Stock Clerk 1 *Doemel v. DER*, 94-0146-PC, 5/18/95 (and Storekeeper); *Pockat v. DER*, 94-0148-PC, 5/18/95 (and Storekeeper); *Strey v. DER*, 94-0150-PC, 5/18/95 (and Storekeeper)

Storekeeper *Doemel v. DER*, 94-0146-PC, 5/18/95 (and Stock Clerk 1); *Pockat v. DER*, 94-0148-PC, 5/18/95 (and Stock Clerk 1); *Strey v. DER*, 94-0150-PC, 5/18/95 (and Stock Clerk 1); *Jacobson v. DER*, 94-0147-PC, 4/20/95 (and Stock Clerk)

Storekeeper 1 and 2 *Crary v. DNR & DER*, 89-0133-PC, 6/1/90 (also Program Assistant 1 and 2)

Storekeeper 2 *Crocker v. DOT*, 81-28-PC, 12/18/81 (see

also Program Assistant 3)

Student Admissions Examiner 1 and 2 *Blum v. UW & DP*, 78-45-PC, 3/7/79

Surveyor-Senior and Advanced 1 *Urbain v. DOT & DER*, 96-0156-PC, 1/28/98

Surveyor Advanced 2 *Hartling v. DER*, 94-0275-PC, 7/24/95 (also Engineering Specialist-Transportation-Advanced 2)

Tax Compliance Supervisor I and 2 *Danielski et al. v. DER*, 85-0196-PC, 9/17/86

Tax Conferee 1 *Frisch v. DOR& DER*, 92-0744-PC, 1/20/95 (also Revenue Agent 2 and 3)

Tax Representative 1 and 2 *Berger & Hansen v. DOR & DP*, 77-217, 218-PC, 1/22/80

Teacher 3 and 4 *Grueter v. DHSS & DP*, 79-266-PC 9/23/81

Teacher 5 *Boldt v. DP*, 81-96-PC (9/28/83); affirmed by Dane County Circuit Court, *Boldt v. State Pers. Comm.*, 83-CV-2733, 3/6/84; affirmed by Court of Appeals District 111, 84-864, 2/5/85 (see also Librarian 2)

Teacher Supervisor 1 and 2 *Bender v. DER*, 86-0062-PC, 10/29/86

Therapist 2 and 3 *Tiedeman & Marx v. DHSS [DHFS] & DER*, 96-0073, 0085-PC, 4/24/97

Therapy Assistant 2 and 3 *Boxrucker v. DHSS & DER*, 92-0040-PC, 12/29/92; *Jesse v. DHSS & DER*, 92-0036-PC, 9/18/92; *Schrock et al. v. DHSS & DER*, 88-0146-PC, 1/10/90

Tourist Information Assistant I and 2 *Stoikes v. DNR & DER*, 87-0075-PC, 1/13/88

Tourist Promotion Representative *Svensson v. DER*, 86-0136-PC, 7/22/87 (see also Administrative Assistant 5)

Traffic Signal Mechanic-Entry and Journey *Coequyt v. DER*, 92-0189-PC, 8/11/93 (also Engineering Specialist, Engineering Technician-Transportation-4)

Traffic Signal Mechanic-Journey *Pope v. DER, 92-0131-PC*, 8/23/93 (also Engineering

Specialist-Transportation-Journey); *Golde v. DER*, 92-0162-PC, 8/11/93 (also Engineering Technician-Transportation 4)

Transportation District Business Supervisor *Dorsey et al. v. DER*, 94-0471-PC, etc., 1/23/96 (also Administrative Officer 3)

Trooper 2 and 3 *Collins v. DOT & DER*, 84-0105-PC, 5/9/85; *Jansen v. DOT & DP*, 78-170-PC, 1/8/81; affirmed by Dane County Circuit Court, *DOT v. PC (Jansen)*, 81-CV-0648, 9/30/81; *Michalski v. DOT*, 82-228-PC, 6/9/83

Typesetting Input Operator 2 *Lulling & Arneson v. DER*, 88-0136, 0137-PC, 9/13/89 (also Management Information Technician 2 and 3)

Typist *Billingsley & Williams et al. v. DP*, 79-PC-CS-62,etc., 10/2/81 (see also clerical Assistant 2) (see also Program Assistant 1); *Brazeau & Johnson v. DP*, 79-PC-CS-357, 9/4/81; *Burkhalter v. DP*, 80-389-PC, 11/19/81 (see also Program Assistant 1); *Harris v. UW & DER*, 87-0046-PC, 9/26/88 (also Program Assistant 1); *Kirkeeng v. DP*, 79-PC-CS-531, 12/8/82; *Klitzke v. UW (Whitewater)*, 85-0022-PC, 6/18/85 (see also Program Assistant 1 and 2 and Secretary 1); *Marty v. DP*, 79-PC-CS-587, 12/8/80; *Praninskas v. DP*, 79-PC-CS-653, 4/23/81; *Rotter v. DP*, 79-PC-CS-749, 4/23/81 (see also Program Assistant 1); *Schroth v. DP*, 79-PC-CS-935, 11/19/81 (see also Program Assistant 2)

Typist 2 and 3 *Jensen v. UW*, 78-84-PC, 7/5/79

Unemployment Benefit Specialist I *Skille v. DER*, 86-0093-PC, 3/18/87 (see also Unemployment Compensation Associate I and 2)

Unemployment Benefits Specialist 2 and 3 *Anderson v. DILHR & DER*, 84-0238-PC, 7/17/85; Foust *v. DILHR & DER*, 84-0218-PC, 5/22/85; affirmed by Dane County Circuit Court, *DILHR & DER v. Wis. Pers. Comm.*, 85-CV-3206, 7/29/86; *Graham v. DILHR & DER*, 84-0052-PC, 4/12/85

Unemployment Benefit Specialist 3 and 4 *Harris v. DER*, 86-0115-PC, 12/14/89; *McCabe v. DER*, 86-0059-PC, 12/18/86

Unemployment Benefit Supervisor 2 and 3 ***Kennedy-Sheahen v. DILHR & DER*****, 88-0120-PC, 6/27/89;** ***Manthei et al. v. DER*****, 86-0116, etc.-PC, 1/13/88**

Unemployment Benefit Supervisor 6 to 7 ***Shorey v. DILHR & DER*****, 87-0070-PC, 2/1/88**

Unemployment Compensation Associate 1 ***Vyas et al. v. DILHR & DER*****, 94-0241-PC, 2/6/95 (also Employment Security Assistant 3)**

Unemployment Compensation Associate I and 2 ***Skille v. DER*****, 86-0093-PC, 3/18/87 (see also Unemployment Benefit Specialist 1)**

Unemployment Compensation Specialist 2 and 3 ***Graham v. DILHR & DER*****, 84-0052-PC, 4/12/85**

Unemployment Contribution Specialist 3 and 4 ***Day et al. & Jerdee v. DILHR [DWD] & DER*****, 95-0195, 0201-PC, 9/17/96**

Unemployment Contributions Supervisor 3 and 4 ***Day et al. & Jerdee v. DILHR [DWD] & DER*****, 95-0195, 0201-PC, 9/17/96**

University Benefits Specialist 2 (and Educational Services Assistant 3 or 4)

Gunderson v. DER**, 95-0095-PC, 8/5/96**

Veterinary 2 Supervisor and Veterinary 3 Supervisor ***Tuttle, Oinonen & Delaney v. DATCP & DER*****, 85-0153, 0154, 0158-PC, 5/14/86**

Vocational Rehabilitation Specialist 1 and 2 ***Schutz v. DHSS & DER*****, 93-0188-PC, 6/21/94**

Waste Management Engineer - Advanced 1 and 2 ***Mickelson v. DNR & DER*****, 95-0182-PC, 7/23/96**

Waste Management Specialist-Senior and Advanced ***Hein v. DER*****, 92-0583-PC, 4/17/95;** ***Misterek v. DER*****, 92-0511-PC, 4/17/95;** ***Edwards v. DER*****, 92-0423-PC, 11/29/93**

Wastewater Engineer-Developmental and Senior ***Hendricks v. DER*****, 91-0066-PC, 1/8/92**

Wastewater Engineer-Senior ***Stanlick v. DER*****, 94-0157-PC, 10/16/95 (also Private Sewage Plan Reviewer 2)**

Wastewater Management Specialist-Senior and Advanced *Vogen v. DER*, 92-0601-PC, 6/23/94

Water Regulation and Zoning Engineer Advanced 1 and Advanced 2 *Lulloff v. DER*, 90-0347-PC, 4/19/94; affirmed by Dane County Circuit Court, *Lulloff v. Wis. Pers. Comm.*, 94-CV-1633, 6/6/96; affirmed by Court of appeals, *Lulloff v. Wis. Pers. Comm.*, 96-2189, 1/8/98

Water Regulation and Zoning Specialist-Senior and Advanced *Lahti v. DER*, 92-0556-PC, 6/21/94

Water Resources Engineer-Advanced 1 and Advanced 2 *Ostenso v. DER*, 91-0070-PC, 4/13/94, affirmed by Dane County Circuit Court, *Ostenso v. Wis. Pers. Comm.*, 94-CV-1571, 3/18/96; affirmed by Court of Appeals, *Ostenso v. Wis. Pers. Comm.*, 96-1777, 1/29/98

Water Resources Management Specialist-Senior and Advanced *Fenster v. DER*, 95-0160-PC, 8/5/96; *Koshere v. DER*, 92-0531-PC, 12/7/95; *Rasman v. DER*, 92-0435-PC, 6/21/94; *Vennie v. DER*, 92-0624-PC, 5/27/94

Water Supply Specialist-Senior and Advanced *Hutchison v. DER*, 92-0577-PC, 10/24/94; rehearing denied, 12/13/94; *Fitzgerald v. DER*, 92-0308-PC, 1/11/94

Word Processing Operator I and 2 *Rogers et al. v. DP*, 79-PC-CS-738, 12/17/80; *Williamson et al. v. DP*, 79-PC-CS-888, 669, 670, 12/3/81

Word Processing Operator 2 and 3 *Thomas v. UW & DP*, 81-410-PC, 4/2/82

Youth Counselor 1 *Perea v. DHSS & DER*, 93-0036-PC, 3/29/94 (also Custodian 3); *Thompson v. DER*, 86-0138-PC, 12/23/87 (see also Building Maintenance Helper 2)

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 403.12(14) through 403.12(17)(m)

[Previous material] [Next material]

403.12(14) Duration of reclassification process

Where the record did not indicate that prior reclassifications of appellants' positions included either a review by DER or a request by appellants for the classification (Parole Board Member) they were now seeking, the appellants' failure to have appealed from previous decisions which granted their requests to intermediate classifications was not a bar to their classification, in the current appeal, to the PBM level, citing *Vesperman et al. v. DOT & DER*, 93-0101-PC, etc., 2/15/94. *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96

Where a request for reclassification was filed initially in 1973, and, after a series of inconclusive communications, no decision had been received by 1979 when the appellant filed another reclassification request which was denied on May 9, 1980, the reclassification request was not handled in a timely manner, but since the appellant did not establish that the denial was incorrect, he was not entitled to any independent relief. *Shepard v. DP*, 80-234, 237, 239-PC, 6/3/81

403.12(15)(a) Generally

In reviewing reallocation decisions placing positions at the objective rather than entry level in a progression series that requires knowledge and skill "upon appointment," the Commission looks to see whether all of the requirements

for classification at the higher level have been met rather than looking at the majority of duties. *DOT et al. v. DER*, 84-0071,etc.-PC, 9/20/85; reversed by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 85-CV-5383, 7/9/86; reversed by Court of Appeals District IV, 86-1483, 1/22/87

Classification within a progression series is dependent upon an employe's level of proficiency. This level of proficiency is typically reflected in the level of supervision and the types of duties and responsibilities assigned to the position, and is typically measured through evaluation of the quality and quantity of an employe's work product. *Nelson v. DER*, 92-0310-PC, 9/17/96

While the general rule is that classification is based on the nature and level of assigned duties and responsibilities, not on the manner in which such duties and responsibilities are performed by the position incumbent, an exception to this rule is made when reviewing classification within a progression series. *Nelson v. DER*, 92-0310-PC, 9/17/96

Where positions were initially reallocated into a progression series based upon a proposed chart for converting the prior classifications into the new classifications based on length of service of the incumbents in positions, but where the length of service criteria were not included in the new class specifications, the language of the class specifications controlled in the event of any conflict between the length of service and the criteria in the class specification. *Cutts v. DER*, 92-0472-PC, 7/24/95

In an appeal of the effective date of a reclassification, the Commission has jurisdiction to determine whether the respondent's policy specifying the minimum qualifications necessary for reclass comported with the class specifications and, if so, whether respondents applied the policy to the appellant's position in a correct manner. *Heath & Mork v. DOC & DER*, 93-0143-PC, 6/23/94

The respondents' belief that the appellant was contemptuous of agency regulations and had a bad attitude was not an appropriate basis for denying reclassification as part of a progression series where the appellant's job performance was comparable to other employes at the higher level. *Brey v. DHSS & DER*, 89-0051-PC, 2/22/90

Appellants' assertion that the Industries Specialist (IS)

series is a progression series was rejected where there was nothing in the position standard that differentiated the class levels on the basis of specified training, education or experience and where the lowest level (IS 1) was designated as the objective level. *Holubowicz et al. v. DHSS & DER*, 88-0039-PC, 1/25/89

Respondent improperly denied the reclassification of the appellant's position from JSS 2 to JSS 3 where appellant failed to pass a performance evaluation generally referred to as the Quality Performance Index, where the duties and responsibilities assigned to appellant's position were at the JSS 3 level and where the class specifications did not identify JSS as a progression series. *McCabe v. DILHR & DER*, 83-0204-PC, 7/6/84

403.12(15)(m) Appeals sustained and denied

***Collins v. DOT & DER*, 84-0105-PC, 5/9/85**

Auditor 2 and 3 *Haney v. DOT & DER*, 89-0091-PC, 6/15/90

Auditor - Senior and Advanced *Nelson v. DER*, 92-0310-PC, 9/17/96

Officer 1 and 2 *Graff v. DHSS & DER*, 88-0046-PC, 1/25/89

Personnel Specialist 4 and 5 *Turner-Strickland v. DER*, 88-0042-PC, 3/24/89

Social Worker 1 and 2 *Brey v. DHSS & DER*, 89-0051-PC, 2/22/90

403.12(16) Factor Evaluation System

Survey job content questionnaires were discoverable on reallocation appeals, even though the Commission lacks authority to review "survey methodology" per se, because the questionnaires were relevant to the evaluation of appellant's positions on the basis of the classification factors in question. Also, based on the record of the motion to compel discovery, it appeared respondent used the survey

rating panel scores to determine the relative ranking of the positions surveyed, and then classification specifications were developed directly from the position descriptions of the positions so evaluated. Therefore, to the extent that the information sought on this discovery request ran to an attempt by appellants to show that the panel's factor evaluation was erroneous and resulted in their positions being placed in the wrong cluster and hence at the lower class level than should have been the case, it fell within the boundaries of relevance to a reallocation appeal and was properly discoverable. *Mincy et al. v. DER*, 90-0229, 0257-PC, 2/21/91 (ruling by examiner); rehearing denied, 3/12/91

403.12(16)(m) Appeals sustained and denied

Motor Vehicle Representative 4 and 5 *Dell et al. v. DOT & DER*, 87-0202-PC, 10/20/88; rehearing denied 12/8/88; *Schram et al. v. DOT & DER*, 87-0197-PC, 9/26/88; *Zerbel et al. v. DOT & DER*, 87-0032-PC, 2/11/88

Program and Planning Analyst 5 and 6; *Blascoe et al. v. DHSS & DER*, 94-0920-PC, 12/20/95

Regulation Compliance Investigation Supervisor I to Regulation Compliance Investigation Supervisor I *Froh & Lach v. DER*, 84-0130, 0136-PC, 2/13/85

Research Analyst 6 and 7 *Klein v. DHSS & DER*, 95-0074-PC, 12/20/95

403.12(17) Decisions based upon performance analysis

In reviewing the appellant's performance examination for reclassification, the Commission should give controlling weight to an appointing agency's interpretation of its own rules, policies and guidelines if that interpretation is clear and consistent. However, that interpretation is not required where the agency's guidelines were ambiguous. *DILHR v. Wis. Pers. Comm. (Foust)*, Dane County Circuit Court, 85-CV-3206, 7/29/86

In a case where reclassification was based on successful

completion of performance examination, the only question was whether the appellant's score on the exam was correct. *Foust v. DILHR & DER*, 84-0218-PC, 5/22/85; affirmed by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm. (Foust)*, 85-CV-3206, 7/29/86

403.12(17)(a) Generally

In a reclassification appeal where movement to the higher level is based on performance, the Commission must decide whether respondent's determination of unsatisfactory performance in the context of the higher class level was correct and the appellant had the burden of proof to establish by a preponderance of the evidence that respondent's evaluation of her performance was incorrect. Where the appellant challenged the respondent's procedure or policy with respect to which case files to score for purposes of her reclassification review, the more specific question is whether that policy or procedure constitutes an inaccurate or otherwise incorrect method of measuring employe performance. *McNown [Williams] v. DILHR & DER*, 94-0828-PC, 11/14/95

Respondent's policy to exclude from the sample of files selected for evaluating appellant's performance those files which received a failing score for reasons not attributable to appellant's performance on the file is inconsistent with the civil service code, §ER 3.015(2)(a), Wis. Adm. Code, which requires that regrades be determined on the basis of the incumbent employe's performance, not the performance of other employes. *McNown [Williams] v. DILHR & DER*, 94-0828-PC, 11/14/95

In the absence of a showing by the appellant that respondents' discipline-free work record standard was inconsistent with some broader classification requirement, or had been inconsistently applied, this was the standard which was applied by the Commission. *Jackson v. DOC & DER*, 92-0839-PC, 6/23/93

In a Quality Performance Index review of unemployment compensation adjudications, the file must be able to stand by itself, without any additional clarification or explanation by the adjudicator. *Vanover v. DILHR & DER*, 89-0128-PC, 11/16/90

Where the issue for hearing merely referred to the correctness of the reclassification denial decision but the record clearly indicated the appellant's position had been reclassified and the appellant not regraded due to the failure to achieve minimum quality standards, the Commission liberally interpreted the issue for hearing as referencing the regrade decision. *Vanover v. DILHR & DER*, 89-0128-PC, 11/16/90

The appellant was unable to obtain a just cause review of a letter of reprimand in the context of a reclassification appeal where reclassification to the higher level was premised upon a 6 month discipline-free work record, the reprimand was issued within the 6 month period and the appellant could have grieved the reprimand but did not. Reclassification was denied where the appellant could not show that the respondent regularly ignored the 6 month discipline-free work record requirement. *Cohn v. DHSS*, 88-0028-PC, 1/25/89

The appellant's supervisor is not required to have first-hand knowledge of all of the incidents which served as the basis for an unsatisfactory performance evaluation. The supervisor did have first-hand knowledge of some of the incidents and reasonably relied on complaints filed by other staff members regarding the appellant's conduct. Reclassification was denied where one requirement for moving to the higher level was a satisfactory evaluation. *Cohn v. DHSS*, 88-0028-PC, 1/25/89

The respondents' determination of the effective date of the reclassification from Trooper II - Trooper III was rejected when it was affected by the decision of the deputy administrator of the State Patrol to delay approval of the action until the employe met the Measurable Standard of Activity (MSA), sole reliance on that criterion having been disapproved in earlier commission and court decisions. The Commission also held that it was within its province to examine the handling of the request at that level since even though the deputy administrator did not have the authority to finally approve the request, he could effectively delay the effective date by refusing to forward it to personnel, so his action was cognizable pursuant to §230.44(l)(b), Stats., as part of the overall reclassification action, and found that the amount of time taken to actually process the reclassification was not excessive. *Michalski v. DOT*, 82-228-PC, 6/9/83

The Commission determined that a test administered to determine whether Food Service Workers 2 (FSW-2) had attained the experience and demonstrated the performance required for reclassification to FSW-3 was unbiased and job related, that such an examination was not subject to the requirements of §230.16(4), Stats., and that the respondents' requirement of 12 months experience as a FSW-2 before reclassification to FSW-3 was consistent with the provisions of §Pers 3.02(4), Wis. Adm. Code, and not improper. *Pittz v. DHSS & DP*, 79-116-PC, 1/13/81

403.12(17)(m) Appeals sustained and denied

Officer 1 and 2 *Jackson v. DOC & DER*, 92-0839-PC, 6/23/93; *Cohn v. DHSS*, 88-0028-PC, 1/25/89

Unemployment Benefits Specialist 1 and 2 *Vanover v. DILHR & DER*, 89-0128-PC, 11/16/90

Unemployment Benefits Specialist 2 and 3 *Anderson v. DILHR & DER*, 84-0238-PC, 7/17/85; *Foust v. DILHR & DER*, 84-0218-PC, 5/22/85; affirmed by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm. (Foust)*, 85-CV-3206, 7/29/86; *McNown [Williams] v. DILHR & DER*, 94-0828-PC, 11/14/95; *Soulier v. DILHR & DER*, 89-0137-PC, 8/8/90; *Soulier v. DILHR & DER*, 88-0051-PC, 1/25/89

Trooper 2 to Trooper 3 *Collins v. DOT & DER*, 84-0105-PC, 5/9/85

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 403.12(4)(a) through 403.12(4)(f)

[Previous material] [Next material]

403.12(4)(a) Main issue (see also 501.03 and 502.75)

The issue in an appeal arising from a decision to deny appellant's reclassification request was not the appropriateness of the appellant's existing classification, but whether he had established that his position should be classified at the requested level, citing *Ellingson v. DNR & DER*, 93-0057-PC, 5/28/98. *Carpenter v. DOC & DER*, 97-0115-PC, 11/18/98

Simply because the appellant has been assigned a responsibility which previously had been performed by a position at a different class level does not mean that the responsibility is properly identified at that different class level. Most positions are an amalgam of responsibilities which vary in strength when viewed from a classification perspective and it is those responsibilities which consume a majority of the position's time which determine its classification. The addition of higher level duties, while strengthening a position, does not justify the reclassification of a position unless and until the majority of the position's duties satisfy the requirements for classification at the higher level. *Dunn-Herfel v. DOJ & DER*, 94-0043-PC, 12/14/94

The fact that respondents did not telephone complainant's supervisor (who had left state service shortly after the classification survey was completed) as part of their review of the appellant's classification level does not serve as a basis for rejecting the reallocation decision. *Orvis v. DOT & DER*, 93-0119-PC, 11/3/94

The proceeding before the Commission is a hearing de novo in nature. The Commission is not limited to review of the information that was before respondent when the reallocation decision was made or re-evaluated, but considers all admissible relevant evidence at the hearing regardless of whether it had been available to respondent at the time of the initial decisional process. Appellant's position description was entitled to some weight but was not conclusive and the Commission considered appellant's additional evidence concerning his position. *Bluhm v. DER*, 92-0303-PC, 6/21/94

In an appeal of a reclassification, the proceeding before the Commission is a *de novo* review of the classification of the appellant's position and the procedure followed by respondents in reviewing the appellant's request for reclassification need not be evaluated in order to resolve the appeal. *Klein v. UW & DER*, 91-0208-PC, 2/8/93

The Commission reviews the actual duties and responsibilities assigned to a position, and factors related to a perceived bias on the part of the Department of Employment Relations against having jobs above a certain level in the classified service rather than academic staff, were not determinative. *Duesterhoeft v. DER*, 90-0343-PC, 12/17/92

"Examples of Work Performed" are not meant to be all inclusive of every position identified at a particular classification level. It is not unusual to find that the duties and responsibilities of a position might be identified in more than one specification as examples of work performed. *Foris v. DHSS & DER*, 90-0065-PC, 1/24/92

A classification specification must be read in its entirety as one document. Segmenting a specification and attempting to find specific words or phrases which can be matched to the duties and responsibilities assigned to a position is not dispositive of the appropriate classification of a position. The duties and responsibilities of the position and the classification specification must be reviewed in their entirety to determine the best fit. *Foris v. DHSS & DER*, 90-0065-PC, 1/24/92

The Commission defers to the fact situation and at what level the classification specifications identify the majority of a position's duties and responsibilities. The Commission

does not recognize any standard which would arbitrarily consider a 25% change in duties and responsibilities as necessary to warrant reclassification. *Johnson v. DER*, 88-0139-PC, 1/10/90

403.12(4)(b) Method of determining correctness

Classification specifications are comparable to administrative standards. Their application to a particular position involves first determining the facts as to the position and then exercising judgment as to which classification best describes, encompasses or fits the position. Although that process involves some discretion in weighing factors against each other, it is essentially the application of a standard to a set of facts. *Division of Personnel v. State Pers. Comm. (Marx)*, Court of Appeals District IV, 84-1024, 11/21/85

The Commission's decision in *Smith v. DER*, 91-0162-PC, 11/29/93, should not be read as establishing precedent that in job classification appeals, the Commission gives far more weight to evidence provided by witnesses with first hand knowledge of the position(s) being considered than it does to documentary evidence. *Ostenso v. Wis. Pers. Comm.*, 94-CV-1571, Dane County Circuit Court, 3/18/96; affirmed by Court of Appeals, *Ostenso v. Wis. Pers. Comm.*, 96-1777, 1/29/98

There is no general rule requiring the Commission to place more weight on testimony of witnesses with first-hand knowledge of the jobs at issue than written position descriptions, distinguishing *Smith v. DER*, 91-0162-PC, 11/29/93. *Sanders & Hubbard v. Wis. Pers. Comm.*, 94-CV-1407, 1408, Dane County Circuit Court, 11/27/96

Classification specifications are not meant to be the exclusive means for assigning a position to a particular classification. WQES factors may be considered in some instances and comparable positions is also an appropriate tool for use in classification. DER's enabling statute and administrative rules do not constrain it to the use of a single source of information in making classification decisions. *Sanders & Hubbard v. Wis. Pers. Comm.*, 94-CV-1407, 1408, Dane County Circuit Court, 11/27/96

The overlap of two or more job specifications in describing a given position is usual and expected. Once a factual determination has been made as to the specifics of an incumbent's job, they must be applied to the various specifications. The specification providing the "best fit" is used to determine the actual classification. The "best fit" is determined by the specification reflecting job duties and activities within which the employe routinely spends a majority of his/her time. *DER & DP v. PC (Doll)*, Dane County Circuit Court, 79-CV-3860, 9/21/80; appeal settled, Court of Appeals, 80-1689, 2/9/81

Where both class definitions were very specific in their descriptions of the positions they included but they did not include appellant's position, position comparisons became more significant than they would be in other cases where more guidance is available from the class specifications. *Morgan v. DER*, 96-0137-PC, 8/13/97

While a case may not be decided upon evidence or information obtained without the presence of the appellants, the Commission may choose to analyze a case in a manner that is consistent with previous Commission decisions, even though the appellants were not parties to those earlier cases. Prior decisions of the Commission are available to the public and are accessible via the Commission's Digest of Decisions. *Tiedeman & Marx v. DHSS & DER*, 96-0073, 0085-PC, 4/24/97

The hearing before the Commission is a hearing *de novo* rather than merely a review of respondent's original approach to the transaction. In other words, regardless of the degree of soundness of the original process followed by respondent, the Commission bases its decision on the evidence adduced at the hearing. *Swim & Wilkinson v. DER*, 92-0576, 0613-PC, 1/16/97

While the Commission can consider to some extent the legal aspects of a decision issued in another case involving the same class specifications, such as its interpretation of the classification specifications, it cannot consider the findings in making its factual determinations. Giving preclusive effect to the findings would not be appropriate because there was no showing that appellant was a party to that proceeding or was in a position to have obtained judicial review of it. *Vakharia v. DNR & DER*, 95-0178-PC, 12/20/96

The Commission is not limited to reviewing the information that was before respondents when the reclassification decision was made, but may consider all admissible relevant evidence presented at hearing, regardless of whether it had been available to respondents at the time of the initial decisional process. The appellant's position description is entitled to some weight but is not conclusive and the Commission may consider additional evidence concerning the duties performed by the appellant's position, citing *Bluhm v. DER*, 92-0303-PC, 6/21/94. *Rhodes v. DOT & DER*, 96-0024-PC, 8/5/96

Where an appellant's position could plausibly be described by the definition statements of both of the classifications in issue, determination of the appropriate level rests primarily on the examples of work performed and a comparison to other positions in the series, citing *Fay v. DER*, 92-0438-PC, 7/7/94. *Rhodes v. DOT & DER*, 96-0024-PC, 8/5/96

The Commission has no authority to impose upon respondents a specific process to follow in reviewing reclassification requests. *Harder v. DNR & DER*, 95-0181-PC, 8/5/96

Where the class specifications in question were apparently drafted to describe positions which carried out a business management function but the series had been used by respondent to classify positions performing other functions such as the function performed by appellant's position, the Commission relied on the established allocation pattern and on position comparisons to determine the best classification for appellant's position. *Boeding v. DER*, 95-0144-PC, 10/22/96

Where both class specifications in issue describe the majority of appellant's responsibilities, it is appropriate to consider, as factors, the relative specificity of the language of the specifications and whether one of the two specifications was newly created by respondent with an intent to include the appellant's position. *Sunstad v. DER*, 94-0472-PC, 5/28/96

It is appellant's burden to show that his position is correctly classified at the higher or requested level rather than merely showing that the decision to classify his position at the lower level was incorrect, citing *Svensson v. DER*,

86-0136-PC, 7/22/87. The conclusion that appellant's position was excluded from one classification did not mean that appellant had sustained his burden of establishing that his position fell within the alternative classification identified in the issue for hearing. *Ellingson v. DNR & DER*, 93-0057-PC, 5/28/96

Where the appellant's position satisfied elements of both the lower and higher classification levels, appellant still had to show that the higher classification was a better fit for her position. *Miller v. DER*, 95-0077-PC, 4/4/96

A class specification which specifically describes the duties and responsibilities of a position provides a closer fit than a specification which only generally describes such duties and responsibilities, citing *Steinhauer et al. v. DER*, 90-0216-PC, 3/30/93. *Dorsey et al. v. DER*, 94-0471-PC, etc., 1/23/96

The burden of proof in a reallocation case is on the appellant to show she should be reallocated as requested and the appellant must show that her position is correctly classified at the higher level rather than merely showing that the decision to classify her position at the lower level is incorrect. *Meyer-Grover et al. v. DER*, 94-1011-PC, etc., 1/23/96

Where certain class specifications were drafted with the appellants' positions in mind, it buttressed the conclusion that appellants are more appropriately classified at that level, citing *Schermetzler v. DER*, 94-0342-PC, 4/17/95. *Dorsey et al. v. DER*, 94-0471-PC, etc., 1/23/96

Where many changes had occurred since the promulgation of the class specifications, the language from the specifications could not be applied mechanically. *Hagan v. DHSS & DER*, 92-0803-PC, 10/27/95

The key determination is whether the appellants' responsibilities were better described at the lower or higher class level. If the appellants did not meet the requirements for the higher level, the question of whether or not the appellants' positions were placed at the lower level due to an agreement by the union and DER to automatically place all positions in a previous class level at the new lower level would have no effect. *Stensberg et al. v. DER*, 92-0325-PC, etc., 2/20/95

Where the appellant's position could plausibly be described by the definition statements of both of the classifications in issue, determination of the appropriate level rested primarily on the examples of work performed and a comparison to other positions in the series. *Fay v. DER*, 92-0438-PC, 7/7/94

Even though his position did not fall within any of the allocations at the higher level, classification at that level was justified based upon the class factors. Appellant established that changes in his position had occurred and that other positions had been classified at the higher level despite not meeting any of the specified allocations. *Moore v. DNR & DER*, 92-0761-PC, 5/2/94

In the context of a motion for summary judgment, the Commission declined to preclude appellants' positions from a classification definition which preceded the sole listed allocation with the phrase "positions at this level typically function as…." and where the listed allocation did not describe the appellants' positions. *Morrissey et al. v. DER*, 92-0525, 0559-PC, 5/2/94

In addition to the traditional method of comparing duties to class specifications, the Commission also reviewed scores generated by a rating panel which reviewed individual positions, including the appellant's position where certain other positions had been reallocated to the higher level solely by the scores generated by the rating panel. *Mangardi v. DER*, 90-0335-PC, 3/29/94

Where the definition statement in the class specifications did not specifically mention the appellant's specific or general category of responsibilities, it was appropriate to resort to the allocation factors to determine at which of two class levels within the series appellants' positions should be classified. *Moran & Kaeske v. DER*, 90-0372, 0382-PC, 1/11/94

Where a position was not specifically identified by one of the class definitions it was appropriate, according to the class specification, to look to the WQES factors to make a final decision on the appropriate classification for the position. *Smith v. DER*, 91-0162-PC, 11/29/93

Where respondent relied on a rating panel to apply various factors and generate a score for various positions being reviewed and where the appellant's position had not been

reviewed by the rating panel, the Commission compared the appellant's position to various other positions which had been reviewed by the panel. *Smith v. DER*, 91-0162-PC, 11/29/93

Even if the appellant's duties met the criteria in one class specification, a second class specification was more appropriate because it described the appellant's position far more specifically. *Coequyt v. DER*, 92-0189-PC, 8/11/93

Where the Commission was not confronted with a situation where the appellant's subject matter responsibilities were specifically included at one class level, and were not included in the specified allocation pattern at the other level, the rating panel's opinion was not entitled to conclusive effect and the analysis of other evidence at hearing supported a conclusion that the appellant's position was more correctly classified at the higher level. The Commission's decision in *Schmidt v. DER*, 90-0246-PC, 3/10/93, was distinguished. *Lautz v. DER*, 91-0091-PC, 6/23/93

Generally, a classification specification which specifically describe the duties and responsibilities of a position provides a closer fit than a specification which only generally describes such duties and responsibilities. *Steinhauer et al. v. DER*, 90-0216-PC, 3/30/93

Where the question of whether DILHR employe's position was more properly classified at the 1 or 2 level turned on whether the work performed involved "the most advanced level," and there were different rating panels which reached different conclusions, there was no convincing rationale for accepting one set of results over the other, and the position at the 2 level to which respondent sought to compare appellant's position was in a different program area and it was very difficult to draw a comparison, the Commission relied heavily on the testimony of DILHR program experts who were most familiar with appellant's work. *Marx v. DER*, 91-0087-PC, 2/5/93

The role played by the results of a second rating panel convened after the initial implementation of the classification survey were limited where the appellant's position was not reviewed by the panel and there was no basis on the record for the Commission to replicate the scoring system with respect to the appellant's position. The

Commission made general comparisons between the appellant's position and various positions which were rated by the second panel. *Jones v. DER*, 91-0145-PC, 11/13/92

The critical factor in reviewing a reclassification decision is what work has been assigned to and performed by the position. Matters such as employe performance or the volume of work are not relevant classification factors between the Library Services Assistant 1 and 2 levels. The fact that the incumbent has the skills and knowledges to perform higher level functions, even if those higher level functions are available, is irrelevant for reclassification if those higher level functions are not assigned to or performed by the position a majority of the time. *Manning v. UW & DER*, 89-0102-PC, 12/13/90

General classification factors need not be utilized by the Commission in analyzing the appellant's position where the applicable position standard provided that the "class descriptions are also intended to be used as a framework within which positions not *specifically defined* can be equitably allocated on class factor comparison basis" but where appellant's position did not meet the specific description for Librarian 2 but was within the specific description for Librarian 1. *Dayton v. DHSS & DER*, 85-0021-PC, 6/11/87

Evidence of actual work performed and pertinent class specifications are necessary to determine the proper classification of a position and the appellant's failure to present any class specifications or any testimony related thereto caused dismissal of the case. *Klemmer v. UW & DER*, 85-0134-PC, 9/4/86

In interpreting one portion of a position standard, other portions of the standard may be relied upon, just as in construing a statute, the intent of a given section must be derived from the act as a whole. *DOT et al. v. DER*, 84-0071,etc.-PC, 9/20/85; reversed by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 85-CV-5383, 7/9/86; reversed by Court of Appeals District IV, 86-1483, 1/22/87

At any given time, the existing class specifications are analogous to a set of statutes or rules. In order to determine the best fit for individual positions not specifically identified, the specifications must be interpreted in the same

way that statutes and rules must be interpreted in order to apply them to particular fact situations. *Klepinger v. DER*, 83-0197-PC, 5/9/85; reversed on other grounds by Dane County Circuit Court, *DER v. Wis. Pers. Comm. (Klepinger)*, 85-CV-3022, 12/27/85

A reclassification request transaction normally involves a three part analysis. First, the classification level of the position must be determined. Second, it must be determined whether the changes in the job which precipitated the reclassification were logical and gradual. Third, it must be determined whether the incumbent of the position has performed the permanently assigned duties and responsibilities for a minimum of six months and should be regraded and allowed to stay in the position at the higher level, or whether the position should be opened to competition. *Usabel v. DER*, 84-0005-PC, 12/6/84

403.12(4)(c) Position description signed by appellant

The appellant did not sustain her burden of proof on the question of her level of supervision where the two class levels in question were clearly differentiated in terms of the level of supervision they received, respondent had identified the level of supervision as a key factor in its analysis, the appellant called her supervisor during the hearing but failed to ask any questions relating to the level of supervision and the appellant's position description, which listed the more extensive degree of supervision and was signed by both the supervisor and the appellant, was left as the only evidence in the record on the point. *Orvis v. DOT & DER*, 93-0119-PC, 11/3/94

A signed position description is not conclusive and must be considered in conjunction with what the rest of the record reflects about the nature and level of complexity of appellants' work. *Olson et al. v. DER*, 92-0071-PC, etc., 9/9/94

Appellant's position description was entitled to some weight but was not conclusive and the Commission considered appellant's additional evidence concerning his position because the proceeding before the Commission is a hearing de novo in nature. *Bluhm v. DER*, 92-0303-PC, 6/21/94

Appellant failed to present a preponderance of evidence that his position was at the higher level despite presenting his own conclusions that the majority of his work was at that level where his assertion was directly contradicted by his official position description, signed by management. *Carroll v. DER*, 86-0112-PC, 1/8/87

In determining which duties were required for classification at different levels within a series, the Commission focused on the position standards of the new classification rather than on the standard position descriptions that had been developed to describe duties actually assigned by management. *DOT et al. v. DER*, 84-0071,etc.-PC, 9/20/85; reversed by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 85-CV-5383, 7/9/86; reversed by Court of Appeals District IV, 86-1483, 1/22/87

403.12(4)(d) Majority of duties, significance of time allocated to particular functions

It is the majority of job duties which is relevant in determining the classification to which a particular position should be allocated. *Prust & Sauer v. Wis. Pers. Comm.*, Dane County Circuit Court, 97-CV-3328, 7/8/98

A position's class level resulting from a classification survey is typically determined based on the duties and responsibilities actually assigned to the position during a discrete and limited period of time immediately prior to the effective date of the survey. However, where individual project assignments could last for many months and where the mix of projects and employes at any given time might preclude assigning an employe to a project of similar complexity to those projects normally assigned the employe, the normal classification rule is inapplicable. *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

There was no basis for requiring the appellants to spend the majority of their time carrying out their responsibilities relating to adult institutions where the position standard merely required that the responsibilities be carried out in terms of both adult and juvenile institutions. The Commission rejected respondent's argument that was based on the fact that the majority of work examples involved

tasks associated with adult institutions. *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96

Where the classification specifications at the higher level required professional library functions for a "significant" amount of time, the term "significant" was not defined in the specifications, respondent's classification analyst testified he used the term to mean between 25% and 49% but half of the position descriptions offered by respondent as representative of the higher level did not meet the 25% standard and ranged as low as 19%, the appellant's position, with less than 19% devoted to these functions, was properly classified at the lower level. *Sandow v. DER*, 94-0180-PC, 3/8/95

Where the classification language at the higher level required the employe to actually perform the work of overhauling engines and the appellant had been in his position nearly five years and had never performed an overhaul although he was capable of doing so and he would have been given this assignment if the need arose and if his supervisor decided it was cost-effective to do the job in-house, he did not meet the language of the specification. *Weber v. DER*, 94-0066-PC, 11/22/94

In deciding between one of two class levels for a position, the decision usually will turn on the level at which the majority of the duties and responsibilities of the position can be identified. A corollary of this principle is that two positions do not have to be identical to be classified in the same classification. That is, two positions may be somewhat different in terms of their levels of responsibility, authority, etc., but may still properly be in the same classification if the degree of difference is not sufficient to justify classification at the higher level. Where 65% to 75% of the appellant's position was essentially identical to other positions classified at the lower level, the majority of appellant's position was not at the higher level. *Miller v. DHSS & DER*, 92-0840-PC, 1/25/94

If changes in time percentages result in the majority of the position's time being spent performing higher level duties and responsibilities, then the position satisfies the requirements for classification at the higher level, regardless of whether any change in the substance or function of these duties and responsibilities has occurred and regardless of the actual size of the change in the

percentages of time consumed by certain functions. *Austin et al. v. DER*, 90-0285, 0294-PC, 10/31/91

Where the class specifications required employes in the Carpenter class to perform "construction carpentry work at the journeyman level of skill, normally on a *full time* basis" and the appellant performed carpentry work a majority of the time but spent at least 15% of his work in a different craft, his position did not fall within the definition of Carpenter. *Landphier v. DER*, 90-0373-PC, 8/21/91

Significant change, for purposes of reclassification, is that amount of change which causes the majority of a position's duties to be at a different class level. *Ghilardi & Ludwig v. DER*, 87-0026, 0027-PC, 4/14/88

The entire position must be considered when making a classification decision. All of the duties must be considered, not just the newly added duties and responsibilities. The fact that new duties, which fell within the higher level specifications, constituted less than a majority of the total duties and responsibilities of the appellant's position was not determinative. *Shorey v. DILHR & DER*, 87-0070-PC, 2/1/88

Appellant's position was classified correctly where appellant admitted that approximately 75% of his duties involved a function specifically allocated to the lower of the two classifications in issue. *McCabe v. DER*, 86-0059-PC, 12/18/86

When the appellant performs a function (collection maintenance and preservation) at least 5% to 10% of his work time in addition to performing a primary function (cataloging) more than 50% of his time, then he meets the Librarian I specification which calls for two or more library functions in contrast to the Library Associate 2 classification which calls for one library function. *Wager v. DP*, 81-0134-PC, 6/18/86

When a function is performed for no more than 2% or 2½% of the appellant's work time, the significance of performing that function is minimal for classification purposes. *Monk v. DP*, 81-0118-PC, 6/4/86; *Badsha v. DP*, 81-135-PC, 5/29/86

In reviewing reallocation decisions placing positions at the objective rather than entry level in a progression series that

requires knowledge and skill "upon appointment," the Commission looks to see whether all of the requirements for classification at the higher level have been met rather than looking at the majority of duties. *DOT et al. v. DER*, 84-0071,etc.-PC, 9/20/85; reversed by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 85-CV-5383, 7/9/86; reversed by Court of Appeals District IV, 86-1483, 1/22/87

In order to be reclassified, more than 50% of the appellant's work must be at the higher level. *Tiser v. DNR & DER*, 83-0217-PC, 10/10/84

A position is not entitled to reclassification because some aspects of the work involved fall within the higher class, particularly if those aspects comprise less than a majority of the total duties and responsibilities of the position. *Fonte v. UW & DP*, 82-131-PC, 4/15/83

In order to be reclassified, normally the majority of the duties and responsibilities of a position must be at the higher level. *Bender v. DOA & DP*, 80-210-PC, 7/1/81

403.12(4)(f) Classification of other specific positions

Where it was undisputed that respondent relied on information contained in a 1988 position description when it classified a comparison position, a 1993 position description for the same position that was admitted into the record had limited relevance. *Tiedeman & Marx v. DHSS & DER*, 96-0073, 0085-PC, 4/24/97

Where the testimony was that the appellant's positions were virtually identical to positions which were the subject of another appeal previously decided by the Commission, that determination was not conclusive *per se* on the appellants and they are not foreclosed from trying to establish a contrary result. However, under these circumstances, it is not inappropriate for respondent to rely on the classification of the essentially identical positions, distinguishing *Moran & Kaeske v. DER*, 90-0372, 0382-PC, 1/11/94. *Swim & Wilkinson v. DER*, 92-0576, 0613-PC, 1/16/97

A reclassification should not be based on a comparison to a misclassified position. *Seidel v. DER*, 95-0081-PC, 7/23/96

Use of comparable positions is a well established tool in classification cases and it can be useful to demonstrate how respondent has interpreted or applied the criteria listed in the classification specifications, citing *Jacobson v. DER*, 94-0147-PC, 4/20/95. *Harder v. DNR & DER*, 95-0181-PC, 8/5/96

It is appropriate for the Commission to follow the rationale delineated in a case previously decided by the Commission, even though that decision is pending appeal. The earlier decision of the Commission was an exhibit of both parties. *Harder v. DNR & DER*, 95-0181-PC, 8/5/96

If the classification level of a comparison position is based upon a mistaken interpretation of the class specifications, the Commission will not compound the error by repeating the mistake in regard to the present appeal, citing *Augustine & Brown v. DATCP & DER*, 84-0036, 37-PC, 9/12/84. *Harder v. DNR & DER*, 95-0181-PC, 8/5/96

A comparison to a position of a coworker who chose not to appeal the reallocation decision should not serve as the sole basis for deciding the proper classification of the appellants, citing *Moran & Kaeske v. DER*, 90-0372, 0382-PC, 1/11/94. *Aslakson et al. v. DER*, 91-0135-PC, etc., 10/22/96

Where a degree of leeway was necessary to justify the conclusion that certain positions continued to be correctly classified under an outdated position standard, the appellants were entitled to the same degree of interpretive leeway when considering whether their positions met the requirements of the same position standard. DER's analyst was aware that the other positions did not meet the position standard yet there was no indication that she reported this discrepancy to anyone else at DER or at the employing agency. *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96

Where a position is clearly misclassified on the basis of the criteria set forth in the class specification, and respondent has acted to remedy the mistake, appellant cannot rely on the initial, mistaken classification to support her case. *Mortensen v. DER*, 94-0276-PC, 12/7/95

Use of comparable positions as a classification tool is a well established practice in classification cases. Comparable positions can be useful to demonstrate how respondent has

interpreted or applied the criteria listed in the class specifications. *Jacobson v. DER*, 94-0147-PC, 4/20/95

Even though a position identified by appellants did not appear to meet the requirements for classification at the lower of the two class levels in question, the conclusion that one position may be mis-classified did not automatically push the appellants' positions to the higher class level. *Stensberg et al. v. DER*, 92-0325-PC, etc., 2/20/95

Identification of a position as a representative position in a class specification is not binding if it does not fit within the definitional language of the class specification. *Holton v. DER & DILHR*, 92-0717-PC, 1/20/95

Where the appellant's position could plausibly be described by the definition statements of both of the classifications in issue, determination of the appropriate level rested primarily on the examples of work performed and a comparison to other positions in the series. *Fay v. DER*, 92-0438-PC, 7/7/94

Where the evidence supported the conclusion that a comparable position functioned very similarly to the appellants' positions and where respondent relied on and defended the classification of the comparable position at the higher level, there was strong support for the appellants' contention that their positions belonged at the higher class level. *Coffaro & Thompson v. DER*, 92-0348, 0352-PC, 7/27/94

It was appropriate to consider a comparison position, even though the incumbent did not perform all of the duties specified in the position description, where the position had been newly created and was vacant at the time of its initial classification. The duties and responsibilities actually performed by the successful candidate could not have affected the classification decision. *Vogen v. DER*, 92-0601-PC, 6/23/94

Even though it appeared, based upon the record established at hearing, that a comparable position had been misclassified at the higher level, as long as the appellants' positions did not meet the higher level specifications, the Commission declined to compound any error which might exist as to the comparable position. *Roberts & DeLaMater v. DER*, 92-0481, 0638-PC, 3/9/94

Where respondents acknowledged that the appellant's predecessor was misclassified at the AA3 level prior to his retirement, it did not provide a basis for moving the appellant's position from PA3 to PA4, citing *Augustine & Brown v. DATCP [& DER]*, 84-0036 0037-PC, 9/12/84. *Olson v. DOA & DER*, 92-0731-PC, 2/3/94

In a case arising from the initial decision to reallocate a group of positions to a particular class level and where the class specifications directed an analysis based upon the application of specified allocation factors which were to be applied to similar positions, it was inappropriate to decide the proper classification of the appellants' positions solely by comparing them to the positions of their co-workers who chose not to appeal the reallocation decision. *Moran & Kaeske v. DER*, 90-0372, 0382-PC, 1/11/94

While the scope of an appeal of a reclassification decision is appropriately limited to the makeup of the subject position as it was considered by the employer, i.e., essentially up to the date the request was submitted, there is no per se barrier to considering a PD which was signed at a later date as a position comparison. *Boxrucker v. DHSS & DER*, 92-0040-PC, 12/29/92

To rely on the incorrect classification of a comparable position as a basis for classifying appellant's position would simply perpetuate the error, where respondents' witnesses acknowledged the position was misclassified, although no action had been taken to correct the error, and where the misclassification was based on the unambiguous language of the specifications. *Gold v. UW & DER*, 91-0032-PC, 6/11/92

The degree of weight to be attached to a position comparison depends on the circumstances. Where two adjacent positions on an organization chart are reallocated at the same time as a result of the same classification survey, it cannot be argued successfully that because the higher-level position was reallocated to the 3 level, the lower-level position is locked in to the 2 level. *Eagon v. DER*, 90-0398-PC, 3/23/92

It is very difficult to conclude that the respondents' decision not to reclassify the appellant's position to the higher level is incorrect where the appellant failed to produce evidence of any comparable position at the higher level, especially

where the language of the position standard is very general. *Schmidt v. Sec. of State & DER*, 89-0129-PC, 1/11/91

Where the Storekeeper 2 class specification specifically required leadwork responsibilities and subsequent to the denial of appellant's reclassification request by DNR, DER changed its application of the specification so that leadwork responsibility was no longer required, the Commission upheld the DNR decision and refused to apply DER's new interpretation where the rationale for DER's decision was completely undeveloped on the record and the leadwork requirement in the class specification was unambiguous. *Crary v. DNR & DER*, 89-0133-PC, 6/1/90

An agency cannot avoid the effect of an unfavorable position comparison merely by contending that the comparison position is misclassified where the only material distinction between the two classification levels at issue is the size of the section supervised, size is nowhere defined in the position standard and the respondent has taken no action regarding the allegedly misclassified comparison position. *Jenkins v. DOR & DER*, 88-0061-PC, 5/31/89

The appellant failed to sustain his burden of proof where three of the four position comparisons favored respondent and only one favored the appellant. *Jenkins v. DOR & DER*, 88-0061-PC, 5/31/89

Where the reclassification decision hinged on whether appellant's position could be considered to have lead work duties and responsibilities, it was appropriate to look at other positions that had been determined to have such duties and responsibilities. The employer is not required to conform its current reclassification decisions to all previous reclassification decisions, whenever made, nor must the employer always decide that an error was made in a prior transaction in order to be able to avoid its effect as a comparison. However, where respondent had neither admitted that certain earlier reclassifications were erroneous nor had contended that there had been an intervening change in policy or circumstances and had suggested that other documentation (prior position descriptions) supported their reclassifications, the Commission relied on evidence in the record that the appellant's position was comparable to the other positions as to their lead work responsibility at the time of their reclassification. *Arny v. PSC & DER*, 86-0200-PC, 10/27/87

Where the incumbent in the comparable position also had a pending appeal before the Commission seeking reclassification to the same level as the appellant was seeking in the instant appeal, the Commission considered the comparable position in determining the appropriate classification of the appellant's position absent some evidence that the determinative factor in respondent's decision to deny the reclassification of the comparable position was a comparison to the appellant's position. *Critchley v. UW & DER*, 86-0037-PC, 1/8/87

Position comparisons are particularly useful when evaluating the classification of positions from among relatively generally worded class specifications, particularly where there may be little or nothing in the language of the competing class specifications to provide guidance in the classification of the position in question. *Saindon v. DER*, 85-0212-PC, 10/9/86

To the extent that two "comparable" positions are erroneously classified at a certain level, they would not provide a basis for also classifying the appellants' positions at that level. *Danielski et al. v. DER*, 85-0196-PC, 9/17/86

The appellant was not entitled to reclassification based upon seven position descriptions alleged by appellant to represent comparable positions classified at the higher level where the overwhelming evidence was that the seven positions failed to meet the classification specifications for the higher level. *McCord v. DER*, 85-0147-PC, 3/13/86

Comparisons of an appellant's position to similar positions often will clarify relatively nebulous distinctions or criteria that exist after reviewing merely the relevant positions' standards. Based on the classification of the most similar comparables, a particular classification is usually suggested. *Langteau v. UW & DER*, 83-0246-PC, 2/13/85

To reclassify a position simply because another comparable position is inappropriately classified would compound an error and would ignore the requirement that the majority of the duties and responsibilities of a position satisfy the applicable specifications before the position may be classified at a particular level. *Augustine & Brown v. DATCP [& DER]*, 84-0036, 0037-PC, 9/12/84

Reclassification of appellant's position was not supported by

the fact that the duties currently performed by two comparable positions had changed so that those two positions might no longer justify classification at the higher levels. *Card v. UW & DER*, 83-0198-PC, 2/2/84

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 403.125 through 420

[Previous material] [Next material]

403.125 Refusal to conduct survey

The administrator's decision refusing to conduct a survey was sustained, inasmuch as this authority was discretionary and there was no showing of an abuse of discretion. *Johnson v. DP*, 78-28-PC, 4/3/79

403.127 Regrade

In deciding whether regrade of the incumbent is appropriate, factors to consider include whether the initial assignment of the new or expanded duties and responsibilities was consistent with the position's classification at the time of such assignment; whether there had been a "wholesale change" in a position requiring a new set of abilities; and whether the change occurred all at once or gradually. *Olson v. DILHR [DWD] & DER*, 96-0015-PC, 10/22/96

Regrade of the incumbent was appropriate where the change occurred gradually and the initial assignment to perform the new duty was a logical outgrowth of appellant's existing responsibilities. Therefore, there was no wholesale or fundamental change in appellant's position requiring a new set of abilities. *Olson v. DILHR [DWD] & DER*, 96-0015-PC, 10/22/96

The proper effective date of appellant's regrade after reallocation was the 1991 date he became the incumbent in the position via a transfer where the previous incumbent appealed a 1990 reallocation decision that was not decided

in his favor until 1993, after he vacated the position and appellant was serving in the position. The Commission rejected respondents contention that the higher class level of the position would invalidate the appellant's transfer in 1991 and would require him to compete for the higher classified position. The reallocation decision in 1993 did not have a retroactive effect with respect to the transfer, a different type of personnel transaction. *Zentner v. DER*, 93-0032-PC, 6/23/94

In an appeal from an allocation decision, i.e. the decision setting the classification level for a new position, §ER 3.015(3), Wis. Admin. Code, which sets forth conditions in which incumbents of filled positions which will be reallocated or reclassified may not be regraded, is inapplicable. Even if such circumstances were present, the employe's statutory right to appeal a reallocation or reclassification decision would not be barred. *Holton v. DER & DILHR*, 92-0717-PC, 11/29/93

An important factor in determining whether to require competition or regrade the incumbent after a change in duties which occurred prior to the subject classification decision is whether, based upon the specifications in existence at the time of the change in duties, the new duties would justify a higher classification level than the one previously assigned to the position. The regrade issue arose after the Commission concluded that assigning appellant's position to use a new technology justified a class level higher than the one to which the appellant's position had been reallocated. *Sannes v. DER*, 92-0085-PC, 8/23/93

Respondent improperly denied the reclassification of the appellant's position from JSS 2 to JSS 3 where appellant failed to pass a performance evaluation generally referred to as the Quality Performance Index, where the duties and responsibilities assigned to appellant's position were at the JSS 3 level and where the JSS class specifications did not identify it as a progression series. Because the appellant's level of performance was not at the JSS 3 level, he was not immediately eligible to be regraded and so was not entitled to a salary increase. However, the respondent is not required to make a determination as to regrade on the basis of one QPI evaluation rather than two such evaluations. *McCabe v. DILHR & DER*, 83-0204-PC, 7/6/84

403.13 Reorganization of a department

Respondent's decision in 1989 to reallocate another employe's position in the work unit from Unemployment Benefit Specialist 3 to 4 to "correct an error" where the reallocation was due in part to a reorganization and other changes occurring subsequent to 1986 did not provide a basis for overturning respondent's decision in 1986 to reallocate the appellant's position from Unemployment Specialist 4 to 3, where the 1986 decision was a result of a classification survey and where the appellant's position in 1986 was clearly identified by the position standard at the 3 level. *Harris v. DER*, 86-0115-PC, 12/14/89

403.15 Salary and pay range

Where an attorney's regrade date was July 1, 1979, the effective date of 1979-1980 pay plan, it was error to have used the pre-existing pay plan to compute the regrade before adding the 7% general economic adjustment, notwithstanding that the regrade in the new pay plan had an adjustment built in, inasmuch as the pre-existing pay plan no longer was in effect. *Stellick v. State Pers. Comm.*, Dane County Circuit Court, 81-CV-4398, 1/28/82

The respondent erred in administering the pay plan with respect to the determination of the appellant's physician's responsibility add-on level, but the appellant failed to establish that he should be at a higher level and therefore the action of the administrator was affirmed. *Zechnich v. DHSS & DP*, 79-4-PC, 9/29/80; affirmed by Dane County Circuit Court, *Zechnich v. State Pers. Comm.*, 80-CV-6092, 2/27/81

403.16 Transfer

Where an employe's transfer was approved by a section chief under the director (now administrator) rather than the director personally, this was permissible since only discretionary duties and powers are nondelegable and the

approval of transfers by the director is ministerial rather than discretionary. *Sheda v. State Pers. Board*, Dane County Circuit Court, 158-117, 11/16/78

The proper effective date of appellant's regrade after reallocation was the 1991 date he became the incumbent in the position via a transfer where the previous incumbent appealed a 1990 reallocation decision that was not decided in his favor until 1993, after he vacated the position and appellant was serving in the position. The Commission rejected respondents contention that the higher class level of the position would invalidate the appellant's transfer in 1991 and would require him to compete for the higher classified position. The reallocation decision in 1993 did not have a retroactive effect with respect to the transfer, a different type of personnel transaction. *Zentner v. DER*, 93-0032-PC, 6/23/94

Appellant failed to show that the administrator's decision to approve the transfer of the appellant to a position at a new location violated a civil service rule or statute where the appellant met the qualification requirements by occupying a position with the same classification as the position to which transfer was sought. *Stasny v. DOT & DP*, 79-192-PC,etc., 1/12/81

Where there was no explicit evidence of the administrator's approval, pursuant to §230.29, Stats., of the transfer, but the record contained a copy of a memo to the administrator requesting his approval, and containing a notation that the administrator verbally had approved the transfer, it will be inferred, in part in keeping with the presumption of administrative regularity, that the required approval had been given. *Harley v. DOT & DP*, 80-77-PC, 11/7/80

The provisions of §230.29, Stats., which state that the administrator is to approve a transfer, are mandatory rather than directory, and the failure to comply with a mandatory statute voids the transaction. *Stasny v. DOT*, 78-158-PC, 10/12/79 (Note: this case was affirmed by the Dane County Circuit Court in all respects except for restoration of sick leave. *DOT v. Pers. Comm. (Stasny)*, 79-CV-6102, 6130, 2/27/81)

420 Relief awarded (see also 130)

The Commission lacks the authority to award retroactive compensation to persons who were denied reclassification. *DER & DP v. PC (Doll)*, Dane County Circuit Court, 79-CV-3860, 9/2/80; appeal settled by Court of Appeals, 80-1689, 2/9/81 In the settlement agreement, the Division of Personnel agreed not to construe the circuit court decision as contrary to the proposition that compensation is appropriately paid from the effective date of the reclassification, regardless of whether reclassification is by DP action on its own motion or as required by lawful order.

In an appeal arising from the decision not to reclassify appellant based on an evaluation of her performance, and where appellant showed that the failure to consider one file as part of the review was contrary to the civil service code, the proper remedy was to review an additional ten files to determine whether appellant obtained an overall passing score, in accord with the respondent's normal procedure for analyzing performance. *McNown [Williams] v. DILHR & DER*, 94-0828-PC, 11/14/95

Where a non-resident was illegally permitted to compete for a vacant position and was ultimately hired to fill the vacancy, the respondent was required to cease and desist from a similar violation of the civil service code with respect to any future examinations and certifications in which the appellant participated. The appellant had ranked tenth on the examination and his name was not among the top five candidates whose names were certified and interviewed for the vacancy. *Smith v. DMRS*, 90-0032-PC, 8/3/95; explained further in ruling on request for reconsideration, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96

The plain language of §230.43(1)(a), Stats., indicates it is meant to cover intentional action against a particular individual or individuals, rather than a violation of the civil service code that has the effect of inuring to the detriment of some of the examinees. The statute is intended to deal with an active, purposeful intent to interfere unlawfully with individual rights under the civil service code, either by helping or hindering particular persons. It is not intended to criminalize any violation of the civil service code that results in adverse effects on a group of examinee's chances for success in a competitive selection process. *Smith v.*

DMRS, 90-0032-PC, 8/3/95; explained further in ruling on request for reconsideration, 1/5/96; affirmed by Dane County Circuit Court; _Smith v. Shaw et al._, 90 CV 5059, 96 CV 283, 12/10/96

There was no violation of §230.43(1)(a), Stats., when respondent improperly permitted someone to participate in the selection process which caused the appellant, as well as all others, to have a lower rank on the exam register than he otherwise would have had. Even if respondent had properly disqualified the candidate who was ultimately hired, the appellant's rank would have improved from tenth to ninth, but appellant still would not have been certified. It would be speculative to rely on the mere possibility that the three other candidates ranked ahead of the appellant would have dropped out of consideration for one reason or another and that appellant ultimately might have been certified and selected. Appellants' request that he be appointed to the position in question and that the incumbent be removed as a remedy to respondent's illegal action of certifying an out-of-state candidate for a vacancy, was rejected. _Smith v. DMRS_, 90-0032-PC, 8/3/95; explained further in ruling on request for reconsideration, 1/5/96; affirmed by Dane County Circuit Court; _Smith v. Shaw et al._, 90 CV 5059, 96 CV 283, 12/10/96

A conclusion that an appointment was made outside the 60 day period referenced in §230.25(2)(b), Stats., would not result in an order voiding the certification or the appointment. _Seitter v. DOT & DMRS_, 94-0021-PC, 3/9/95

If the positions in question would be reclassified retroactively from Area Services Specialist 5 to Administrative Assistant 5 for the period from January 17, 1988 through October 8, 1989, the reclassification would have no effect on the actions of the appellants in demoting into the positions because the demotions were effective on January 15, 1988, i.e. prior to the effective date of the reclassification. In addition, the degree of hardship that would be suffered by the appellants who were not eligible to have demoted in lieu of layoff into an Administrative Assistant 5 classification would also preclude the reclassification having a retroactive effect on the demotions. _Gardipee, et al. v. DER_, 88-0004-PC, 1/24/92

Where the respondent, in deciding that the appellant did not qualify for Handicapped Expanded Certification, relied

improperly on criteria that were required to have been, but were not, promulgated as administrative rules, and where the Commission could not conclude that a correct result under the statute would have been to have certified the appellant as HEC eligible, the only appropriate remedy was to remand the matter to the respondent to exercise its statutory discretion without reliance on the invalid criteria. *Schaub v. DMRS*, 90-0095-PC, 10/17/91

Where the respondents' denial of reclassification, which was rejected by the Commission, was based on an analysis of the classification level of appellant's duties and responsibilities and did not address the question of whether the changes in the position had been logical and gradual, the Commission remanded the matter "for action in accordance," which, presumably would result in a determination as to whether there had been a logical and gradual change. *Beaumier v. DNR & DER*, 90-0203-PC, 1/24/91

Where the Commission rejected the respondent's requirement of certain training and experience criteria for the Civil Engineer 1 - Transportation exam, the Commission declined appellant's request to void the current register. The record did not establish that the persons on the register were unqualified and the only purpose of voiding the register would be to delay any possible appointments until appellant would have a chance to compete under revised training and experience standards, a purpose which did not meet the standards necessary for invalidating a register established in §230.44(4)(d), Stats. *Heikkinen v. DOT*, 90-0006-PC, 4/16/90

Where the failure to certify the appellant for the position in question was the result of an unintentional administrative oversight and there was no showing of willfulness, the Commission ordered the respondents to cease and desist from engaging in the activities which resulted in the subject error. *Rose v. DHSS & DMRS*, 89-0035-PC, 10/25/89

The only appropriate remedy in an appeal arising from an invalid exam is to order respondent to cease and desist from utilizing the subject exam or an employment register created using the results of the subject exam. It would be inappropriate to certify the appellant for or appoint the appellant to the subject position. It would also be inappropriate for the order to encompass any other exam,

register, certification, or position. *Doyle v. DNR & DMRS*, 86-0192-PC, 87-0007-PC-ER, 11/3/88

While the Commission cannot explicitly award back pay in a reclassification/reallocation appeal, an appeal filed by a represented employe relating to the effective date for a reallocation decision is not barred by §111.93(3), Stats. *Popp v. DER*, 88-0002-PC, 5/12/88

The improper denial of a reclassification does not give rise to entitlement to back pay, citing *Seep v. DHSS*, 83-0032-PC, 83-0017-PC-ER, 10/10/84; affirmed, *Seep v. Pers. Comm.*, 140 Wis. 2d 32 (Ct. of App., 1987). *Ghilardi & Ludwig v. DER*, 87-0026, 0027-PC 4/14/88

Where the appellants were successful in a reclassification appeal, the Commission could not effectuate a remedy requiring the extension of the appellants' reinstatement rights at the higher classification level because the sole respondent, DER, had no authority with respect to reinstatement. *Ghilardi & Ludwig v. DER*, 87-0026, 0027-PC 4/14/88

The Commission lacked the authority to award back pay for the period of time the appellant was assigned duties consistent with the higher classification level in a case where appellant had met his burden of showing the position he filled was entitled to reallocation to the higher level and that it should be filled via competition. The Commission declined to grant appellant's request that the Commission order respondent to complete the recruitment and selection process by a date certain. *Shorey v. DILHR & DER*, 87-0070-PC, 2/l/88

Appellants, who were successful in an appeal of a reallocation of their positions, were not entitled to an explicit back pay award given the limitation in §230.43(4), Stats., to employes who have been unlawfully "removed, demoted or reclassified," citing *Seep v. Personnel Commission*, 140 Wis 2d 32, 41-42 (Ct. App, 1987) *Manthei et al. v. DER*, 86-0116, etc.-PC, 1/13/88

The Commission declined to award the appellant any relief where she had been illegally certified for a vacant position, hired and then fired by the appointing authority less than two weeks into her probationary period, where the appellant had declined an opportunity to return to her former position and where she had been paid for her work in the position to

which she had been illegally certified. The appellant was not entitled to back pay until the date of the Commission's hearing because to do so would place her in a far better position than she would have been in absent the error by DMRS. *Carey v. DMRS & DOR*, 85-0179-PC, 3/13/86

The question of whether the Commission has the authority to issue an order requiring back pay in a reclassification appeal was not determinative as to the issue of relief. The Commission assumed that the respondent would take action to establish the correct effective date in accordance with ch. 335 of the Wisconsin Personnel Manual which requires that "reclassification actions be made effective at the start of the second pay period following effective receipt…." citing *McGrew v. UW & DP*, 81-443-PC, 1/7/83. *Tiffany et al. v. DHSS & DER*, 83-0225-PC, 7/6/84

Although there were violations of §230.16, Stats., in an exam process with respect to its timing and nonverbal feedback from one of the oral exam panel members, there was no showing of obstruction or falsification as set forth in §230.43(l), Stats., and therefore the Commission could not require the removal of the incumbent, and the remedy would be to require the respondents to cease and desist from further violations of the kind found in this case. *Zanck & Schuler v. DP*, 80-380-PC, 81-12-PC, 12/3/81

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 403.12(4)(g) through 403.12(4)(x)

[Previous material] [Next material]

403.12(4)(g) Size of unit

> **Where the sole material distinction between two classification levels was the size of the section supervised and the appellant's position had not changed in terms of the section size, there had been no "logical and gradual change" upon which to base a reclassification, and any change in the classification of appellant's position due to a different conclusion about the size of appellant's section would have to be effectuated by a reallocation. *Jenkins v. DOR & DER*, 88-0061-PC, 5/31/89**

In a reclassification appeal within the Personnel Manager series, where the number of employes at the institution determine the classification level, it is inappropriate to equate classified employes with unclassified employes, when the personnel function related to unclassified student employes and faculty and academic staff is less comprehensive than the personnel work performed with respect to the classified employes. *Barry v. DP*, 80-346-PC, 11/19/81

> **Where the sole criterion in the class specifications distinguishing the Personnel Manager 3 and 4 levels is the size of the institutions, other factors such as non-personnel duties not mentioned in the specifications cannot be considered in determining whether to reclassify the positions in question. *Shepard v. DP*, 80-234, 237, 239-PC, 6/3/81**

> **The record failed to support the appellants' contention that notwithstanding specific numerical criteria for institutional size contained in the class specifications, an allocation**

pattern utilizing different criteria had been developed over time. The positions which had been reallocated to a level apparently higher than justified by the numerical criteria in the class specifications were done so on the basis of DHSS representations that impending mergers, which in fact never ensued, would bring the institutions up to the required size levels. The fact that the respondent initiated corrective action with respect to these positions shortly before the hearing was not found to be attempted intimidation. *Shepard v. DP*, 80-234, 237, 239-PC, 6/3/81

403.12(4)(h) Duties changed

Reclassification decisions are to be based upon the duties assigned to the position as of the effective date of the request. *Gutierrez v. DOT & DER*, 96-0096-PC, 4/11/97

A tentative work assignment which was inconsistent with previous levels of responsibility assigned to the appellant and which was never carried out by the appellant was not an appropriate basis for reallocating the appellant pursuant to a classification survey. *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

A position's class level resulting from a classification survey is typically determined based on the duties and responsibilities actually assigned to the position during a discrete and limited period of time immediately prior to the effective date of the survey. However, where individual project assignments could last for many months and where the mix of projects and employes at any given time might preclude assigning an employe to a project of similar complexity to those projects normally assigned the employe, the normal classification rule is inapplicable. *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

Where many changes had occurred since the promulgation of the class specifications, the language from the specifications could not be applied mechanically. *Hagan v. DHSS & DER*, 92-0803-PC, 10/27/95

Simply because the appellant has been assigned a responsibility which previously had been performed by a position at a different class level does not mean that the responsibility is properly identified at that different class

level. Most positions are an amalgam of responsibilities which vary in strength when viewed from a classification perspective and it is those responsibilities which consume a majority of the position's time which determine its classification. The addition of higher level duties, while strengthening a position, does not justify the reclassification of a position unless and until the majority of the position's duties satisfy the requirements for classification at the higher level. *Dunn-Herfel v. DOJ & DER*, 94-0043-PC, 12/14/94

Appellants' duties were unchanged from the time their positions had been reallocated until the time they filed their reclassification request two years later. Therefore, there had been no logical and gradual change as required for reclassification. *Henderson et al. v. DHSS & DER*, 92-0804-PC, 8/18/94

While some technological advancement is implicit in any set of duties, there can be technological developments which have a dramatic effect on the set of responsibilities assigned to a particular position and may justify classification of the position at a higher level, even though the new technology is not referenced in the specifications. *Sannes v. DER*, 92-0085-PC, 8/23/93

Nothing in the civil service code prevents management from adding duties in connection with a reallocation nor from assigning duties in addition to those that were there on appointment. *Ponto v. DER*, 90-0181-PC, 4/17/92

The appellant's position was properly classified at the Facilities Repair Worker 1 level, even though the appellant had been performing Painter duties for the period from October, 1987 to January 24, 1989, where he had been reassigned FRW 1 duties starting January 25th and the effective date of his classification request was January 26th. *Seay v. DER*, 89-0117-PC, 1/24/91

In conducting its reclassification analysis, the Commission must focus on the duties assigned to the position and being performed on the effective date. The analysis may not be based on duties which had been performed earlier but were no longer assigned by the appointing authority to the position on the effective date. *Schmidt v. Sec. of State & DER*, 89-0129-PC, 1/11/91

The appellants' argument that their positions had been

eroded by the assignment of certain of their duties to other positions did not help the appellants' reclassification appeal. The general rule is that the appointing authority, or management, has the right to assign and reassign duties and responsibilities to employes, §230.06(1)(b), Stats., DER has the authority to determine the classification of positions based on the duties and responsibilities assigned by management, §230.09(1), (2)(a), Stats., and it is only DER's decision which can be appealed to the Commission, §230.44(1)(b), Stats. *Holubowicz et al. v. DHSS & DER*, 88-0039-PC, 1/25/89

The Commission found that the appellant's duties had not changed materially since the effective date of the personnel classification survey, and that his duties were still adequately described by the more specific Chief, Protective Services specification (rather than the more general Administrative Officer 2 specification). *Hamele v. DER*, 85-0172-PC, 8/6/86

403.12(4)(j) New specifications applied

A tentative work assignment which was inconsistent with previous levels of responsibility assigned to the appellant and which was never carried out by the appellant was not an appropriate basis for reallocating the appellant pursuant to a classification survey. *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

Where both class specifications in issue describe the majority of appellant’s responsibilities, it is appropriate to consider, as factors, the relative specificity of the language of the specifications and whether one of the two specifications was newly created by respondent with an intent to include the appellant’s position. *Sunstad v. DER*, 94-0472-PC, 5/28/96

The conclusion that appellant's position was more appropriately classified at a certain level was buttressed by the evidence in the record that the relevant specifications were drafted with the appellant's position in mind. *Schermetzler v. DER*, 94-0342-PC, 4/17/95

Even though a definition statement identified two allocations, one for a "department expert" and one for a

"districtwide expert," a district position which did not meet the terms of the specifications which referred to positions responsible for "developing… statewide policies and programs…" and "considered to be the statewide expert in their assigned program area" could not be classified at that higher level. *Fitzgerald v. DER*, 92-0308-PC, 1/11/94

Where appellant's position adequately met the more specific language of the newer classification, it was more properly classified there than in the more general language of the older classification. *Bloom v. DER*, 92-0088-PC, 8/25/93

The Commission declined to accept the respondent's argument that respondent could not determine whether the appellant's position met an allocation in the specifications at the higher level because the employing agency had not yet developed the criteria for measurement. The respondent cannot abdicate its responsibility to classify positions as provided in §§ 230.09(l) and (2)(a), Stats. *Miller v. DER*, 85-0066-PC, 4/16/86

Where appellant requested reclassification in April of 1984 from ES 4 to ES 5, the fact that appellant's position was reallocated to ES 5 as a result of the approval of new position standards for the ES series in April of 1985 as irrelevant to the issue before the Commission. *Rasman v. DNR & DER*, 85-0002-PC, 8/1/85

403.12(4)(k) Promise of advancement

Equitable considerations, such as an alleged statement by the survey coordinator that the appellant's position would remain at its previous classification, do not prevail over the requirements of the class specifications. *Doemel v. DER*, 94-0146-PC, 5/18/95; *Pockat v. DER*, 94-0148-PC, 5/18/95; *Strey v. DER*, 94-0150-PC, 5/18/95

A promise to reclassify, based upon the assumption of duties upon another employe's retirement, is not binding on an agency, citing *Ryczek v. Wettengel*, 73-26, 7/3/74. *Olson v. DOA & DER*, 92-0731-PC, 2/3/94

403.12(4)(l) Teacher credits

The Commission sustained the respondents' action refusing, pursuant to Pers. 13.06(5), Wis. Adm. Code, to reclassify the appellants to Teacher 6 when they satisfied the requirements therefore during their probationary periods. *Kluttermann et al. v. DHSS & DP*, 78-12,etc.-PC, 8/19/80; affirmed by the Dane County Circuit Court, *Kluttermann v. State Personnel Commission*, 80-CV-5546, 3/2/82

403.12(4)(m) Time served in lower class

In an appeal of the effective date of a reclassification, the Commission has jurisdiction to determine whether the respondent's policy specifying the minimum qualifications necessary for reclass comported with the class specifications and, if so, whether respondents applied the policy to the appellant's position in a correct manner. *Heath & Mork v. DOC & DER*, 93-0143-PC, 6/23/94

The operative reclassification standards which require two years of experience as an Officer 1 precluded the reclassification of the appellant's position where over the course of the 24 month period, the appellant had worked in a different classification and was on medical leave for a total of 7 months. *Graff v. DHSS & DER*, 88-0046-PC, 1/25/89

Where the requirements for reclassification from Officer I to Officer 2 include two years of "experience" at the Officer I level, the most reasonable interpretation of the term "experience" is actual work experience. Periods in which the appellant was on approved medical leaves of absences do not qualify as Officer I "experience." *Conley v. DHSS*, 83-0075-PC, 5/23/84

Respondents' decision to require one year service as Trooper 2 before considering for reclassification to Trooper 3 was sustained where the employe had a 20 year hiatus from enforcement duties as Motor Vehicle Inspector before move to Trooper 2 position. *Snider v. DP/DOT*, 81-254-PC, 3/8/82

The Commission affirmed the respondents' refusal to consider the appellant for reclassification to Trooper 3, noting that although the appellant had 111-2 years prior experience as a Trooper, that had been followed by 61-2

years as an investigator, a non-law enforcement position, and that the work of a trooper is performed highly independently, with little immediate supervision, and with correspondingly little opportunity to observe and evaluate performance. *Mittelstadt v. DOT & DP*, 81-31-PC, 10/2/81

The Commission determined that the respondents' requirement of 12 months experience as a FSW-2 before reclassification to FSW-3 was consistent with the provisions of §Pers. 3.02(4), Wis. Adm. Code, and not improper. *Pittz v. DHSS & DP*, 79-116-PC, 1/13/81

Where the attorney's pay plan required 11-2 years of employment as a prerequisite to regrade eligibility, it was held that time in layoff status could not be credited towards the period of employment. *Germane v. DILHR*, 79-50-PC, 8/30/79

403.12(4)(n) Employe retention

Employe retention is normally not a classification factor. *Theobald v. DP*, 78-82-PC, 1/8/82

403.12(4)(o) Other quantitative factor

The Commission declined to disregard the score given appellant's position by one of nine rating panel members where there was testimony that the panel results were within the accepted 80% standard deviation, there was no reason to suspect bias on the part of the rater in question and the record did not enable an analysis of the effect on all of the positions' scores if one rater's score would be excluded for each position. *Lulloff v. DER*, 90-0347-PC, 4/19/94; affirmed by Dane County Circuit Court, *Lulloff v. Wis. Pers. Comm.*, 94-CV-1633, 6/6/96; affirmed by Court of appeals, *Lulloff v. Wis. Pers. Comm.*, 96-2189, 1/8/98

Such quantitative factors as staff size, may be a recognized factor in the classification process. Usually greater size has positive implications from a classification standpoint. *Ballhorn v. DILHR & DER*, 87-0033-PC, 12/17/87

A rating system used by DNR in classifying assistant area

forester positions could serve as a useful classification tool but could not override the requirements of the classification specifications. *Jones v. DNR & DER*, 85-0127-PC, 1/24/86

Certain quantitative factors, such as the size of an automotive fleet managed by a position, can be a recognized factor in the classification process. *Dworak v. DP*, 79-PC-CS-198, 2/9/82

403.12(4)(r) Field audit

Appellant offered no persuasive evidence that respondent acted improperly by not conducting an onsite audit of his position prior to the reclassification decision or that the failure to conduct such an audit would have affected the outcome of respondent's decision. *Wedul v. DOT & DER*, 85-0118-PC, 2/6/86

During the Commission's hearing on an appeal of a reclassification denial, consideration of the procedure followed by the respondent in making its findings would serve no useful purpose and would have no probative value in relation to the merits of the appeal because the Commission's hearing on an appeal is *a de novo* proceeding and the facts to be considered are not limited to the findings made by the respondent in its review of the request. *Rasman v. DNR & DER*, 85-0002-PC, 8/1/85

The failure of the Division of Personnel to have field audited the positions in question was not improper, as this is not required by statute, and the division's classification manual, which requires a field audit where it appears that a reclassification request may be denied, was established only for agencies acting on a delegated basis pursuant to §230.05(2), Stats. *Shepard v. DP*, 80-234, 237, 239-PC, 6/3/81

403.12(4)(s) Temporary duties/responsibilities and continuing responsibilities

Work performed on a temporary basis does not qualify a position for reclassification unless the work has been performed for a number of years and the timing of future

changes cannot be predicted with any degree of certainty, citing *Miller v. DHSS & DER*, 91-0129-PC, 5/1/92. *Gutierrez v. DOT & DER*, 96-0096-PC, 4/11/97

A tentative work assignment which was inconsistent with previous levels of responsibility assigned to the appellant and which was never carried out by the appellant was not an appropriate basis for reallocating the appellant pursuant to a classification survey. *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

A position's class level resulting from a classification survey is typically determined based on the duties and responsibilities actually assigned to the position during a discrete and limited period of time immediately prior to the effective date of the survey. However, where individual project assignments could last for many months and where the mix of projects and employes at any given time might preclude assigning an employe to a project of similar complexity to those projects normally assigned the employe, the normal classification rule is inapplicable. *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

Where the employing agency planned to fill a new position through competitive examination but a hiring freeze existed which delayed the process and appellant volunteered to perform the duties of the new position knowing the agency planned to conduct permanent hires on a competitive basis, the work assignment was temporary. *Wenzel v. DOR & DER*, 96-0037-PC, 11/14/96

Where appellants performed their work on a seasonal or cyclical basis, it was appropriate to look at their duties being performed throughout the year in order to insure an accurate classification decision. *Stensberg et al. v. DER*, 92-0325-PC, etc., 2/20/95

Filling in for a position due to a vacancy is a temporary rather than a permanent assignment and is not entitled to consideration for classification purposes. A position which, over time, becomes vacant on a periodic basis, cannot be considered a permanent vacancy, just as filling in for some of the duties of the periodically vacant position cannot be considered a permanent responsibility. *Stensberg et al. v. DER*, 92-0325-PC, etc., 2/20/95

Where the classification language at the higher level required the employe to actually perform the work of

overhauling engines and the appellant had been in his position nearly five years and had never performed an overhaul although he was capable of doing so and he would have been given this assignment if the need arose and if his supervisor decided it was cost-effective to do the job in-house, he did not meet the language of the specification. *Weber v. DER*, 94-0066-PC, 11/22/94

Those duties appellant performed only in the absence of his supervisor may not serve as the basis for a classification decision. *Leiterman v. DER*, 92-0557-PC, 9/9/94

An acting or temporary assignment, in the absence of a showing that the assignment continued for an extensive period of time, cannot serve as the basis for a reclassification. *Dolsen v. UW & DER*, 93-0066-PC, 6/21/94

The fact that a co-worker classified at a higher level performed appellant's duties when the appellant was on vacation would not be determinative in terms of establishing the proper classification level of the co-worker's position. *Ksicinski v. DER*, 92-0798-PC, 6/21/94

The Commission did not consider a vacant lead position in terms of the impact it could have on the appellants' positions if the vacant position was to be filled in the future. It was highly speculative as to whether the position would ever be filled and, if so, what the assigned duties would be. *Medora et al. v. DER*, 90-0324-PC, etc., 9/18/92

Classification of a position is based on its permanently assigned duties and responsibilities and cannot be affected by sporadic acting assignments, citing *Graham v. DILHR & DER*, 84-0052-PC, 4/12/85. *Siewert v. DER*, 91-0235-PC, 9/18/92

Work performed on a temporary basis does not qualify a position for reclassification unless the work has been performed for a number of years and the timing of future changes cannot be predicted with any degree of certainty. *Miller v. DHSS & DER*, 91-0129-PC, 5/1/92

The fact that the supervisory position over the appellants' positions was vacant for a period or was filled temporarily by someone who may not have been able to have operated at a full performance level is immaterial from a classification standpoint so long as the position has not been

vacant for so long that the vacancy has become in effect the status quo. *Holubowicz et al. v. DHSS & DER*, 88-0039-PC, 1/25/89

Higher level work performed on a temporary basis does not qualify a position to be classified at the higher level. *Graham v. DILHR & DER*, 84-0052-PC, 4/12/85

While the Commission recognizes that as a general proposition, positions are not reclassified on the basis of temporary job changes, there comes a point after duties have been in place for a number of years and the timing of future changes cannot be predicted with any degree of certainty, that the changes cannot be considered "temporary." *Fredisdorf et al. v. DP*, 80-300-PC, 3/19/82

Reclassification to Personnel Specialist 6 requires "…responsibility for a significant segment of a major program on a continuing basis…" The Commission held that the appellant's work with the clerical survey was "continuing," where it began in 1976 and was still continuing in 1981. *Belongia v. DP*, 79-263-PC, 6/30/81

403.12(4)(t) Job sharing

Where the appellants shared a position and were co-directors of a unit pursuant to a team management concept, and were jointly accountable for all the projects in their unit whether or not at that moment a specific project had been assigned to them, a reclassification decision must take into account the level of duties and responsibilities of the entire position. *Cirilli & Lindner v. DP*, 81-39-PC, 8/4/83

403.12(4)(u) Professional and paraprofessional duties

In considering whether the appellants performed professional engineering, the Commission considered the definition of professional engineering set forth in §443.01, Stats., rather than relying on the definition of "professional employe" found in §111.81(15), Stats., and concluded that the appellants did not function the majority of their time at the professional engineering level. *Miller et al. v. DER*,

92-0122-PC, etc., 5/5/94

Appellant's work of designing specialized instrumentation and equipment was considered professional where the appellant established that he performed this responsibility independently and was given free rein to come up with solutions when a problem arose or whenever he thought of a way to improve existing equipment. *Peck v. DER*, 92-0130-PC, 11/18/93

While some duties performed by appellants involved making engineering judgments, the majority of their duties did not involve the application of engineering principles. *Kaminski et al. v. DER*, 91-0121-PC, 9/30/93

Responsibilities to provide guidance to staff on the applicable policies and procedures as well as to insure that the policies and procedures were followed constituted paraprofessional work. *Havel-Lang v. DHSS & DER*, 91-0052-PC, 8/26/92

Complainant's position was responsible for exercising considerable discretion and making many "judgment calls", but was not responsible for developing and maintaining statistical information reporting systems as described in the professional level Research Assistant series. Rather, complainant operated a statistical information reporting system as set forth in the position standard at the paraprofessional level of Research Technician 3. *Schultz v. DER*, 83-0119-PC, 84-0252-PC, 85-0029-PC-ER, 8/5/87; *Schultz v. DER & DILHR*, 84-0015-PC-ER, 8/5/87

The Commission could not conclude that the appellant's duties were at a professional level where there was no evidence that the position incumbent needed a college degree or equivalent training which is a characteristic of the Educational Services Assistant series and also is cited in the statutory definition of "professional employe" at §111.81(15)(a)4, Stats. *Saindon v. DER*, 85-0212-PC, 10/9/86

Appellant's position was found not to have "professional" duties and responsibilities as that term is used in §111.81(11)(a) where appellant was not required to apply professional research methodologies but took raw data and put it in a more useful form for other parties and in doing so used procedures and/or formulas which have been established over time and which must be constantly

reapplied to new data. *Vranes v. DER*, 83-0122-PC, 7/19/84

Commission found that appellant did not have duties and responsibilities of a "professional" nature. *Braith v. DER*, 83-0105-PC, 4/25/84

Appellants were found to not have "professional" duties and responsibilities in their help desk positions where they were primarily involved in diagnosing and solving the less complex operational problems encountered with data process systems designed, programmed, installed, maintained and operated by others. *Ellsworth & Parrell v. DP*, 82-0021, 0022-PC, 8/23/83

403.12(4)(v) Volunteer/committee responsibilities

Service on certain committees that had some input into the development of statewide policies, which was common to many positions in a wide range of class levels, fell considerably short of the requirement of having responsibility for "developing, implementing, monitoring and evaluating statewide policies and programs" and "considered to be the statewide expert in their assigned program area." *Koch v. DER*, 92-0555-PC, 8/22/94

A district position which had some input into statewide policies as a member of a committee and sometimes provided advice that would otherwise normally come from a central office expert fell short of meeting the requirement in the class specifications of being responsible for "developing, implementing, monitoring and evaluating statewide policies and programs" and being "considered to be the statewide expert in their assigned program area." *Rasman v. DER*, 92-0435-PC, 6/21/94

The fact that the appellant volunteers in performing library preservation responsibilities does not cause his efforts to be uncompensable where responsibilities are ongoing, professional and programmatic. *Wager v. DP*, 81-0134-PC, 6/18/86

403.12(4)(w) Leadwork/supervisory/management responsibilities

Where the class specifications recited the section chief as the level where management responsibilities began, it was improper to rely upon the definition of management in §111.81 for setting the bureau level as the beginning level. *Murray v. Wis. Pers. Comm.*, Dane County Circuit Court, 93-CV-2661, 4/29/94

Subordinate Limited Term Employes were not considered in determining whether or not the appellant qualified as a supervisor within the meaning of the class specifications at issue. *Ellingson v. DNR & DER*, 93-0057-PC, 5/28/96

Where, on an ongoing and continuous, albeit somewhat unpredictable basis, engineers were assigned to the appellants in the maintenance unit from among the group of positions designated "pool" positions and, when it did occur, the appellants carried essentially the same supervisory authority as did their counterparts in the design and construction sections, appellants supervised the pool positions as required by the class specifications. There was nothing in the definition of "supervisor" found in §111.81(19), Stats., that requires an employe to have authority year around in order to be considered a supervisor. The reference on the position description form to supervision of "subordinate employes in permanent positions" is a means of distinguishing permanent positions from project or limited term positions. *Von Ruden et al. v. DER*, 91-0149-PC, etc., 8/31/95

Appellants , who were employed as construction representatives, did not meet the classification requirement for leadwork even though other persons in the same classification had periodically been assigned to the same construction project as appellants and appellants retained project oversight authority and accountability where the assignments were either temporary or project specific and where appellants' supervisors did not intend to create superior/subordinate relationships. *Runyan v. DER*, 94-0052-PC, 9/21/94

Where the Manager class specifications in question acknowledged the typical allocation of a "management" position was at the section head level, the inquiry before the Commission was whether the appellant's position required the exercise of "similar functions and responsibilities" within the meaning of §111.81(13). *Pamperin v. DER*, 90-0321-PC, 7/25/94

The appellant failed to show that he participated in a significant manner in the formulation, determination and implementation of management policy and was "engaged predominantly in executive and management functions" where he spent only 5% of his duties on the determination of policy and up to 30% on supervision. *Pamperin v. DER*, 90-0321-PC, 7/25/94

A supervisor does not have to have more than one subordinate in order to meet the definition in §111.81(19), Stats. *McKnight v. DER*, 92-0493-PC, 5/2/94

Appellants, who, as project managers, directed the work of other state employed architects and engineers, oversaw the work of "contract employes" who were paid by the state but were not in the classified service and also had a directory role with respect to outside architect/engineer firms and had a role in evaluating the performance of those firms, were not supervisors. *Germanson et al. v. DER*, 91-0223-PC, etc., 5/20/93

Appellant was functioning as a leadworker consistent with the testimony of her supervisors where she guided, scheduled and trained LTEs as well as permanent employes. *Jesse v. DHSS & DER*, 92-0036-PC, 9/18/92

The reference in the Civil Engineer-Transportation-Supervisor 5 definition to "11 or more FTE" is a reference to state employes, and non-state employes cannot be considered for classification purposes under that language. The language in the specifications was meant to mean actual direct supervision, including all that entails in the way of staffing, discipline, grievance processing, etc., of state employes. *Felsner et al. v. DER*, 91-0199, etc.-PC, 7/8/92, explained further in *Von Ruden et al. v. DER*, 91-0149-PC, etc., 7/8/92

Where the Storekeeper 2 class specification specifically required leadwork responsibilities and subsequent to the denial of appellant's reclassification request by DNR, DER changed its application of the specification so that leadwork responsibility was no longer required, the Commission upheld the DNR decision and refused to apply DER's new interpretation where the rationale for DER's decision was completely undeveloped on the record and the leadwork requirement in the class specification was unambiguous. *Crary v. DNR & DER*, 89-0133-PC, 6/1/90

Supervision of permanent and non-permanent employes cannot be strictly equated for classification purposes. It is axiomatic that permanent employes have more rights and their supervision entails more responsibility. *Smetana v. DNR & DER*, 89-0055-PC, 2/12/90

The appellant was found not to be a "leadworker" as used in the Management Information Technician (MIT 4) position standard where she provided certain training and technical advice for other technicians in the unit but there was no evidence indicating the appellant assigned work or was accountable for the majority of the work of the other technicians. *Davidson v. DP*, 81-291-PC, 1/20/83

403.12(4)(x) Level of supervision

The distinction between serving as an assistant project manager rather than as a project manager is one of responsibility rather than of the relative degree of supervision received. *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

An employe's work performance can have an impact on the assigned level of supervision and on the types of duties and responsibilities assigned, both of which are key classification considerations. *Nelson v. DER*, 92-0310-PC, 9/17/96

The appellant did not sustain her burden of proof on the question of her level of supervision where the two class levels in question were clearly differentiated in terms of the level of supervision they received, respondent had identified the level of supervision as a key factor in its analysis, the appellant called her supervisor during the hearing but failed to ask any questions relating to the level of supervision and the appellant's position description, which listed the more extensive degree of supervision and was signed by both the supervisor and the appellant, was left as the only evidence in the record on the point. *Orvis v. DOT & DER*, 93-0119-PC, 11/3/94

A position which did not have the authority to effectively recommend formal discipline such as suspensions and discharges and was not identified as the first step in the grievance procedure lacked significant components in the

classification's definition for supervisor. *Koch v. DER*, 92-0555-PC, 8/22/94

Appellant was properly designated as receiving "limited" rather than "general" supervision where, in comparison to another employe whose position description referenced "general" supervision, the appellant's work was reviewed more closely both for content and form, his meetings outside the work unit were more closely monitored and his position description referenced "limited" supervision. *Stemrich v. DER*, 91-0058-PC, 6/4/93

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 500 through 503.06

[Previous material] [Next material]

---

500 PROCEDURE AND RELATED TOPICS [APPEALS]

500.50 Filing fee

The 30 day time limit for receipt of a filing fee is mandatory rather than directory. The appeal was dismissed for failing to timely tender the filing fee where the fee was due to be received by the Commission on Columbus Day, Monday, October 13, which is a business day for the Commission but is also a federal holiday, the fee was mailed via Express Mail for "next" day delivery by complainant in Maryland on October 10th, but it was not received by the Commission until October 14th. *Runde v. DMRS*, 97-0088-PC, 12/17/97

When the Commission relies on another state agency to receive and distribute its mail, that agency is acting on behalf and in place of the Commission with respect to the receipt of mail from the postal service. Because the Commission inferred that it would have received appellant's filing fee in a timely manner but for the failure of the Department of Administration to have processed its mail on a Friday and subsequent Monday, the delivery of the filing fee to DOA was equivalent to delivery to the Commission. The envelope enclosing the filing fee had been postmarked in Milwaukee on Thursday, August 8, and was correctly addressed, but did not reach the Commission's offices until August 13. *Bouche v. UW & DER*, 96-0095-PC, 10/29/96

The filing fee requirement of §PC 3.02, Wis. Adm. Code, was enacted, at least in part, to discourage filing of clearly non-meritorious claims, such as claims over which the Commission clearly has no jurisdiction. *Van Beek v. DER*, 96-0072-PC, 6/25/96

Appellant's request for waiver of the filing fee requirement was denied where the requirement applies to all appeals filed on and after June 1, 1996, appellant mailed his appeal in the afternoon of Friday, May 31st, and it was received on Monday, June 3rd. Neither the respondent nor appellant's employing agency had any obligation to notify appellant of the potential of a new Commission administrative rule. *Van Beek v. DER*, 96-0072-PC, 6/25/96

501.01 Evidentiary standard

It is the respondent's burden to show "by a preponderance of credible evidence that there was just cause for the termination of appellant," a standard equated by the Court in Reinke to "a reasonable certainty by the greater weight or clear preponderance of the evidence." *Hogoboom v. Wis. Pers. Comm.*, Dane County Circuit Court, 81-CV-5669, 4/23/84

The standard of judgment to be applied by the Commission is that of a reasonable certainty, by the greater weight of the evidence, citing *Reinke v. Pers. Bd.*, 53 Wis. 2d 123 (1971). *Jackson v. State Personnel Board*, Dane County Circuit Court, 164-086, 2/26/79

In cases involving the termination of employes with permanent status in the state classified civil service, the appointing authority has the burden of proving the discharge was for just cause and to sustain its action, the appointing authority must prove to a reasonable certainty, by the greater weight of credible evidence, that the discharge was for just cause, citing *Bell v. Personnel Board*, 259 Wis. 602, 49 N.W. 2d 889 (1951). *Higgins v. Wis. Racing Bd.*, 92-0020-PC, 1/11/94

Regardless of whether the conduct underlying the discipline would also support a criminal charge, the Commission is to apply a standard of judgment of "a reasonable certainty, by the greater weight of the credible evidence" in discipline

cases. *Blake v. DHSS*, 82-208-PC, 1/4/84

501.02(1) Just cause in disciplinary actions (including constructive discipline)

It is the obligation of the Commission to determine a reasonable level of discipline and the action of the employing agency is not material to the determination by the Commission. *DNR v. Pers. Comm (Hess)*, Dane County Circuit Court, 80-CV-5437, 6/24/81

In a constructive demotion appeal, appellant had the burden of proof to establish that management acted to reduce her position with the intent of effectively disciplining her because of dissatisfaction with her performance. *Davis v. ECB*, 91-0214-PC, 6/21/94

The Commission has subject matter jurisdiction over an alleged constructive disciplinary demotion. In order to prevail, an employee must establish not only that changes in assigned duties and responsibilities imposed by management reduced the effective classification of the position, but also that the appointing authority had the intent to cause this result and to effectively discipline the employe. *Davis v. ECB*, 91-0214-PC, 6/12/92

It is not necessary for the respondent to show that the charged activity actually impaired the performance of the duties of the appellant's position or the group with which he works. Respondent needs only show that the activity could be reasonably concluded to have had a tendency to do so. *Paul v. DHSS*, 87-0147-PC, 4/19/90

In deciding whether the appellant's misconduct had a tendency to impair the performance of the duties of the appellant's position or the group with which he works, it is appropriate to consider whether, if the appellant's actions had become known to the public, it would have had a tendency to undermine the public image of the institution. *Paul v. DHSS*, 87-0147-PC, 4/19/90

The underlying questions in an appeal of a discharge were: 1) whether the greater weight of credible evidence shows that appellant committed the conduct alleged by respondent in its letter of discharge; 2) whether the greater weight of

credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline, and; 3) whether the imposed discipline was excessive. *Mitchell v. DNR*, 83-0228-PC, 8/30/84

In considering the severity of the discipline to be imposed, the Commission must consider at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the *Safransky* test, it did or could reasonably be said to have a tendency to impair the employer's operation, and the employe's prior work record with the respondent. *Barden v. UW-System*, 82-237-PC, 6/9/83

In determining whether the decision to terminate the appellant's employment with the agency, and not to demote him was excessive discipline, the Commission cannot second guess the employer, and render its own independent decision in the matter, but can only examine the record to determine whether the action taken was excessive. *Ruff v. State Investment Board*, 80-105-PC, etc., 8/6/81

The issue of whether there is just cause for the discipline imposed includes the question of whether the imposition of the discipline violated appellant's right to freedom of speech where appellant's speech activity was readily discernible from the face of the letter imposing the suspension. *Hess v. DNR*, 79-203-PC, 8/19/80; affirmed by Dane County Circuit Court, *DNR v. Wis. Pers. Comm. (Hess)*, 80-CV-5437, 6/24/81

In a First Amendment case, the question of the excessiveness of the discipline imposed is superseded by the requirement that the state impose a penalty that is no more drastic than necessary to satisfy its legitimate interests. *Hess v. DNR*, 79-203-PC, 8/19/80; affirmed by Dane County Circuit Court, *DNR v. Wis. Pers. Comm. (Hess)*, 80-CV-5437, 6/24/81

In an appeal of a one-day suspension based on five separate allegations of inadequate performance, the Commission did not decide whether any single instance justified the suspension but considered whether the combined weight of those instances where performance was found to be inadequate justifies the imposition of discipline and the amount of discipline actually imposed. *Clark v. DOT*, 79-117-PC, 10/10/80

501.02(2) Just cause for a layoff

In a layoff case, the employer is not required to prove that the employes selected for exemption from layoff were the best qualified. If the employer can show that it had a rational basis for its decision, it has satisfied its burden of proof. It is not required to prove that its decision was perforce the best personnel decision that could have been made under the circumstances. E*ft v. DHSS*, 82-98-PC, 8/17/83; *Newberry & Eft v. DHSS*, 82-98, 100-PC, 8/17/83

Arbitrary or capricious action is unreasonable or does not have a rational basis and is not the result of the "winnowing and sifting" process. Arbitrary is defined as being 1) without adequate determining principle, or 2) fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance … decisive but unreasoned. *Martin v. Transportation Commission*, 80-366-PC, 3/21/83

In applying the arbitrary and capricious standard, the focus must be on whether the process, as a whole, was arbitrary and capricious, not on whether the end result might have been reached in any event had a different analysis been followed by the agency. *Martin v. Transportation Commission*, 80-366-PC, 3/21/83

On an appeal of a layoff, the Commission can consider only the question of whether there was just cause for the layoff, and pursuant to *Weaver v. Wis. Pers. Board*, 71 Wis. 2d 46, 52, 237 N.W. 2d 183 (1975), the employing agency sustains its burden of proof when it shows it has acted in accordance with administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious. In this case, the laid off appellant alleged that the respondent over the course of several years slowly eroded his duties and usurped his responsibilities, and the appellant argued that the "respondent should be forced to carry the burden of proof in justifying all of his actions affecting the appellant from the commencement of the respondent's term as Commissioner of Securities. . ." The Commission held that the language of the *Weaver* decision limited review of the layoff to the personnel decision itself and precluded review of the numerous decisions relative to

the administration of the agency which may have affected the appellant's position during the period of years preceding the layoff. *Oakley v. Comm. of Securities*, 78-66-PC, 4/19/79

501.02(3) Just cause for resignation by job abandonment

The just cause standard for lay-off situations is the proper standard to be applied in the review of an abandonment/resignation, reaffirming *Petrus v. DHSS*, 81-86-PC, 12/3/81. The issue of whether the action was "otherwise authorized by applicable law" includes considering, where appropriate, whether the requirements of §230.37(2), Stats., have been met. The failure to comply with the statutory mandate of §230.37(2), Stats., prior to effecting the separation from employment of an employe who has become physically or mentally unfit to perform the duties of her position would be arbitrary and capricious, and, therefore, the action of deeming the incumbent as having abandoned her job would be without just cause. *Smith v. DHSS*, 88-0063-PC, 2/9/89

The just cause standard for lay-off situations, i.e., whether the appointing authority has acted in accord with administrative and statutory guidelines and the exercise of the authority has not been arbitrary or capricious, is the proper standard to be applied in the review of an abandonment/resignation, where the legislature has established precise procedural requirements that must be followed before an employe may be considered as having resigned due to job abandonment. *Petrus v. DHSS*, 81-86-PC, 12/3/81

501.03 Correctness of actions by the administrator

The Commission has the authority to review for correctness any reclassification decisions made by DER itself or by the appointing authority delegated from DER. *DILHR v. Pers. Comm. (Foust)*, Dane County Circuit Court, 85-CV-3206, 7/29/86

The appellant in a reclassification case has the burden of

proof and must establish by a preponderance of the evidence the facts necessary to show that respondent's decision that appellant's position should remain in a particular classification was in error, citing *Cox v. DER*, 92-0806-PC, 11/3/94. *Harder v. DNR & DER*, 95-0181-PC, 8/5/96

In an appeal of a decision to remove the appellants' names from a register, the appellants have the burden to prove by the greater weight of the credible evidence that the respondent was not justified, pursuant to §230.17, Stats., and §ER-Pers 6.10(7), Wis. Adm. Code, in removing the appellants' names. *Dugan & Fisher v. DMRS*, 88-0043, 0044-PC, 1/13/89

In reviewing decisions by the Secretary of the Department of Employment Relations, the Administrator of the Division of Merit Recruitment and Selection and their predecessors, the Commission applies the standard of whether the decision being reviewed was correct. *Robinson v. DHSS & DMRS*, 85-0064-PC, 7/17/85

501.04 Abuse of discretion

An agency acts outside the proper exercise of, or abuses its discretion, when it bases a discretionary decision on an erroneous view of the law relating to the transaction in question. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

If an agency considers a factor it should not have considered, or fails to consider at all a factor it should have considered, this can amount to an abuse of discretion. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

In reviewing a transfer decision, the decision had to be examined to determine, 1) whether the decision had a rational basis, 2) whether respondent failed to consider any factors which it can be concluded it should have considered, or considered any improper factor, and 3)whether respondent based its decision on any erroneous views of the law. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

Abuse of discretion is "a discretion exercised to an end or purpose not justified by and clearly against reason and evidence." (Citing case law and Black's law dictionary).

***Lundeen v. DOA*, 79-208-PC, 6/3/81**

502.01(1) Burden of persuasion

With the exception of appeals of disciplinary matters, the burden of proof as to all issues, including jurisdiction, is on the party seeking relief. The appellant has the burden of proof relative to issues of jurisdiction. *Lawry v. DP*, 79-26-PC, 7/31/79

502.01(2) Applicability of burden

The five factors to consider in determining which party has the burden of proof in a particular matter, as set forth in *State v. McFarren*, 62 Wis. 2d 492, 215 N.W.2d 459 (1974), do not have equal weight. The first factor is the customary common law rule that the moving party has the burden of proof. The four remaining factors are considered to determine whether special considerations exist to justify shifting the burden of proof to the opposing party. *WPEC v. DMRS*, 95-0107-PC, 5/14/96

When considering the fourth factor (fairness based on analyses of proof of exceptions and proof of negatives) in determining which party has the burden of proof, an exception clause in the underlying statute must be analyzed in terms of whether it involves a true exception or is an integral part of the described activity, citing *State v. McFarren*, 62 Wis. 2d 492, 215 N.W.2d 459 (1974) *WPEC v. DMRS*, 95-0107-PC, 5/14/96

502.02 Jurisdiction

It is appellant's burden to establish that her appeal was timely filed. *Schuster v. DER*, 94-0479-PC, 1/20/95

In an appeal of the examination and selection process for a vacant position, the appellant was the party asserting jurisdiction and seeking relief and, therefore, had the burden of establishing the Commission's jurisdiction over the matter. The Commission found the more credible

evidence favored the conclusion that the appellant had failed to file his appeal within 30 days after he received notice of his nonselection. *Allen v. DHSS & DMRS*, 87-0148-PC, 8/10/88

With the exception of appeals of disciplinary matters, the burden of proof as to all issues, including jurisdiction, is on the party seeking relief. The appellant has the burden of proof relative to issues of jurisdiction. *Lawry v. DP*, 79-26-PC, 7/31/79

502.03 Discharge

In cases involving the termination of employes with permanent status in the state classified civil service, the appointing authority has the burden of proving the discharge was for just cause and to sustain its action, the appointing authority must prove to a reasonable certainty, by the greater weight of credible evidence, that the discharge was for just cause, citing *Bell v. Personnel Board*, 259 Wis. 602, 49 N.W. 2d 889 (1951). *Higgins v. Wis. Racing Bd.*, 92-0020-PC, 1/11/94

The burden of persuasion in an appeal from a discharge is on the employer and the appellant does not have to prove that the assignment that he refused to carry out was unethical in order to show there was no just cause. *Lyons v. DHSS*, 79-81-PC, 7/23/80; affirmed by Dane County Circuit Court, *DHSS v. Wis. Pers. Comm. (Lyons)*, 80-CV-4948, 7/14/81

502.04 Suspension/demotion

In a constructive demotion appeal, appellant had the burden of proof to establish that management acted to reduce her position with the intent of effectively disciplining her because of dissatisfaction with her performance. *Davis v. ECB*, 91-0214-PC, 6/21/94

502.06 Actions of the administrator

In an appeal under §230.44(1)(a) of the correctness of the decision under §230.30 to establish new employing units in an agency as opposed to treating the entire agency as one employing unit, the burden of proof properly rests with the appellant. *WPEC v. DMRS*, 95-0107-PC, 5/14/96

In an appeal of respondent's approval of the creation of new employing units for an agency, the burden of proof rested with the appellant rather than the respondent. The "proof of exceptions" principle, which supports placing the burden of proof on the party who relies on an exception to a general rule or statute, was inapplicable to the language of §230.30, Stats. *WPEC v. DMRS*, 95-0107-PC, 4/4/96; rehearing denied, 5/14/96

In an appeal of a decision to remove the appellants' names from a register, the appellants have the burden to prove by the greater weight of the credible evidence that the respondent was not justified, pursuant to §230.17, Stats., and §ER-Pers 6.10(7), Wis. Adm. Code, in removing the appellants' names. *Dugan & Fisher v. DMRS*, 88-0043, 0044-PC, 1/13/89

502.07 Reclassifications/reallocations

Court found no error in the Board's statement that the burden of proof was on the appellant to show that he be reclassified as requested. *Jackson v. State Personnel Board*, Dane County Circuit Court, 164-086, 2/26/79

The appellant in a reclassification case has the burden of proof and must establish by a preponderance of the evidence the facts necessary to show that respondent's decision that appellant's position should remain in a particular classification was in error, citing *Cox v. DER*, 92-0806-PC, 11/3/94. *Harder v. DNR & DER*, 95-0181-PC, 8/5/96

It is appellant's burden to show that his position is correctly classified at the higher or requested level rather than merely showing that the decision to classify his position at the lower level was incorrect, citing *Svensson v. DER*, 86-0136-PC, 7/22/87. The conclusion that appellant's position was excluded from one classification did not mean that appellant had sustained his burden of establishing that

his position fell within the alternative classification identified in the issue for hearing. *Ellingson v. DNR & DER*, 93-0057-PC, 5/28/96

In a reclassification appeal where movement to the higher level is based on performance, the Commission must decide whether respondent's determination of unsatisfactory performance in the context of the higher class level was correct and the appellant had the burden of proof to establish by a preponderance of the evidence that respondent's evaluation of her performance was incorrect. Where the appellant challenged the respondent's procedure or policy with respect to which case files to score for purposes of her reclassification review, the more specific question is whether that policy or procedure constitutes an inaccurate or otherwise incorrect method of measuring employe performance. *McNown [Williams] v. DILHR & DER*, 94-0828-PC, 11/14/95

In a reclassification appeal, the appellant has the burden of proof and must establish by a preponderance of the evidence the facts necessary to show that respondent's decision that appellant's position should remain in a particular classification was in error. *Cox v. DER*, 92-0806-PC, 11/3/94

The appellant in a reallocation case has the burden of proof and must establish the necessary facts by a preponderance of the evidence. *Bluhm v. DER*, 92-0303-PC, 6/21/94

In a reallocation case, the employe who is asserting that his position should be classified at a higher level has the burden of proof, and must establish the requisite facts by a preponderance of the evidence. If the trier of fact feels the evidence on each side of a disputed issue is equally weighted, or that the respondents' evidence is more weighty, then the appellant cannot prevail as to that factual issue, citing *Tiser v. DNR & DER*, 83-0217-PC, 10/10/84. *Hubbard v. DER*, 91-0082-PC, 3/29/94; affirmed by Dane County Circuit Court, *Hubbard v. Wis. Pers. Comm.*, 94-CV-1408, 11/27/96

Appellant in a reclassification case has the burden of proof and must establish by a preponderance of the evidence that the respondents' decision was incorrect. *Miller v. DHSS & DER*, 92-0840-PC, 1/25/94

It is the appellant's burden to show that her position is

correctly classified at the higher level rather than merely showing that the decision to classify her position at the lower level was incorrect. *Svensson v. DER*, 86-0136-PC, 7/22/87

In a reclassification appeal, the employe or appellant who is asserting that his position should be reclassified to a higher level has the burden of proof, and must establish the requisite facts by a preponderance of the evidence. If the trier of fact feels that the evidence on each side of a disputed issue is equally weighted, or that the respondent's evidence is more weighty, then the appellant cannot prevail as to that factual issue. *Tiser v. DNR & DER*, 83-0217-PC, 10/10/84

The burden of proof in a reallocation case is on the appellant to show he should be reallocated as requested. *Vranes v. DER*, 83-0122-PC, 7/19/84

502.09 Burden of proceeding

In an appeal from discharge based on refusal to carry out a work assignment, the employer must show that there was a refusal to carry out an assignment which was within the employe's duties and responsibilities, and then the employe has the burden of going forward with evidence on the issue of the reasonableness of the order. *Lyons v. DHSS*, 79-81-PC, 7/23/80; affirmed by Dane County Circuit Court, *DHSS v. Pers. Comm. (Lyons)*, 80-CV-4948, 7/14/81

502.15 Affirmative defenses

Where the appellant had met the burden of establishing that respondents had failed to comply with the statute, it was respondent's burden to establish "harmless error" (or, at a minimum, the burden of going forward) rather than the appellant's burden to establish the absence of harmless error, because harmless error amounts to an affirmative defense. *Paul v DHSS/DMRS*, 82-156-PC, 82-PC-ER-69, 6/19/86

502.75 Issue for hearing

Where Board misstated the issue for hearing by referring only to the two classifications sought by the appellant rather than the current classification, the board was still able to conclude that the appellant was properly classified at his current level. *Kolonick v. State of Wisconsin (Personnel Board)*, Dane County Circuit Court, 162-178, 2/26/79

The proposed decision erred where it addressed matters outside the scope of the notice of hearing. Complainant claimed he was discriminated against based on arrest and conviction record. The statement of the issue was phrased in terms of whether respondent discriminated on the basis of arrest or conviction record in connection with the last paragraph of a letter it issued to complainant. The letter stated that it served as a last chance warning to complainant that "any subsequent driving while intoxicated or similar charges" would result in termination of his employment. The statement of the issue did not provide adequate notice to the parties that the Commission would consider whether respondent's conduct violated §111.322(2), Stats, which prohibits circulating any statement which implies or expresses any limitation, specification or discrimination; or an intent to make such limitation, specification or discrimination because of any prohibited basis. The original charge of discrimination did not mention the circulation issue. The initial determination also did not mention that issue, nor had either party addressed that issue prior to the issuance of the proposed decision and order. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

Where the hearing examiner erred in deciding, in a proposed decision and order, an issue that was not properly noticed, circumstances were consistent with a remand for further proceedings before the hearing examiner. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

Adjudicative bodies should decide cases on the basis of the result the law requires, regardless of whether the particular legal theory is brought to bear by the parties or, *sua sponte*, by the adjudicative body, so long as the parties have sufficient notice and an adequate opportunity to be heard on the issue in question. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

The decision to reallocate appellants' positions to a particular classification level rather than to another classification level was a decision made by the secretary of the Department of Employment Relations (or delegated by the secretary) pursuant to §230.09(2)(a), Stats., rather than a decision by an appointing authority that relates to the hiring process. Appellants' motion to supplement the issue for hearing to include a review of the reallocation decisions on an "abuse of discretion" standard was denied. *Arenz et al. v. DOT & DER*, 98-0073-PC, etc., 2/10/99

Appellant's tentative reference to the Wisconsin Fair Employment Act in its post-hearing brief to an appeal under §230.44(1)(d), Stats., of a non-selection decision, was insufficient to create an obligation for respondent to object to the consideration of such a claim at the pain of creating an implied waiver. While it is possible to effect a waiver by silence or inaction, the tentative reference in appellant's brief did not indicate that appellant was seeking to amend his appeal. It could not be concluded that respondent reasonably should have foreseen the possibility that complainant's reference, coupled with respondent's failure to object to that reference, would be converted *sua sponte* and without prior notice into an accomplished amendment converting the civil service appeal into a FEA claim and accompanied immediately by the adjudication of the claim and the establishment of liability. There was no effective waiver by respondent to the interjection of the FEA claim. The parties had not had the opportunity to present arguments on a possible amendment or to make a record on that issue. The Commission remanded the matter to the designated hearing examiner to allow complainant to seek to amend his appeal to add a claim under the FEA. *Holley v. DOCom*, 98-0016-PC, 1/13/99

No error occurred in listing two issues for hearing in an appeal arising from a non-selection decision where the first issue referred to the traditional analysis of whether the hiring authority committed an illegal act or abuse of discretion in failing to hire the appellant and the second issue referred to whether the hiring authority committed an illegal act or abuse of discretion in requesting the Division of Merit Recruitment and Selection to certify additional names beyond the initial names received. Separate statements of issue provided clearer notice to the parties of the matters to be litigated. *Morvak v. DOT & DMRS*,

97-0020-PC, 6/19/97

It was not inappropriate to read a transaction's effective date into the topic of whether a reclass denial was correct as long as both parties were ready to present evidence at hearing on the effective date question. No prejudice to respondent was shown, the effective date issue was clearly identified by the appellant in his letter of appeal and appellant appeared *pro se*. It is better practice to clearly specify the question of effective date in the statement of issue agreed upon prior to the hearing. The fact that respondent was unaware of certain specific arguments to be offered by appellant at hearing was not a sufficient reason for denying appellant's request to amend the issue. *Gutierrez v. DOT & DER*, 96-0096-PC, 4/11/97

Where appellant requested and was given reconsideration following respondent's initial decision not to hire her, respondent's decisional process consisted of two distinct parts. The second part of the decisional process, in which the director of the facility decided to stand by previous decision made by the assistant director of nursing but changed the rationale for its decision to include a new reason, was part of the subject matter of the appeal. The additional reason fell within the scope of the respondent's failure or refusal to hire the appellant and within the stipulated issue for hearing which asked whether respondent committed an illegal act or an abuse of discretion in not appointing the appellant to the vacant positions in question. In addition, respondent waived any objection to the scope of the hearing by never raising this issue until after the promulgation of the proposed decision and order, where respondent specifically addressed the second part of the decisional process in terms of the evidence it presented at hearing and in terms of the arguments it made in its closing statement at hearing. *Neldaughter v. DHSS*, 96-0054-PC, 2/14/97

Issues raised in an appellant's post-hearing brief that were outside the scope of the issue noticed for hearing could not be considered by the Commission. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

Where respondent did not, until the day of hearing, raise its contention that a classification other than those included in the agreed upon issue best described appellant's position, its request to amend the issue was denied. *Pamperin v. DER*,

90-0321-PC, 7/25/94

In an appeal of the effective date of a reclassification, the Commission has jurisdiction to determine whether the respondent's policy specifying the minimum qualifications necessary for reclass comported with the class specifications and, if so, whether respondents applied the policy to the appellants' positions in a correct manner. *Heath & Mork v. DOC & DER*, 93-0143-PC, 6/23/94

In classification appeals, appellants may be required to specify, prior to hearing, which classifications they allege as better describing their positions. The appellants' proposal that the statement of issue refer to alternative classifications "with equivalent pay ranges," without further specification, was rejected as being inconsistent with §227.44. *Germanson et al. v. DER*, 91-0223-PC, etc., 3/19/92

It is inappropriate to frame an issue in a way that might, in effect, resolve the contentions appellant is seeking to raise in advance of the hearing and before the parties have an opportunity to present evidence. *DuPuis v. DHSS*, 90-0219-PC, 7/25/91

Where the issue for hearing only referred to the respondent's decision to deny the appellant's request for reclassification but during the course of the hearing and in his post-hearing brief, the appellant clearly argued both reclassification and reallocation and the respondent did not argue that the reallocation contention extended beyond the issue for hearing, the Commission addressed both the reclassification and reallocation claims. *Seay v. DER*, 89-0117-PC, 1/24/91

Where the issue for hearing merely referred to the correctness of the reclassification denial decision but the record clearly indicated the appellant's position had been reclassified and the appellant not regraded due to the failure to achieve minimum quality standards, the Commission liberally interpreted the issue for hearing as referencing the regrade decision. *Vanover v. DILHR & DER*, 89-0128-PC, 11/16/90

The Commission declined to take a literalistic interpretation of the statement of issue where that approach would lead to absurd results. *Cernohous v. UW & DER*, 89-0131-PC, 9/13/90

Where the issue for hearing agreed to by the parties during the prehearing conference referred to the classifications of Program Assistant 2 and Educational Services Intern, and the respondent's representative recounted the discussion which had occurred during the prehearing and noted that respondents had prepared for hearing only on the basis of the PA 2 and ESI classifications, evidence relating to the PA 3 classification was not considered. *Darland v. UW & DER*, 89-0160-PC, 7/12/90

Where an employe makes a general request for the upgrading of the classification of his position, the Commission's review need not be limited to those classifications specified by the employe in his request but may extend to any classification the specifications for which could describe the duties and responsibilities of appellant's position. But where the employe specifically limits his request to certain classifications or series, the Commission's review will be limited to those classifications or series. *Kleinert v. DER*, 87-0206-PC, 8/29/88

Even though the appellants had not made any factual allegations that would constitute circumstances under which the Commission could conclude that DER had rejected either explicitly or implicitly the AA 5 classification, the Commission directed the respondent to issue a decision on the appropriateness of the AA5 classification in the interest of avoiding undue further delay, and scheduled a hearing in approximately 90 days on an issue including the AA5 classification. *Gardipee v. DER*, 88-0004-PC, 8/10/88

Where it was not possible, on the record before it, to determine how the appellant had raised an additional classification for consideration during the position audit and whether the personnel analyst had indicated he would consider the additional classification, the Commission directed the parties to proceed to hearing on an issue broad enough to allow a determination of this preliminary question in order not to unnecessarily delay a hearing on the merits. *Kleinert v. DER*, 87-0206-PC, 2/24/88

Even though employes may use the term "reclassification" loosely in a way that includes the legal definition of both "reclassification" and "regrade", the record indicated that the appellant had requested reclassification for her position and regrade for herself. Therefore, the Commission established an issue for hearing that included a subissue

relating to regrade (versus opening the position for competition). *Stratil v. DILHR & DER*, 87-0210-PC, 2/24/88

Where the conference report required the parties to file objections within 10 days from the date the conference report was signed or the parties would be deemed to have agreed to the issue as proposed, and respondent's objections were filed on the 11th day, the issues as set in the report were established as the issue for hearing. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 12/17/87

Appeals of reclassification denials are heard on a de novo basis. The Commission does not simply review the reclassification decision on the basis of the evidence that was before the analyst at the time of the decision, but it allows both parties to present at hearing whatever evidence is relevant to the classification question. That does not mean that respondent has no recourse if, for example, the appellant were to present at the hearing an entirely new aspect of the job that was not even alluded to in the position description or during the audit. The respondent could argue, for example, that the appellant is estopped from raising this now, or that the element of the job was only added to the position after the decision was made. Such issues have to be dealt with on a case by case basis. *Ratchman v. UW-Oshkosh & DER*, 86-0219-PC, 11/18/87

Where respondent issued a layoff notice for appellant's Executive Personnel Officer 2 position, the ultimate issue was whether the appellant had ever attained permanent status in class in an Executive Officer 3 position in the Career Executive Program, thereby entitling him to the career executive lay off procedure. In determining whether the appellant had permanent status in class, the focus had to be on what did happen to the appellant rather than what should have happened and the respondent cannot ask the Commission to revise a reallocation decision made three months before the layoff decision. *McDowell v. DER*, 87-0006-PC, 4/15/87

Where respondent declined to process the appellant's request before the respondent reached a determination as to the appropriate classification level, the issue for hearing did not include an analysis of the appropriate classification for the appellant's position. *Spilde v. DER*, 86-0040-PC, 1/8/87

Where the appellant was told by her personnel office that she should not include a specific classification in her reclass request and that the appropriate classification would be determined, she had the right to assume that in response to her request, DER would select the most appropriate classification out of the universe of potential state classifications and she is not restricted on appeal to the classification recommended by her employing agency or the ones actually considered by DER. In addition, DER did not restrict itself to the classification actually requested by the employing agency but ended up reallocating her position to a classification it determined was more appropriate than either the current classification or the one requested. *Saindon v. DER*, 85-0212-PC, 10/9/86

In a case arising from respondents rejection of appellant's application for a position, the Commission established the issue for hearing as one of whether respondent's decision was correct. *Robinson v. DHSS & DMRS*, 85-0064-PC, 7/17/85

An issue for hearing which asked whether the respondent's decision setting September 16, 1984 as the proper effective date for a reclassification was correct or whether the date should have been October 30, 1983, provided adequate notice for a Commission decision setting December 12, 1983 as the correct date. The date established by the Commission was simply a different result of the issue of "correctness" included in the established issue. *Wentz v. DER*, 84-0068-PC, 3/5/85

Where the issue for hearing in an appeal arising from the decision establishing the effective date for reclassification referred to whether September 16, 1984 was proper or, if not, whether it should have been October 30, 1983, the Commission established December 12, 1983 as the correct effective date, concluding that it fell within the range of dates that were implicit within the issue for hearing. The issue for hearing was found to provide adequate notice to the parties. *Wentz v. DER*, 84-0068-PC, 3/5/85

The Commission permitted the appellant to amend the issue for hearing, effectively reopening a prior stipulation between the parties, where the charges were based upon the appellant's inadvertence or excusable neglect and there was no indication that the respondent had been prejudiced by appellant's delay in seeking the amendment. *Novak v. DER*,

83-0104-PC, 2/29/84

Respondent Secretary of Department of Employment Relations lacked standing to challenge his own decision not to reallocate appellant's position to a particular classification. The appeal was filed by an employe whose position was reallocated from Research Analyst 3 (RA3) to RA2 as a result of a classification survey. Appellant proposed that her position should have been reallocated to the RA3 level. Respondent proposed that, if its initial reallocation decision was incorrect, appellant's position should be at either the RA3 or Research Technician 4 level. The Commission declined to consider respondent's proposed issue because the Secretary was part of the decisional process and, therefore, was not an aggrieved party. *Nichols v. DER*, 83-0099-PC, 9/16/83

Where appellant was granted leave without pay from his career executive position to accept a gubernatorial appointment in the unclassified service and after seeking restoration to his former position, he was temporarily assigned and then subjected to a layoff so that he demoted into a non-career executive position, the Commission held that the transaction should be reviewed as a layoff rather than as a career executive demotion (§ER-Pers 30.10(3), Wis. Adm. Code) even though the transaction met both definitions, because the layoff provision was more specific. *Givens v. DILHR & DP*, 83-0046-PC, 7/12/83

The Commission has jurisdiction over the decision of the administrator refusing to process the appellant's reclassification request without a position description agreed to by the appellant and his supervisor, but its inquiry on such an appeal must be limited to whether that decision was correct and cannot reach the substantive question of the most proper classification of appellant's position, which the administrator did not reach. *Corning v. DER & DP*, 82-185-PC, 10/27/82

In an appeal of a reallocation, the more appropriate issue for hearing is "whether or not the decision of the administrator to reallocate appellant's position… was correct "as opposed to "what is the proper civil service classification for…," because the appeal is of a decision of the administrator to reallocate the position to a particular classification, and although the Commission conducts a *de novo* hearing, it does not have the authority to enter into an

independent inquiry as to the position's proper classification as is intimated by the latter issue, proposed by the appellant. *Werth v. DP*, 81-130-PC, 8/5/81

The issue of whether there is just cause for the discipline imposed includes the question of whether the imposition of the discipline violated appellant's right to freedom of speech where appellant's speech activity was readily discernible from the face of the letter imposing the suspension. *Hess v. DNR*, 79-203-PC, 8/19/80; affirmed by Dane County Circuit Court, *DNR v. Pers. Comm. (Hess)*, 80-CV-5437, 6/24/81

The appropriate issue for hearing in an appeal of the non-selection of the appellant for a particular position is: Whether or not respondent acted illegally or abused its discretion in not selecting the appellant. *Rowe v. DER*, 79-202-PC, 6/3/80

Commission would not consider ground of error that was outside of the scope of hearing notice. *Stasny v. DOT*, 78-158-PC, 10/12/79 (Note: this case was affirmed by the Dane County Circuit Court in all respects except for restoration of sick leave. *DOT v. Wis. Pers. Comm. (Stasny)*, 79-CV-6102, 6130, 2/27/81)

The appellant should be allowed to raise issues which may fairly be said to relate to the transaction that was the subject of the original appeal, and may be allowed to amend the original appeal letter to do so. *Halter v. DILHR & DP*, 78-144-PC, 11/22/78

503.01 Resignation

Where complainant resigned after her complaint was filed, the question of whether the controversy was moot involved reviewing complainant's claims and the available related remedies to determine if the resignation precluded granting effective relief to complainant. *Burns v. UW-Madison*, 96-0038-PC-ER, 4/8/98

Appellant's fourth step grievance relating to the requirement that he carry and respond to a pager was moot where he had resigned from the position in question. *Loomis v. UW*, 92-0035-PC, 2/15/96

An employe who resigns from his/her position after commencing a reclassification appeal may continue with the appeal after their resignation. *Fullmer, Mastricola & Belshe v. DP*, 83-0008-PC, 1/4/84

503.02 Examination appeal

An appeal of a non-selection decision does not become moot when the unsuccessful applicant/appellant resigns from state service. *McLlquham v. UW*, 79-207-PC, 4/25/80

A mootness argument was rejected by application of the rationale of *Watkins v. DILHR*, 69 Wis 2d 782 (1975), since the Commission conceivably could enter an order affecting future selection processes in which the appellant might compete. *Kaeske v. DHSS & DP*, 78-18-PC, 11/22/78

503.03 Future abuses

A mootness argument was rejected by application of the rationale of *Watkins v. DILHR*, 69 Wis 2d 782 (1975), since the Commission conceivably could enter an order affecting future selection processes in which the appellant might compete. *Kaeske v. DHSS & DP*, 78-18-PC, 11/22/78

503.06 Other matters

An appeal arising from a decision to discipline the appellant was moot where respondent had unilaterally rescinded the discipline due to appellant's decision to voluntarily demote to a lower-classified position in a different institution. *Klemmer v. DHFS*, 97-0054-PC, 4/8/98

The question of fees and costs is not part of the analysis of mootness. *Klemmer v. DHFS*, 97-0054-PC, 4/8/98

Where the remedies sought by the appellant were exemption from respondent’s employe fraternization policy and the addition of her name to an inmate’s visitation list, any

decision by the Commission could not have any practical legal effect because the appellant was no longer employed by respondent. *Greuel v. DOC*, 96-0135-PC, 1/16/97

Where the appeal arose from a three-day suspension in 1995 which was retracted by respondent by letter in August of 1996, several months after appellant had filed his appeal, and respondent issued a new letter in October of 1996 suspending the appellant for three days as a result of the same conduct described in earlier suspension letter, the appeal was moot because the suspension imposed in 1995 no longer existed so there could no longer be any actual controversy. Dismissal of the appeal did not deprive appellant of a mechanism to have the suspension imposed by the October 1996 letter reviewed. *Friedrichs v. DOC*, 96-0023-PC, 11/22/96

An appeal with an issue relating to whether respondent had carried out an investigation was dismissed as moot or, in the alternative, for failure to state a claim, where it was undisputed that respondent had investigated the matter to the extent it deemed necessary. *ACE & Davies v. DMRS*, 94-0060-PC, *ACE & Davies v. DOA & DMRS*, 94-0069-PC, 10/24/94

An appeal of the effective date of reclassification was moot where, subsequent to the appeal, the respondents have decided that the appellant's reclassification in a progression series should not have been delayed because of appellant's §230.36, Stats., employment injury leave. Since the appellant had received the remedy sought by this appeal, a decision of his appeal could have no effect on his current working conditions. Since he was already at the progression (CO 2) level, a decision of his appeal could not affect his future working conditions. There were no special policy factors that would support a contrary conclusion. *Maday v. DOC & DER*, 92-0838-PC, 6/23/93

Where appellants were seeking a declaratory ruling that respondents had engaged, in effect, in a pattern or practice of recurring activity designed to circumvent the protections of the civil service system and to create and perpetuate a political patronage system in state employment, and were not alleging simple misfeasance in failure to follow the civil service code with respect to an isolated transaction, the matter was not moot. *ACE et al. v. DHSS et al.*, 92-0238-PC, 1/12/93

Appeal filed with the Commission as the 4th step in the noncontractual grievance procedure was moot where appellant alleged she had not been allowed to have a representative present at a disciplinary meeting, where the appellant was no longer employed by respondent and where any ruling by the Commission could have no effect on appellant's current or past conditions of employment. *Parrish v. UW*, 84-0163-PC, 12/6/84

In an appeal involving an alleged failure by the appointing authority and the administrator to restore the appellant to his former status following a downward reallocation pursuant to §Pers 5.03(h), Wis. Adm. Code, the matter was not moot because the time for reinstatement had elapsed by the time of the hearing, inasmuch as either the time restriction would not be applicable in a case where it might be determined on appeal that during the initial period of reinstatement eligibility, the employe was denied certain rights with respect to reinstatement, or, alternatively, the time period with respect to which it might be determined that the employe's rights to reinstatement eligibility were denied would be considered tolled, and the factors set forth in *Watkins v. DILHR*, 69 Wis. 2d 782, 233 N.W. 2d 360 (1975), with respect to the employe's right to what amounts to a declaration of rights, and similar policy reasons, are present. *Wing v. UW & DP*, 79-148, 173-PC, 10/4/82

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 511 through 516

[Previous material] [Next material]

511.01 Jurisdiction

Section 227.42(1)(d), Stats., provides authority for state agencies, such as the Personnel Commission, to develop appropriate summary disposition procedures, where the disposition does not require the resolution

of any disputes of material fact, unless such summary procedures are otherwise precluded by statute. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

Because there was a dispute between the parties as to whether the respondent had taken the steps necessary to effectuate the termination of appellant's employment during her probationary period, respondent's motion to dismiss for lack of subject matter jurisdiction had to be reviewed in the context of a motion for summary judgment. *Morschauser v. DOC*, 98-0175-PC, 3/10/99

Even if the signature on the letter terminating appellant's employment was not the warden's and even if the warden was not aware the termination letter had been given to the appellant until more than 6 months after her date of hire, the termination letter hand-delivered to the appellant during her probationary period constituted the requisite dismissal notice under §ER-MRS 13.08(2), Wis. Adm. Code., because it was undisputed that the warden had directed that the termination of appellant's employment proceed unless information came up at the intent to terminate meeting that would substantially affect the termination decision and no

such information was disclosed at the meeting. The appeal was dismissed for lack of subject matter jurisdiction. *Morschauser v. DOC*, 98-0175-PC, 3/10/99

Issues of subject matter jurisdiction, which include timeliness objections under §230.44(3), Stats., can be raised at any time and cannot be waived. *ACE et al. v. DHSS et al.*, 92-0238-PC, 3/29/93

A request which does not, as a matter of law, satisfy the statutory criteria for hearing contained in §227.42, Stats., constitutes a defect of subject matter jurisdiction which is not waivable. *ACE et al. v. DHSS et al.*, 92-0238-PC, 3/29/93

Objections to subject matter jurisdiction may be raised at any time. Because the time limit for filing an appeal is considered jurisdictional in nature, the respondent could renew its timeliness objection even though it had previously been rejected. *Kelling v. DHSS*, 87-0047-PC, 3/12/91

Respondent was not barred from reasserting its motion to dismiss the complaint as untimely filed where in a brief filed on the first motion to dismiss, respondents effectively relied on the effective date of the decision and reserved the issue as to the actual date of notification, the second motion raised the date of notification issue and both motions were filed well before any petition for judicial review. *Ames v. UW-Milwaukee*, 85-0113-PC-ER, 9/17/86

511.02 No factual hearing necessary -- issues of law

The Commission's consideration of matters beyond those plead in the complaint does not preclude the Commission from granting a motion for failure to state a claim. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

Appellant was put on notice that a motion to dismiss was pending due to his failure to appear at the scheduled hearing and he was given more than a fair opportunity to explain, in writing, his absence. Appellant failed to explain his absence by the established deadline. The Commission was not required to give him a separate hearing on whether he had good cause for missing the hearing. *Oriedo v. Wis. Pers.*

***Comm.*, *et al.*, Dane County Circuit Court, 98 CV 0260, 12/11/98**

Even if the signature on the letter terminating appellant's employment was not the warden's and even if the warden was not aware the termination letter had been given to the appellant until more than 6 months after her date of hire, the termination letter hand-delivered to the appellant during her probationary period constituted the requisite dismissal notice under §ER-MRS 13.08(2), Wis. Adm. Code., because it was undisputed that the warden had directed that the termination of appellant's employment proceed unless information came up at the intent to terminate meeting that would substantially affect the termination decision and no such information was disclosed at the meeting. The appeal was dismissed for lack of subject matter jurisdiction. *Morschauser v. DOC*, 98-0175-PC, 3/10/99

Dismissal (or default judgment) for a party's first failure to appear at a prehearing conference is appropriate only where sufficiently egregious circumstances exist. *Balele v. DOR*, 98-0002-PC-ER, 2/24/99

The failure of respondent's attorney to inform complainant of respondent's request to postpone the prehearing conference was not a sufficiently egregious circumstance to justify granting default judgment. *Balele v. DOR*, 98-0002-PC-ER, 2/24/99

Failure to dispute pleadings did not automatically entitle complainant to a judgment by default. *Balele v. DOR*, 98-0002-PC-ER, 2/24/99

Judicial appellate procedure can not fairly be applied to a *de novo* administrative hearing. Complainant's motion for a "judgment on admitted claim" was rejected. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Respondent's motion to dismiss appellant's appeal for failure to state a claim was denied where appellant had been demoted in lieu of layoff, he declined respondent's offer of restoration as unreasonable, and he perceived, as a result of respondent's restoration letter, that he could forfeit any further restoration rights due to his refusal and where there was a difference of opinion between the parties as to whether the restoration offer was reasonable under §Pers 22.10(3), Wis. Adm. Code. *Sundling v. UW*, 93-0049-PC, 11/23/93

A matter appealed to the Commission can be dismissed for failure to state a claim if it appears to a certainty that no relief can be granted under any set of facts that appellant could prove in support of his allegations. *ACE et al. v. DHSS et al.*, 92-0238-PC, 1/12/93

If persons could intervene in proceedings with respect to which they did not have a community of interest, without regard to the 300 day statute of limitations, the statute of limitations would be rendered meaningless. *Schroeder v. DHSS & DER*, 85-0036-PC-ER, 11/12/86

Motion for summary judgment was ruled on where there were no material issues of fact in dispute. *Southwick v. DHSS*, 85-0151-PC, 8/6/86

511.03 Factual hearing necessary – questions of fact

In a motion challenging the sufficiency of the evidence, made at the close of the presentations of the respondent's case and for the purpose of determining whether the respondent met its burden of establishing just cause, the standard to be applied is the same standard applicable to non-jury trials as described in *Household Utilities, Inc. v. Andrews Co.*, 71 Wis 2d 17 (1976). *McBeath v. DHSS*, 82-119-PC, 7/7/83

In considering a motion to dismiss raised at the close of appellant's case, the motion was, in effect, a request to issue a judgment against the appellant on the grounds that appellant failed to present sufficient evidence to shift the burden of persuasion to respondents, the Commission should consider only the proof which was offered by appellant at the time he rested his case. The motion should not be granted unless the Commission is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion was made that there is not credible evidence to sustain a finding in favor of that party, citing *Beacon Bowl v. Wis. Elec. Power Co.*, 176 Wis. 2d 740, 501 N.W.2d 788 (1993). *Sutton v. DOC & DMRS*, 96-0155-PC, 6/4/97

511.08 Motion for summary judgment

Section 227.42(1)(d), Stats., provides authority for state agencies, such as the Personnel Commission, to develop appropriate summary disposition procedures, where the disposition does not require the resolution of any disputes of material fact, unless such summary procedures are otherwise precluded by statute. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

Because there was a dispute between the parties as to whether the respondent had taken the steps necessary to effectuate the termination of appellant's employment during her probationary period, respondent's motion to dismiss for lack of subject matter jurisdiction had to be reviewed in the context of a motion for summary judgment. *Morschauser v. DOC*, 98-0175-PC, 3/10/99

Where respondent's motion for summary judgment was filed 3 days after complainant's motion for judgment on the pleadings but did not mention complainant's motion, and where respondent did not submit a brief relating to complainant's motion pursuant to a schedule established by the Commission, complainant still was not entitled to default judgment because the motion for summary judgment and the motion for judgment on the pleadings were competing motions. *Oriedo v. DOC*, 98-0124-PC-ER, 2/2/99

While summary judgment should only be granted in clear cases, the mere assertion of a factual dispute will not defeat an otherwise proper motion for summary judgment. *Randby et al. v. DER*, 94-0465-PC, etc., 10/16/95

A party is not restricted to the eight month time limit set forth in §802.08(1), Stats., for filing a motion for summary judgment. *Stroede v. DER*, 94-0403-PC, 8/17/95

Although the appellants had not responded to the motion for summary judgment, the Commission examined the papers respondent submitted in support of the motion to ascertain whether a grant of summary judgment would be appropriate. *Swim & Wilkinson v. DER*, 92-0576, 0613-PC, 5/15/95

Although the Wisconsin Administrative Procedure Act does not provide explicitly for a summary judgment procedure, if

it can be determined that there are no disputed issues of material fact, the Commission can issue a decision without an evidentiary hearing in what amounts functionally to a summary judgment proceeding. The Commission went on to apply the summary judgment methodology set forth in *In re Cherokee Park Plat*, 113 Wis. 2d 1212, 116, 334 N.W.2d 580 (Ct. App. 1983). *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92

Appellant's motion was granted in an appeal of an examination where in a previous interim order, the Commission held that the invalidity of the subject examination was deemed admitted by operation of §804.11, Stats. However, the motion was not granted as to companion equal rights proceeding because the underlying interim order specifically limited its application to the appeal and the issue in the equal rights case extended beyond the examination. *Doyle v. DNR & DMRS*, 86-0192-PC, 87-0007-PC-ER, 11/3/88

Summary judgment is appropriate only when there is no genuine issue as to all material facts. *Thompson v. DMRS & DNR*, 87-0204-PC, 6/29/88

Motion for summary judgment was denied, where appellant failed to establish she was entitled to summary judgment as a matter of law. *Southwick v. DHSS*, 85-0151-PC, 8/6/86

511.20 Motion to dismiss for lack of prosecution (see also 515.2)

Respondent’s motion to dismiss for lack of prosecution was granted where the only notice that was provided with respect to complainant’s failure to appear at the scheduled hearing was 1) a message from complainant’s wife left early in the morning on the day of hearing on the answering machine of the personnel manager at respondent’s institution and 2) a message at the office of respondent’s attorney after he had left for the hearing. Although complainant contended his absence was due to an "ulcerative colitis flare-up," he failed to submit any documentation. The hearing had previously been postponed, one day before it had been scheduled to commence, due to the death of complainant’s mother. The fact that the prehearing conference had been postponed twice at respondent’s request was of little significance. *Coffey v.*

***DHSS*, 95-0076-PC-ER, 7/16/97**

Respondent's motion to dismiss for failure to prosecute was granted where immediately prior to opening statements at the scheduled hearing date, appellant advised the hearing examiner that she could not proceed. Complainant had left a telephone message for the hearing examiner two weeks prior to the hearing date asking to reschedule the hearing, the examiner had written the appellant and explained the procedure for requesting a continuance and one week before the hearing the appellant had again telephoned the examiner and stated she had not received the letter and the examiner had denied the continuance at that time. Appellant's only statement as to the reason for her request for a continuance was that a meeting she was to have with a staff person for the Division of Vocational Rehabilitation had been delayed until one day after the date of the hearing. *Mueller v. DOC*, 97-0010-PC, 6/19/97

Respondent's motion to dismiss for lack of prosecution was granted where appellant was provided repeated opportunities and directives to respond to respondents' draft settlement agreement and where appellant had also been granted two delays in the scheduled hearing date. Appellant's conduct was egregious and appellant provided no adequate excuse for the failure to respond to the draft settlement agreement or to clear written directives from the examiner. *Witt v. DOT & DER*, 93-0093-PC, 11/14/95

Respondent's motion to dismiss an appeal from a discharge for lack of prosecution was granted where there had been a two year delay since appellant requested a postponement for health reasons, appellant never provided medical documentation for the request, appellant's counsel was unable to locate the appellant, respondent had the burden of proof and respondent stated that the delay had prejudiced its ability to preserve evidence and produce witnesses including two who were no longer employed by respondent. *Hanson v. DHSS*, 92-0765-PC, 8/4/95

The failure of appellant to respond to a request from the Commission for a status report and his failure to actively pursue his appeal over a period of several months would not constitute "bad faith or egregious conduct" so as to justify dismissal of the appeal if appellant's asserted excuse, i.e., side effects of a prescription drug, was as he represented. This representation held to constitute a waiver of the

privilege relating to disclosure of medical information and respondent was provided an opportunity to examine the information. *Gabay v. DMRS & DOC*, 90-0140-PC, 10/1/92

511.50 Motion to sequester

Where subsequent to a sequestration order, several of respondent's witnesses, in the presence of each other, were asked questions regarding the case by respondent's counsel, the hearing examiner properly exercised her discretion by permitting appellant's counsel to question the witnesses about the communications and to adjust the weight of their testimony accordingly. *Hogoboom v. Wis. Pers. Comm.*, Dane County Circuit Court, 81CV5669, 4/23/84

A witness who was also identified by respondent as an "assistant to counsel" was exempt from the appellant's sequestration request. *Young v. DP*, 81-7-PC, 8/26/81

511.80 Timing

Where respondent's motion for summary judgment was filed 3 days after complainant's motion for judgment on the pleadings but did not mention complainant's motion, and where respondent did not submit a brief relating to complainant's motion pursuant to a schedule established by the Commission, complainant still was not entitled to default judgment because the motion for summary judgment and the motion for judgment on the pleadings were competing motions. *Oriedo v. DOC*, 98-0124-PC-ER, 2/2/99

By waiting until the first day of hearing, respondent waived its right to raise, as an issue, whether the failure of appellants to appeal the decisions on prior reclassification requests operated as a bar to their appeals requesting classification at a certain level, where the alleged bar was in the nature of an affirmative defense which may be waived. *Fulk et al. v. DHSS & DER*, 95-0004-PC, etc., 4/4/96

511.90 Withdrawal of motion

Respondent was not permitted to withdraw its motion to dismiss for lack of subject matter jurisdiction after the motion had been heard and a proposed decision issued, absent a stipulation by the parties. *Pfeifer v DILHR*, 86-0149-PC-ER, 86-0201-PC, 12/17/87

512.01(1) Power to adopt

Commission rule PC 1.10(4), Wis. Admin. Code (1980) requiring state agencies to permit employe parties and their representatives to prepare for Commission proceedings and to interview witnesses and parties during regular work hours without loss of pay was held to be null and void as being beyond the Commission's authority to promulgate. *DER et al. v. Wis. Pers. Comm.*, Dane County Circuit Court, 80-CV-4433, 12/9/82

512.03 Filing of briefs

Respondent's motion to dismiss based on appellant's failure to adhere to the briefing schedule was denied where the brief was served on respondent on the final day of the briefing period but did not reach the Commission until the following work day. *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

Respondent's request that the Commission not consider appellant's reply brief, which was due 10 days after respondent's brief, or on June 6th, but was actually filed on June 17th, was rejected where it appeared that appellant incorrectly understood his reply brief was due 20 rather than 10 days after the respondent's brief and there were no difficulties caused by the delay. *Gunderson v. DER*, 95-0095-PC, 8/5/96

513 Timing (including postponement/acceleration) of proceedings

The Commission refused to hold petitioner's classification

appeal in abeyance, even though the Commission granted petitioner's request to hold two companion discrimination complaints in abeyance while they were processed by the federal Equal Employment Opportunity Commission. It had been nearly 4 years since the effective date claimed by petitioner in her classification appeal and the federal proceedings would probably not dispose of the claims underlying the appeal. *Tyus v. DER et al.*, 97-0078-PC, etc., 1/27/99

The hearing examiner did not err in denying complainant's request for postponement of the hearing by providing respondent an opportunity to respond to complainant's suggestion that the hearing be postponed until some time the following year. It is the presiding official's responsibility to give each side an opportunity to reply to issues raised. *Oriedo v. DPI*, 96-0124-PC-ER, 1/14/98; affirmed by Dane County Circuit Court, *Oriedo v. Wis. Pers. Comm. et al.*, 98-CV-0260, 12/11/98

Indefinite postponement was granted where proceeding with administrative hearing had the potential to compromise appellant's Fifth Amendment protections in related criminal proceeding, and where there was specific evidence of agency bad faith or malicious government tactics on the part of respondent. Considerations of harm to the public interest by a postponement were outweighed by the erosion of appellant's constitutional rights that would result if the proceeding was not stayed, and by the judicial findings of respondent's misconduct in connection with the criminal proceeding. *Gibas v. DOJ*, 92-0247-PC, 9/10/93 (ruling by examiner)

Petitioner's request for an indefinite stay of proceedings in order to pursue his case in federal court was denied where petitioner had not yet filed a federal action, respondent opposed the request and respondent had the burden of proof as to one of the two cases before the Commission. The Commission modified petitioner's request and granted him a stay until the earlier of September 1 or 30 days from the service of any federal court proceeding, at which time the request for an indefinite stay was to be reconsidered. *Hodorowicz v. WGC*, 91-0078-PC, 91-0177-PC-ER, 4/23/93

Appellant's request to stay his Commission proceeding to pursue claims in another forum was denied where two out

of three scheduled days of hearing already had been completed. *Stoner v. DATCP*, 92-0041-PC, 1/27/93

In an appeal and complaint arising from a discharge decision, the Commission declined to direct the decision of the hearing examiner be the final decision of the Commission where the cases had already been treated on an expedited basis, the parties had agreed to hearing dates prior to the effective date of the discharge and effective relief of back pay would be available to the petitioner in the event she would be successful with either claim. *Tews v. PSC*, 89-0150-PC, 89-0141-PC-ER, 12/14/89

In an appeal of a decision denying the appellant the opportunity to continue in the examination process for a vacant position, the Commission granted the appellant's request that the hearing process be accelerated so that a decision could be issued before the vacancy was filled, found that the prospect of losing an opportunity for any meaningful remedy generated an "emergency" as that term is used in §227.44, Stats., and designated a hearing examiner to issue a final decision pursuant to §227.46(3)(a), Stats. *Nash v. DNR & DMRS*, 88-0117-PC, 10/5/88

Respondent's request to schedule the hearing five months after the prehearing conference was denied where the appellant objected to the delay. Despite the existence of various logistical problems not of respondent's own making, the Commission scheduled the hearing for a date approximately two and one-half months after the prehearing conference so that it could be heard in a timely fashion. *Young v. DP*, 81-7-PC, 8/26/81

Respondent's motion to dismiss for lack of prosecution was denied where the hearing had been delayed over 4 years at the request of the complainant who suffered from both obsessive-compulsive disorder and depression, nothing in the record suggested that these conditions were not relatively constant over the 4 year period, and complainant's psychiatrist stated that proceeding to hearing could generate suicidal behavior. Complainant was granted an indefinite postponement but was directed to submit, within 5 months, a physician's opinion as to whether the complainant could safely appear at a hearing. *Wermuth v. DATCP*, 82-PC-ER-47, 6/24/87

The Commission denied the appellant's request for a

continuance and dismissed the appeal for lack of prosecution where appellant failed to submit any exhibits or additional names of witnesses, failed to contact opposing counsel to request a continuance as advised by the hearing examiner and failed to appear on the scheduled date of hearing. *Allen v. DNR & DP*, 83-0045-PC, 8/17/83

Appellant's request for continuance was denied and respondents' motion to dismiss granted where the case had been postponed previously, where appellant failed to submit exhibits, where the Commission was advised that appellant's representative was ill but evidence showed the representative worked a regular work day at his place of employment on the scheduled date of the hearing and there was no showing that he was, in fact, ill. *Shultis v. DHSS & DP*, 81-79-PC, 3/17/83

Where the original appeals were of downward reallocations and were scheduled for hearing when the appellants submitted letters indicating that they did not wish "to pursue the issue at the hearing," but later indicated that they wished to have the appeals held in abeyance until after their positions had been audited as a result of an impending survey, and the respondent objected to this request, the Commission ordered the appeals dismissed, since it was clear that the appellants did not want to proceed with the issue generated by the original reallocations and any subsequent reallocations should be handled as new appeals. *Forslund et al. v. DHSS & DP*, 79-182, 193, 194-PC, 4/l/81

514 Location of hearing

Complainant's request to move the hearing location from a correctional institution to a city hall was denied, without prejudice, where complainant failed to show that inmates would testify more truthfully if the hearing was held off institution grounds. Complainant contended the inmates would not freely testify in a case against prison management if the hearing would be conducted in the prison administration building adjacent to the inmate resident dormitories or cells. *Egan v. DOC*, 96-0111-PC-ER, 3/11/98

The examiner's decision to hold the hearing on the campus

of the University of Wisconsin-Platteville was not an abuse of discretion despite complainant's contentions that the location was an inherently non-neutral site and that witnesses would be subject to intimidation because of having to testify in front of respondent's management where respondent had stipulated to the sequestration of witnesses, the rules of sequestration would not be any different if the hearing had been held elsewhere, virtually all of the witnesses were UW-Platteville employes, it would be a significant burden for the witnesses to have to appear elsewhere and where depositions had been conducted successfully at UW-Platteville. *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

In resolving a dispute between parties as to the appropriate site for the hearing, the Commission selected a neutral site that was accessible to both parties in order to avoid even a possible appearance of unfairness, and directed the hearing examiner to conduct the hearing in a manner that would avoid, to the extent reasonably possible, the interruption of the witnesses' teaching schedules. *Andritzky v. UW-Milwaukee*, 88-0137-PC-ER, 12/23/91

515.2 For lack of prosecution

Dismissal (or default judgment) for a party's first failure to appear at a prehearing conference is appropriate only where sufficiently egregious circumstances exist. *Balele v. DOR*, 98-0002-PC-ER, 2/24/99

The fact that complainant may not have claimed, opened or read the correspondence from the Commission does not absolve him from his responsibilities to pursue his case. *Benson v. UW (Whitewater)*, 98-0004, 0014-PC-ER, 8/26/98

Respondent's motion to dismiss for failure to prosecute was granted in April of 1998 with respect to a complaint filed in December of 1994, where even though complainant had been incarcerated since June of 1997, he did nothing to process his complaint during the prior six months. While incarcerated, complainant did not advise the Commission of his circumstances or address or make any attempt to keep his complaint alive. *Tetzner v. SPD*, 94-0182-PC-ER, 4/29/98

The complaint was dismissed due to complainant's failure to appear at the hearing. Complainant failed to exchange any exhibits or a witness list in advance of hearing and did not provide advance notice that he would not appear. Complainant's request for postponement of the hearing, filed one week before the hearing was scheduled to commence, had been denied. *Oriedo v. DPI*, 96-0124-PC-ER, 1/14/98; affirmed by Dane County Circuit Court, *Oriedo v. Wis. Pers. Comm. et al.*, 98-CV-0260, 12/11/98

Respondent's motion to dismiss for lack of prosecution was granted where the only notice that was provided with respect to complainant's failure to appear at the scheduled hearing was 1) a message from complainant's wife left early in the morning on the day of hearing on the answering machine of the personnel manager at respondent's institution and 2) a message at the office of respondent's attorney after he had left for the hearing. Although complainant contended his absence was due to an "ulcerative colitis flare-up," he failed to submit any documentation. The hearing had previously been postponed, one day before it had been scheduled to commence, due to the death of complainant's mother. The fact that the prehearing conference had been postponed twice at respondent's request was of little significance. *Coffey v. DHSS*, 95-0076-PC-ER, 7/16/97

Respondent's motion to dismiss for failure to prosecute was granted where immediately prior to opening statements at the scheduled hearing date, appellant advised the hearing examiner that she could not proceed. Complainant had left a telephone message for the hearing examiner two weeks prior to the hearing date asking to reschedule the hearing, the examiner had written the appellant and explained the procedure for requesting a continuance and one week before the hearing the appellant had again telephoned the examiner and stated she had not received the letter and the examiner had denied the continuance at that time. Appellant's only statement as to the reason for her request for a continuance was that a meeting she was to have with a staff person for the Division of Vocational Rehabilitation had been delayed until one day after the date of the hearing. *Mueller v. DOC*, 97-0010-PC, 6/19/97

Whether or not the appellant received the notice of hearing

contained in the prehearing conference report, he had at least actual notice of the hearing and waived any lack of formal notice by failing to come forward with his claim of lack of notice until after the final decision had been mailed. Appellant's petition for rehearing arising from the Commission's decision to dismiss his appeal for lack of prosecution for failure to appear at the hearing was denied. *Mayer v. DHSS & DER*, 95-0002-PC, 1/16/96

Respondent's motion to dismiss for lack of prosecution was granted where appellant was provided repeated opportunities and directives to respond to respondents' draft settlement agreement and where appellant had also been granted two delays in the scheduled hearing date. Appellant's conduct was egregious and appellant provided no adequate excuse for the failure to respond to the draft settlement agreement or to clear written directives from the examiner. *Witt v. DOT & DER*, 93-0093-PC, 11/14/95

Respondent's motion to dismiss an appeal from a discharge for lack of prosecution was granted where there had been a two year delay since appellant requested a postponement for health reasons, appellant never provided medical documentation for the request, appellant's counsel was unable to locate the appellant, respondent had the burden of proof and respondent stated that the delay had prejudiced its ability to preserve evidence and produce witnesses including two who were no longer employed by respondent. *Hanson v. DHSS*, 92-0765-PC, 8/4/95

An appeal was dismissed where appellant failed to attend three prehearing conferences. The Commission had made special arrangements through the affirmative action office of the agency where appellant worked to have a sign language interpreter present at the second and third conferences. Appellant's failure to attend was found to have been inexcusable. *Ross v. DER*, 94-0412-PC, 2/6/95

The failure of appellant to respond to a request from the Commission for a status report and his failure to actively pursue his appeal over a period of several months would not constitute "bad faith or egregious conduct" so as to justify dismissal of the appeal if appellant's asserted excuse, i.e., side effects of a prescription drug, was as he represented. This representation held to constituted a waiver of the privilege relating to disclosure of medical information and respondent was provided an opportunity to examine the

information. *Gabay v. DMRS & DOC*, 90-0140-PC, 10/1/92

At least three factors may be weighed when considering dismissal for lack of prosecution: the duration of the delay, the reason for the delay and any prejudicial effect on the adverse party. *Wermuth v. DATCP*, 82-PC-ER-47, 1/31/89

Respondent's renewed motion to dismiss was denied despite a delay of five and one-half years since the complainant first obtained a postponement for medical reasons where during that period the complainant had received treatment for her medical condition, the most recent available information was that the complainant could not safely appear at a hearing and the respondent had not made any allegation that its ability to offer a defense to the complainant's claim of discrimination had been prejudiced by the delay in the hearing. *Wermuth v. DATCP*, 82-PC-ER-47, 1/31/89

There was insufficient basis for dismissing an appeal where appellant had agreed to provide a telephone number where he could be reached on the date and time the prehearing conference was to be reconvened and where, four days prior to the date on which the conference was to be reconvened, the complainant mailed the requested information to the Commission but it did not reach the Commission prior to the time the conference was to be reconvened. *La Plante v. DMRS*, 87-0168-PC, 3/10/88

Appeal was dismissed where appellant notified the Commission, in writing, that he would not be attending the scheduled hearing, the examiner then wrote the appellant and interpreted appellant's letter as a withdrawal which would result in dismissal of the case and the appellant then wrote that his prior memorandum was not a withdrawal but he expected the Commission to "pursue this claim vigorously to a successful end." The Commission has no authority to prosecute a case on behalf of a party. *Jones v. UW-System*, 87-0102-PC, 12/3/87, petition for rehearing denied, 1/14/88

Respondent's motion to dismiss for lack of prosecution was denied where the hearing had been delayed over 4 years at the request of the complainant who suffered from both obsessive-compulsive disorder and depression, nothing in the record suggested that these conditions were not

relatively constant over the 4 year period, and complainant's psychiatrist stated that proceeding to hearing could generate suicidal behavior. Complainant was granted an indefinite postponement but was directed to submit, within 5 months, a physician's opinion as to whether the complainant could safely appear at a hearing. *Wermuth v. DATCP*, 82-PC-ER-47, 6/24/87

Appellant failed to show good cause for his failure to appear at the scheduled hearing and the appeal was dismissed. Appellant failed to contact the Commission to advise that he would not be appearing and failed to file copies of exhibits prior to the scheduled hearing. Appellant contended that he could not leave his work site to attend the hearing because of office emergencies. *Salazar v. DHSS*, 84-0038-PC, 6/27/84

Appellant's request for continuance was denied and respondents' motion to dismiss granted where the case had been postponed previously, where appellant failed to submit exhibits, where the Commission was advised that appellant's representative was ill but evidence showed the representative worked a regular work day at his place of employment on the scheduled date of the hearing and there was no showing that he was, in fact, ill. *Shultis v. DHSS & DP*, 81-79-PC, 3/17/83

A petition for rehearing was denied where the appeal originally had been dismissed for lack of jurisdiction without reaching the respondent's motion to dismiss for failure of prosecution, because said motion would have to be granted even if the Commission were to determine that it had jurisdiction. *Jansen et al. v. DOT & DP*, 78-170-PC, etc., 10/4/82

Where the appellant failed to appear at a hearing following an initial postponement at his request, and failed to contact the Commission with an explanation until after a motion to dismiss was filed, and then stated that his car had been stuck on the morning in question, but failed to explain his failure to have contacted the Commission that date, the Commission concluded that he had failed to prosecute his appeal, and it was dismissed. *Thom v. DOR*, 81-335-PC, 3/8/82

Where the hearing was twice postponed at the appellant's request, and six days before the third hearing date the

Commission contacted the appellant regarding the status of certain witnesses and the appellant indicated that he had decided to retain counsel and requested a third postponement, the Commission held that the appellant had failed to prosecute his appeal and ordered it dismissed. *Beer v. DHSS*, 79-198-PC, 7/17/80

The matter was dismissed for failure to prosecute where appellant employe failed to appear at the scheduled hearing and his representative, who did appear, was unprepared to proceed with all issues. *Sasso v. UW-Whitewater*, 79-285-PC, 6/27/80

Motion to dismiss for lack of prosecution was denied as to five of seven appellants whose union representation was withdrawn subsequent to the prehearing conference and who were not present for the hearing of the group appeal. The exercise of what may have been the representative's privilege to decline to represent some of the appellants did not change their status and the only thing waived by the absence of the five was their right to add to evidence otherwise presented. *Krewson et al. v. DP*, 78-23-PC, 1/30/79

515.5 Withdrawal

Appellant's request to withdraw her appeal after the promulgation of proposed decision on her reclassification appeal was denied. Appellant had indicated she intended to submit a new reclassification request based on changes in job responsibilities. To permit withdrawal would encourage the use of the appeal and hearing process as a test run with the option of withdrawal prior to a decision on the merits if the case appeared to be heading towards a negative conclusion. *Klein v. UW & DER*, 91-0208-PC, 2/8/93

Appellant's petition for rehearing was granted where the order dismissing appellant's appeal at her request was issued under a misapprehension of appellant's intent and was premised on a material error of fact. Although the appellant had previously indicated she had wished to withdraw her appeal, a letter from the Commission to appellant to confirm this intent was improperly addressed, appellant changed her mind before she received the Commission's dismissal order and, at that time, wrote the

Commission to continue her appeal. *Wipperfurth v. DER*, 92-0135-PC, 11/13/92

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 503.50 through 505.50

[Previous material] [Next material]

503.50 Standing

An appointing authority has standing to appeal a denial of a reclassification request for a position within his unit. *DER v. Wis. Pers. Comm. (Cady),* Dane County Circuit Court, 79-CV-5099, 7/24/81

Appellant who was not aware of a vacancy and, therefore, did not apply for it, lacks standing to raise issue with the change in the headquarters city of the position after someone was hired to fill the vacancy. Appellant suffered no injury in fact. *Ernst v. DATCP,* 97-0152-PC, 7/1/98

Appellant lacks standing to appeal a hiring decision where it was undisputed that he would not have applied for the vacancy even if he had been aware of it. Appellant suffered no injury in fact. *Ernst v. DATCP,* 97-0152-PC, 7/1/98

Employe X filed an appeal of a reallocation decision and later left the position. Employe Y transferred into the position vacated by X and requested to be added as a party to X's appeal, pursuant to s. 227.44(2m), Stats. The Commission concluded that Y had a "substantial interest [which] may be affected" by a decision in X's case and therefore was added as a party. The Commission noted that the case remained an appeal of the decision reallocating X's position, rather than an appeal of the decision setting the class level for the position filled by Y. *Kiefer v. DER,* 92-0634-PC, 5/2/94

Appellants were "interested" persons for purposes of seeking a declaratory ruling under §227.41, if for no other

reason, because of their allegation that an evasion of the civil service code had resulted in the improper expenditure of tax dollars. *ACE et al. v. DHSS et al.*, 92-0238-PC, 1/12/93

To the extent that the question of standing involves an issue of subject matter jurisdiction, it cannot be waived. *ACE et al. v. DHSS et al.*, 92-0238-PC, 1/12/93

The appellant, who was qualified to apply for a position because of his status as an employe of a state agency, lacked standing to contest the decision to limit competition to current classified employes because he was not "adversely affected." *Taylor v. DMRS*, 90-0279-PC, 11/1/90

Where appellant participated in a successful group appeal of a reallocation, and then retired after the entry of the Commission decision but before the Commission's decision ultimately was upheld in judicial review proceedings and effectuated, and respondent failed to include him in the group of employes who received reallocation as a result of the ultimate implementation of the Commission's decision, it was held that he had standing to challenge respondent's failure to have included him in the group of employes whose positions were reallocated, since presumably he would have been entitled to some back pay for the period preceding his retirement. *Thompson v. DOT & DER*, 88-0037-PC, 6/29/88

In an appeal arising from the failure to provide exam scores or rankings as part of the certification, the failure to consider the scores would cause injury to the appellant who was among those certified, to the extent the scores can be shown to be an appropriate factor for consideration in a selection decision. *Thompson v. DMRS & DNR*, 87-0204-PC, 6/29/88

Appellant, who was certified but not selected for a vacant position, has standing in an appeal of the non-selection decision. *Allen v. DHSS & DMRS*, 87-0148-PC, 2/12/88

Complainants had standing to challenge agency's decision to consider career executive and transfer candidates as well as those who, like complainants, had taken the competitive civil service exam, notwithstanding that there were nonminority candidates who were similarly disadvantaged by the addition of the Career Executive and transfer

candidates, and that an order restricting competition to candidates who had taken the competitive examination conceivably could have a "boomerang" effect on minority candidates by creating more competition at the exam stage, because the question of whether some nonminority candidates may have received similar treatment runs to the merits rather than to standing, and even if there were some nonminority candidates treated the same as minority candidates, this would not necessarily be inimical to liability, and because a conceivable remedy could hypothetically have an adverse effect on complainant's interests does not make the original claim of injury hypothetical or conjectural. Furthermore, complainants had standing notwithstanding respondent's argument that they ultimately were able to be considered for the position in question, and were therefore not among the group on whom the alleged disparate impact falls, since they meet the requirement of alleging that an employment action which caused them injury-in-fact is illegal under the Fair Employment Act, which does not limit discrimination to action taken against the complainants based on his or her age, race, creed, color, etc. *Balele & Humphrey v. DMRS, DER & DETF*, 87-0047, 0048-PC-ER, 12/2/87

Complainant, who sought review of respondent's use of "balanced" screening and hiring panels, lacked standing due to the absence of any allegation of injury to himself for the time period covered by the complaint and arising from the disputed practice. Complainant had not appeared before such a panel nor had he applied for any positions during the 5 years preceding his complaint. *Larson v. DHSS*, 86-0152-PC-ER, 7/8/87

Appellant lacked standing to challenge an appointing authority's alleged failure to follow their policy regarding hiring preferences for veterans since appellant was not a veteran and had not suffered any "injury in fact" in that regard. *Royston v. DVA & DMRS*, 86-0222-PC, 6/24/87

Appellant, an out-of-state resident, had standing to appeal respondent's decision not to allow appellant to compete in an examination because he did not meet Wisconsin residency requirement. *Wiars v. DMRS*, 86-0209-PC, 3/4/87

The appellants had standing to appeal the decision to reclassify a coworker's position because of the effect of the

reclassification in the event of a future layoff. *Peabody & Disterhaft v. DILHR & DER*, 85-0060, 0114-PC, 4/16/86

Appellant had standing to appeal a decision to fill a new position (created via reorganization) via reclassification/regrade rather than by competition because appellant would have been in a position to compete for the position. *Witt v. DILHR & DER*, 85-0015-PC, 9/26/85

Respondent Secretary of Department of Employment Relations lacked standing to challenge his own decision not to reallocate appellant's position to a particular classification. The appeal was filed by an employe whose position was reallocated from Research Analyst 3 (RA3) to RA2 as a result of a classification survey. Appellant proposed that her position should have been reallocated to the RA3 level. Respondent proposed that, if its initial reallocation decision was incorrect, appellant's position should be at either the RA3 or Research Technician 4 level. The Commission declined to consider respondent's proposed issue because the Secretary was part of the decisional process and, therefore., was not an aggrieved party. *Nichols v. DER*, 83-0099-PC, 9/16/83

Appellants lacked standing to obtain review of the administrator's accretion decision under §230.15(l), Stats, where the appellant could not even be considered for accretion by the administrator due to a preclusive (an unreviewable) determination of "minimal qualification" made by DILHR. *Smith & Berry v. DILHR & DP*, 81-412,415-PC, 8/5/82

Appellants, who were Disabled Veterans Outreach Program staff who had been working for various veterans organizations under contract with DILHR, had standing to obtain review of respondents' decision to classify the permanent DVOP positions within DILHR. The appellants had been in line to fill the permanent positions until they failed an examination and a different classification decision might have resulted in either no exam or a different exam being given. *Smith & Berry v. DILHR & DP*, 81-412,415-PC, 8/5/82

The appellant, supervisor of the Elkhorn Job Service, was found to have standing to appeal respondent's decision to reclassify a fellow employe, (the supervisor of the Janesville Job Service), the injury occurring when appellant

was denied the opportunity to have competed for the Janesville job since it was not opened for competition. *May v. DILHR & DP*, 82-23-PC, 7/8/82

Appellant's union had standing to appeal the classification of a limited term position where the employe filling the position was a union member even though the position fell outside of the scope of the collective bargaining agreement. The union was found to lack standing to seek back pay but the employe was permitted to be added as a party. *Bricklayers and Radish v. DHSS*, 81-367-PC, 5/28/82

Where the appellant was a state employe at the time he requested reclassification and at the time he appealed, the fact that he was not a state employe at the time of the prehearing did not affect his standing to prosecute his appeal. *Renard v. DHSS & DP*, 80-317-PC, 1/22/81

A question of standing under §230.44(l), Stats., is resolved by reference to §§227.01(6) and (8), Stats., as applied in *Wis. Environmental Decade v. PSC*, 69 Wis. 2d 1, 10, 230 N.W. 2d 243 (1975), wherein the court looked for "injury in fact." In this case, the appellant was not in a certifiable range for the position in question and hence could not have been affected by the position's reclassification, and her allegation of mental anguish could not qualify as "injury in fact," particularly in light of *Cornwell Personnel Associates v. DILHR*, 92 Wis. 2d 53, 62, (Court of Appeals, 1979). *Pullen v. DILHR*, 79-72-PC, 5/15/80

Where the appellants filed an appeal in 1979 with respect to a failure to pay overtime in 1977, and were met with a motion to dismiss for untimely filing, one of their alternative arguments was that their appeal ran not to the 1977 failure to pay overtime but to the decision of the administrator in 1979 to pay overtime to certain other employes in compromise and settlement of an appeal that they had timely filed in 1977. The Commission held that this decision was not in effect a decision not to pay the appellants and that since they were not parties to the other appeal, the decision did not affect adversely their substantial interests and they lacked standing to appeal it. *Wickman v. DP*, 79-302-PC, 3/24/80

A union or union representative has standing to appeal a decision to fill a job on an open competitive basis. *Kienbaum v. UW*, 79-213-PC, 12/13/79

The standing of the appellant was not affected by the absence of immediate injury caused by the administrator's decision where the appellant's interests could be affected in the future by the application of the administrator's decision. *Kaeske v. DHSS & DP*, 78-18-PC, 11/22/78

An appellant who objected to the admission of a third party to an exam and appointment to a position had standing to appeal where the position in question supervised appellant's position. *Heil v. DP & DHSS*, 78-13-PC, 12/20/78

A division administrator has standing to appeal a reclassification denial with respect to a position in his division which he supervises. *Sielaff v. DP*, 78-2-PC, 11/22/78

Union was determined to have a sufficient interest to invoke §227.06, Stats., and seek a declaratory ruling regarding benefits due a wrongfully discharged employe on reinstatement. *Request for Declaratory Ruling*, 78-37, 8/29/78

504 Amendment (see also 712.5)

Appellant's tentative reference to the Wisconsin Fair Employment Act in its post-hearing brief to an appeal under §230.44(1)(d), Stats., of a non-selection decision, was insufficient to create an obligation for respondent to object to the consideration of such a claim at the pain of creating an implied waiver. While it is possible to effect a waiver by silence or inaction, the tentative reference in appellant's brief did not indicate that appellant was seeking to amend his appeal. It could not be concluded that respondent reasonably should have foreseen the possibility that complainant's reference, coupled with respondent's failure to object to that reference, would be converted *sua sponte* and without prior notice into an accomplished amendment converting the civil service appeal into a FEA claim and accompanied immediately by the adjudication of the claim and the establishment of liability. There was no effective waiver by respondent to the interjection of the FEA claim. The parties had not had the opportunity to present arguments on a possible amendment or to make a record on that issue. The Commission remanded the matter to the designated hearing examiner to allow complainant to seek to

amend his appeal to add a claim under the FEA. *Holley v. DOCom*, 98-0016-PC, 1/13/99

Deciding whether the appellant to a civil service appeal of a selection decision should be allowed, after hearing, to amend his appeal to add a claim under the Wisconsin Fair Employment Act, involves the informed exercise of discretion. Factors to consider should include, pursuant to *Kloehn v. DHSS*, 86-0009-PC-ER, 1/10/90, the stage of the proceeding, the opportunity appellant had to amend earlier and whether the proposed claim should have been obvious at an earlier point in the proceeding. *Holley v. DOCom*, 98-0016-PC, 1/13/99

A grievance which merely alleged that an employe had been harassed by his employer without describing the conduct which was alleged to constitute harassment failed to describe "the condition of employment which is the subject of the grievance" or the "facts upon which the grievance is based" as required in §ER 46.05(3). When the appellant failed to state on his first, second and third step grievance forms that he was grieving the failure to promote him, and when the respondent's answer did not respond to such an allegation, the appellant was barred from seeking to later amend his fourth step grievance pending before the Commission to refer to the failure to promote. *Flannery v. DOC*, 91-0047-PC, 2/21/92

Amendment was not permitted where the original claim related to the first nonselection decision and the facts set forth in the amended appeal concerning the second and third transactions related to the act of filing the original appeal, i.e., it was alleged that retaliation occurred because the original appeal was filed. However, because the proposed amended complaint was filed within 30 days of the alleged date of notification of the third transaction, the Commission treated that matter as a separate appeal. *Schmidt v. DHSS*, 88-0131-PC, 6/14/89

505.01 Same appellant

Appellant's motion to sever was denied where the two personnel actions (a suspension and a discharge) occurred two months apart but were clearly related, involved the same witnesses, background facts and, possibly, defenses.

***Thompson v. UW*, 88-0058, 0103-PC, 10/31/88**

It is the Commission's usual practice to keep appeals separate from companion discrimination complaints unless and until a consolidated hearing becomes appropriate, in order to permit proper application of the different statutory standards and to deal with any jurisdictional problems. *Thorn v. DHSS*, 81-401-PC, 12/18/81

505.02(2) Hearing

While there were various distinctions between the reallocation appeal and three discrimination/retaliation claims in terms of parties, issues and burdens of proof, consolidation was appropriate where two of the three personnel transactions that were the subject of the appeal were also the subject of the equal rights proceedings. It made sense in terms of judicial economy to combine the cases for one hearing on all issues rather than holding two hearings. *Thorn v. DHSS*, 81-401-PC, 12/18/81, distinguished. *Harden & Nash v. DRL & DER*, 90-0106-PC-ER, etc., 1/23/96

Two cases, filed by separate appellants, were ordered consolidated where they were both being processed according to the expedited arbitration procedure under §230.44(4)(bm), Stats., the respondent was the same in both cases, the issues, though not identical, substantially overlapped, it appeared the respondent would call at least some of the same witnesses in both cases and the factual backgrounds in the two cases were similar, although not identical. *Wakely & Johnsonv. DER*, 94-0253, 0163-PC, 2/20/95

Appellants' cases were consolidated for hearing because the respondent was the same, the issue was the same, and the circumstances were the same where appellants, although in different layoff groups, were employed in the same department and lost their jobs as the result of the same layoff plan. Respondent still had to establish just cause as to each appellant. *Thoresen & Behm v. UW*, 93-0202, 0212-PC, 1/6/94

Consolidation for hearing was ordered where the appellants' position descriptions were similar, the witnesses were the

same in all four cases, and the classifications in question were the same. *Martin et al. v. DP*, 83-0031, 0035, 0036, 0037-PC, 5/25/83

These reclassification appeals were ordered consolidated for hearing on a determination that it would effect administrative economy and convenience where the two appeals had a common respondent, respondent's counsel, and respondent's witnesses, and the positions in question had the same classification and the issues for hearing were basically the same, and this outweighed the differences between the two jobs. *Jobelius & Herald v. DP*, 80-306, 250-PC, 1/8/81

505.50 Open records law

While all personnel records implicate reputation or privacy interests to a certain extent, the analysis in *Woznicki v. Erickson*, 202 Wis. 2d 178, 195 (1996) does not exempt any record from disclosure; it merely subjects personnel records to the balancing test. The presumption remains that the records should be disclosed. *Carter v. Wis. Pers. Comm.*, 98-CV-2620, 1/28/99

The public's interest in disclosure of a settlement agreement arises from the fact that the petitioner was a public employee and he was engaged in public litigation, in the form of administrative proceedings, against an arm of state government. Even though the settlement did not involve the direct payment of money, the public's right to know the terms of the agreement were just as strong. *Carter v. Wis. Pers. Comm.*, 98-CV-2620, 1/28/99

The open records law advances the strong public interest in knowing the terms and conditions under which any public employee leaves office and this interest may only be overcome in the most limited situations. Even to the extent that the public may have a greater interest in the disposition of claims involving higher level rather than lower level employes, the employe must still establish an actual threat to his privacy or reputation which implicates the public's interest in keeping such matters private. *Carter v. Wis. Pers. Comm.*, 98-CV-2620, 1/28/99

A settlement agreement reached in a case before the

Commission was subject to release to the public under the open records law where the agreement revealed that: 1) an employment dispute existed that led ultimately to the termination of employment; 2) the employe disputed the grounds for the termination and challenged it before the Commission, claiming the termination was discriminatory; 3) the employe agreed to resign, not seek future employment with the employer, drop his claims and be provided with a neutral reference; and 4) the parties agreed that a performance evaluation, letter of reprimand and letter of termination would be pulled from the employe's personnel file and held separately. Disclosure of those other documents was not before the court. There was nothing in the settlement agreement that created any reasonable expectation of non-disclosure on the part of the employe. *Carter v. Wis. Pers. Comm.*, 98-CV-2620, 1/28/99

When determining whether to make a record available, it is the public's interest in disclosure, not the requester's specific interest, which matters. *Carter v. Wis. Pers. Comm.*, 98-CV-2620, 1/28/99

The public interest in revealing the terms in which legal disputes involving an arm of the State, even legal disputes involving the termination of public employees, outweighs the public interest in preserving the privacy and reputation of the employee where the record sought did not reveal the nature of the conduct alleged against the employe and the record itself created no independent expectation of privacy. *Carter v. Wis. Pers. Comm.*, 98-CV-2620, 1/28/99

A request for access to a sex discrimination complaint file was made by a fellow employe of complainant who had alleged that the requester was one of a group of male officers who were engaged in harassment of female officers at a correctional institution by reporting to institution management every rule violation by female officers they observed, to see how management would respond. Respondent DOC objected to this request on the ground that the review of the file by the person making the request would result in further harassment or retaliation against complainant. The request was granted because the strong presumption in favor of disclosure was not rebutted by a showing that this was the type of exceptional case recognized under the law where denial of access is appropriate. The person requesting access already was aware of the general nature of the accusations, and there

was no basis on which to conclude that knowledge of the specific content of the file would be likely to lead to improper conduct on his part. Further, he would be subject to discipline if he engaged in any improper conduct. *Neal v. DOC*, 94-0019-PC-ER, 6/2/94

Complainant's request to the Commission for disclosure of the identity of a witness under Wisconsin's Open Records Law was granted despite the Commission's equal rights investigator's statements to the witness during the course of the investigation that her information was confidential, where the complainant made a particularized showing of need for the information in order to pursue the complaint of discrimination and where all possibilities of avoiding the issue had been exhausted. Disclosure of the witness's identity was provided with specific safeguards. *Stroud v. DOR*, 82-PC-ER-97, 3/27/85

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 517 through 521.7(8)

[Previous material] [Next material]

517.01 Generally

Where the hearing examiner erred in deciding, in a proposed decision and order, an issue that was not properly noticed, circumstances were consistent with a remand for further proceedings before the hearing examiner. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

It is not necessary that a party engaged in an oral argument concerning a proposed decision explicitly address every argument of the opposing party to avoid a conclusion of waiver or admission of that party's arguments. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

The Commission declined to grant oral argument before the Commission relating to a motion to dismiss based on mootness. The Commission distinguished its practice of granting oral argument in appeals where an evidentiary hearing has been held by an individual hearing examiner. *Friedrichs v. DOC*, 96-0023-PC, 11/22/96

The Commission did not have the option of treating appellant's submission as a motion for reconsideration where the Commission had already issued a final decision in the case. Appellant's submission was treated as a petition for rehearing and was subject to the requirements of §227.49, Stats. *Dusso v. DER & DRL*, 94-0490-PC, 7/23/96

Where, in the objections to the proposed decision, appellant stated that one of respondent's witnesses lied under oath, the Commission declined respondent's subsequent request

to direct the appellant to identify the witness and the alleged lie or lies so that respondent could carry out an investigation. *Dorsey et al. v. DER*, 94-0471-PC, etc., 1/23/96

Appellant was not permitted to reopen the record to add evidence of the same nature as evidence previously offered, where there was no showing that this additional evidence would not have been available for the hearing if it had been requested earlier. *Hutchison v. DER*, 92-0577-PC, 12/13/94

A party was not permitted to reopen the record after the issuance of a proposed decision where the party offered no reason why the information could not have been presented at the hearing already held. *Lyons v. WGC*, 93-0206-PC, 12/5/94

Appellant's request to reopen the hearing record and hold it open until the occurrence of a number of personnel transactions was denied where the preponderance of the evidence indicated that the events would have no effect on the issue presented by the appellant's appeal. Even if the subsequent transactions occurred differently than expected, they could generate appeals which would cause further uncertainty and delay. *Hutchison v. DER*, 92-0577-PC, 10/24/94; rehearing denied, 12/13/94

Appellant's request for oral argument with respect to a hearing examiner's proposed decision was granted over respondent's objection, where appellant was proceeding without counsel, the case turned on factual findings which were at least to some extent disputed at hearing, and his request appeared to have been founded at least in part on the contention that he would be better able to present his arguments verbally than in writing. *Peck v. DER*, 92-0130-PC, 9/8/93

Appellant's petition for rehearing was granted where the order dismissing appellant's appeal at her request was issued under a misapprehension of appellant's intent and was premised on a material error of fact. Although the appellant had previously indicated she had wished to withdraw her appeal, a letter from the Commission to appellant to confirm this intent was improperly addressed, appellant changed her mind before she received the Commission's dismissal order and, at that time, wrote the Commission to continue her appeal. *Wipperfurth v. DER*,

92-0135-PC, 11/13/92

The Commission lacked jurisdiction over an appeal filed in February of 1991 regarding a discharge decision where in April of 1990, the Commission had dismissed with prejudice an appeal filed by the same appellant regarding the same discharge decision. *Briskey v. DHSS*, 91-0016-PC, 4/5/91

The Commission granted the complainant's request for an evidentiary hearing on the issue of remedy even though, in the proposed decision and order, the examiner had addressed the remedy issue. The examiner had chosen to address the issue in the proposed decision, even though it had not been briefed, because it appeared that there might not be any disagreement between the parties. *Oestreich v. DHSS & DMRS*, 87-0038-PC-ER, 2/12/91

The Commission declined to grant a request from counsel representing complainants in three other proceedings pending before the Commission for a delay in the issuance of a final decision in the captioned matter. The request was for a delay until hearings could be held in the other three cases. *Wood v. DOT*, 86-0037-PC-ER, 5/5/88; affirmed by Milwaukee County Circuit Court, *Wood v. Wis. Pers. Comm. & DOT*, 88-CV-09-178, 5/10/89; affirmed by Court of Appeals, 009-178, 11/22/89

The provisions of §222.49(1), Stats., relating to petitions for rehearing are inapplicable to an interim, rather than final, order. The interim order had found subject matter jurisdiction. *Spilde v. DER*, 86-0040-PC, 1/8/87

The appellant's request for reconsideration was denied where she sought to have the Commission adopt additional facts in the absence of newly discovered evidence. *Atkinson v. DILHR & DER*, 86-0042-PC, 6/12/86

In considering appellant's motion to reopen the hearing filed after a proposed decision had been issued and oral arguments heard, the Commission considered the statutory bases identified for granting a petition for rehearing and denied the motion given the timing of the request, the nature of the proposed additional evidence and a lack of justification for reopening. *Conley v. DHSS*, 83-0075-PC, 5/18/84

The Commission denied appellant's request to reopen the

hearing after a proposed decision had been issued but before the final decision, where the "new evidence" was available at the time of the original hearing but simply was not offered. *Conley v. DHSS*, 83-0075-PC, 5/18/84

The Commission lacked the authority to entertain a petition for rehearing filed by a would-be intervenor more than 20 days after service of the underlying Commission decision on all parties of record, but less than 20 days after the petitioner received a copy of the decision. *Martin v. Transportation Commn. & DER*, 80-366-PC, 3/21/83

The Commission has the authority to order a hearing reopened for additional testimony following the issuance of a proposed decision by the hearing examiner, and it would exercise its discretion to do so, where the appellant's offer of a medical report was rejected by the examiner as hearsay, and the appellant was unrepresented by counsel, it was not unreasonable for him to have expected that the document, which was entitled "Practitioner's Report on Accident or Industrial Disease in Lieu of Testimony," would have been received in evidence, and the document related to the central question in the appeal. *Blied v. DOT*, 81-290-PC, 3/4/83

A petition for rehearing was denied where the appeal originally had been dismissed for lack of jurisdiction without reaching the respondent's motion to dismiss for failure of prosecution, because said motion would have to be granted even if the Commission were to determine that it had jurisdiction. *Jansen et al. v. DOT & DP*, 78-170-PC, etc., 10/4/82

517.55 Timeliness of objection/request

The Commission considered respondent's request for reconsideration relating to the ruling on costs even though it was filed after the Commission had entered an order which awarded appellant certain costs if appellant filed an affidavit or other evidence regarding his adjusted gross income in accordance with §227.485(7), Stats., and if there was no meritorious objection thereto. The request for reconsideration relied on case law that had apparently not been included in the published advance sheets as of the date of the request for reconsideration. *Smith v. DMRS*,

90-0032-PC, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96

Respondent's objection to the additional two months provided complainant for filing objections to the proposed decision was rejected where complainant resided in California, was out of the country for a part of the period in question, had made closing argument rather than filed post-hearing briefs and requested a copy of the hearing tapes in order to prepare his objections. *Schmitt v. UW-Milwaukee*, 90-0047-PC-ER, 9/24/93

The Commission lacks authority to toll, due to mental illness, the limitation on the time period for filing a petition for rehearing. *DePagter v. UW-Madison*, 93-0003-PC-ER, 7/22/93

The complainant's petition for rehearing was denied where the Commission had affidavits of mailing reflecting that the complainant's Initial Determination and dismissal order were mailed to his address even though he alleged he did not receive them. The Commission is not required to establish service through the use of certified mail. *Stewart v. DOR*, 92-0062-PC-ER, 3/10/93

The Commission lacked the authority to consider appellant's supplementary motion for attorney's fees and costs arising from attempts by appellant's counsel to obtain full compliance or a compromise settlement with respect to the remedy ordered by the Commission where the decision and order was served on May 15 and the supplementary motion was filed on August 26. *Arneson v. UW*, 90-0184-PC,11/13/92

The Commission lacked the authority to grant a request filed in June of 1991 to modify the Commission's interim decision and order issued in April of 1990, which had been followed by a July, 1990 final decision, regardless of the equitable factors advanced by the appellant. *Showsh v. DATCP*, 90-0120-PC, 12/23/91

The Commission lacked the authority to grant a request filed in 1989 to reopen an appeal which was dismissed with prejudice pursuant to a settlement agreement on November 18, 1987, or to open a new appeal arising from the alleged breach of the settlement agreement. *Krueger v. DHSS*, 89-0070-PC, 1/10/90

Where, after promulgation of a proposed decision and order in a case arising from the decision not to select the complainant for a vacant position, the respondent argued that the complainant was illegally certified for the vacancy and therefore lacked standing and failed to make out a prima facie case, the argument came too late because there was no opportunity for the complainant to have made a record on this point at the hearing. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

The Commission lacked the authority to consider appellant's petition for rehearing which was filed 7½ months after the Commission issued an order to dismiss due to lack of prosecution. *Peters v. DER*, 84-0148-PC, 10/31/85; affirmed by Brown County Circuit Court, *Peters v. Wis. Pers. Comm.*, 85-CV-3056, 4/14/86; affirmed by Court of Appeals District 111, 86-1067, 4/15/87

The Commission declined to consider respondent's objections to a proposed decision and order which were received four days after the twice-extended due date without justification for the failure to meet the established deadline. *Novak v. DER*, 83-0104-PC, 1/17/85

The Commission declined to consider respondent's request for oral arguments which was received twelve days after the once-extended due date without explanation as to why the deadline had not been met. *Wentz v. DER*, 84-0068-PC, 1/17/85

The Commission lacked the authority to reconsider interim and final orders that were issued six months prior to appellant's motion to reconsider. Appellant contended that the case should be reopened due to events that occurred several months after the issuance of the final decision. *Smith v. DILHR & DP*, 81-412-PC, 83-0001-PC, 6/9/83

The 20 day period for filing a petition for rehearing begins on the date of mailing of the decision to each party, rather than on the date a non-party may have received the decision. The intervening respondent, though not a party at the time the decision was issued, is still precluded from petitioning for rehearing more than twenty days after service was complete. *Martin v. Trans. Comm. & DER*, 80-366-PC, 5/23/83

The pendency of a petition for judicial review may act to

suspend the Commission's authority to reconsider its determination. *Martin v. Trans. Comm. & DER*, 80-366-PC, 5/23/83

A petition for rehearing was untimely where the Commission's decision was mailed January 21, 1983, and the petition for rehearing was received by the Commission on February 18, 1983, since §227.12, Stats., provides that petitions for rehearing must be filed "within 20 days after service of the order." *DuPlessis v. DHSS*, 80-PC-ER-111, 3/17/83

518.01 Number present and voting

Where only two of the three commissioners voted on a motion for substitution of hearing examiner, one voting against and one voting in favor (and one abstaining), the motion was denied because it failed to obtain a majority (two votes) of a quorum. The Commission's prior order designating the hearing examiner remained in effect. [Opinions, constituting dicta, on both sides of the substantive issue of substitution, are set out as part of the decision]. *Bridges v. DHSS*, 85-0170-PC-ER, 5/17/88

518.02 Disqualification of commissioner/examiner

There was insufficient basis for granting complainant's motion for substitution of examiners, made first after the examiner denied complainant's request to introduce more than one thousand pages of documents at hearing and renewed during the post-hearing briefing schedule. The complainant had introduced other exhibits and declined to identify which of the one thousand pages were critical to her case. *King v. DOC*, 94-0057-PC-ER, 11/18/98

The complainant failed to establish adequate grounds for disqualification where he alleged 1) the hearing examiner twice corrected complainant's grammar, 2) the hearing examiner held several telephone conversations with respondent's representative where there was no allegation that the conversations related to the merits of the case rather than to procedural or non-substantive matters, 3) the

examiner established deadlines for the complainant but not for the respondent, 4) the examiner ignored complainant's requests for certain materials in the respondent's possession, where complainant's allegations amounted to a disagreement with the various interim decisions on discovery disputes issued by the examiner, and 5) the examiner did not allow the complainant to express himself during telephone conferences, where an examination of the case file did not support contentions 3) and 5). The fact that the complainant's motion to disqualify was filed shortly after the examiner had written the parties a letter ruling on several matters which were in dispute, suggested that the motion was motivated by disagreement with the ruling rather than by some bias on the part of the examiner. *Asadi v. UW*, 85-0058-PC-ER, 1/24/92

Nothing in the Commission's rules or the Wisconsin Administrative Procedure Act provides for the parties to have any input into the selection of the hearing examiner for a particular case, other than the party's right to make a substitution request. The complainant had requested that the presiding examiner be removed and be replaced by "a member of a protected class (Black, Hispanic, Asian or Native American.)" *Asadi v. UW*, 85-0058-PC-ER, 1/24/92

Petitioner's motion for the appointment of a new tribunal was granted where observations and concerns of Commission staff were transmitted to the employer and allegedly were part of respondent's motivation for requiring a psychological exam and allegedly were cited in the termination letter. *Iwanski v. DHSS*, 89-0074-PC-ER, etc., 12/2/91

In dicta, the Commission rejected appellant's allegation that the examiner was biased where it appeared that the appellant had waited to raise his allegation until the examiner had issued his proposed decision and where there was no apparent tie between the facts serving as the basis for the appellant's allegation of bias and the matter before the Commission. *Mincy v. DER*, 90-0229-PC, 10/3/91

There was no absence of fairness nor an appearance of the absence of fairness in having a commissioner, whose spouse is lieutenant governor, participate in deciding a FEA claim filed against a state agency. *Cozzens-Ellis v. UW-Madison*, 87-0070-PC-ER, 2/26/91

Hearing examiner A denied appellant's request that consolidated appeals be reassigned to examiner B who had been designated for one of the cases prior to their consolidation. There was no suggestion that examiner A was unqualified to serve and a review of a document serving as the basis for one of the appeals revealed a potential conflict of interest by examiner B relative to a potential witness. *Thompson v. UW*, 88-0058, 0103-PC, 10/31/88

Complainant's motion to disqualify a commissioner from participating in rendering the final decision of the Commission was denied where the complainant had contended that the commissioner was prejudiced because the commissioner had presided at the hearing and had prepared a proposed decision and order favorable to the respondent. *Brownlee v. State Public Defender*, 83-0107-PC-ER, 12/6/85

In interpreting "personal bias or other disqualification" as used in §227.09(6), Stats. (1983), the Commission looked to the standards for use by a judge in a civil or criminal action. *Dolphin v. DATCP*, 79-PC-ER-31, 5/26/83

The Commission denied respondent's motion to prohibit any consultation by the Commission with the former Commissioner who had served as the hearing examiner in the case. The motion was based on the fact that the hearing examiner had, 3 months after issuing a proposed decision and order but before the Commission had issued a final decision, attended a conference that was attended by approximately 500 other people, including both the complainant and a division administrator for respondent. The examiner lunched at a table with the complainant and six other persons. The Commission noted that granting the motion would preclude consultation with the examiner regarding her impressions of the material witnesses on which she based her conclusions of credibility. *Dolphin v. DATCP*, 79-PC-ER-31, 5/26/83

519 Findings, conclusions and order

Where an agency rejects or reverses the recommended findings and order of its hearing examiner, due process of law requires that the examiner first be consulted as to his or

her personal impressions of the witnesses. The record of the agency must affirmatively show that it had the benefit of the examiner's first-hand impressions of the material witnesses. *Braun v. Industrial Comm.*, 36 Wis 2d 56-57 (1967). The agency must prepare a separate statement or memorandum opinion setting forth the reasons, facts and ultimate conclusions relied upon in rejecting the recommendations of the examiner and substituting its own findings. *Appleton v. ILHR Dept.*, 67 Wis. 2d 162 (1975). *DILHR & Martin v. Pers. Comm.*, Dane County Circuit Court, 79-CV-389, 6/30/80

The proposed decision erred where it addressed matters outside the scope of the notice of hearing. Complainant claimed he was discriminated against based on arrest and conviction record. The statement of the issue was phrased in terms of whether respondent discriminated on the basis of arrest or conviction record in connection with the last paragraph of a letter it issued to complainant. The letter stated that it served as a last chance warning to complainant that "any subsequent driving while intoxicated or similar charges" would result in termination of his employment. The statement of the issue did not provide adequate notice to the parties that the Commission would consider whether respondent's conduct violated §111.322(2), Stats, which prohibits circulating any statement which implies or expresses any limitation, specification or discrimination; or an intent to make such limitation, specification or discrimination because of any prohibited basis. The original charge of discrimination did not mention the circulation issue. The initial determination also did not mention that issue, nor had either party addressed that issue prior to the issuance of the proposed decision and order. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

Adjudicative bodies should decide cases on the basis of the result the law requires, regardless of whether the particular legal theory is brought to bear by the parties or, *sua sponte*, by the adjudicative body, so long as the parties have sufficient notice and an adequate opportunity to be heard on the issue in question. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

Appellant's contention that the hearing examiner's observations as to witness credibility were entitled to deference was inapplicable where the Commission adopted the examiner's proposed findings of fact but went on to

substitute its conclusions of law for those set forth in the proposed decision. *Showsh v. DATCP*, 87-0201-PC, 3/14/89; reversed on other grounds by Brown County Circuit Court, *Showsh v. Wis. Pers. Comm.*, 89-CV-445, 6/29/90; affirmed by Court of Appeals, 90-1985, 4/2/91

Respondent's action to reallocate the appellant's position (rather than to reclassify the position) was affirmed despite reference in Commission's order in predecessor case (Marx v. DP, 78-138-PC) for respondent to use an "effective date of *reclassification*", where the reference in the order to "reclassification" had been in error and reallocation of the appellant's position was consistent with applicable law. *Marx v. DATCP & DER*, 82-0050-PC, 3/18/87

521.2 Applicable standards

Neither §227.485(3), Stats., nor Wisconsin case law construing that provision provides that the government agency must be substantially justified in its position throughout the period up until the matter is decided, i.e. the hearing before the Commission. The Commission did not abuse its discretion in determining that the employing agency was substantially justified in taking its position at the time that it imposed discipline. [Note: In its decision, the Commission did not address any contention that the issue of whether the respondent was substantially justified should be viewed in terms of the information known to the respondent at the time of hearing.] *Showsh v. Wis. Pers. Comm.*, Brown County Circuit Court, 90 CV 1001, 7/25/91

The agency has the burden of establishing that its position was substantially justified. *DER v. Wis. Pers. Comm. (Anderson)*, Dane County Circuit Court, 87CV7397, 11/7/88

In order for the agency to demonstrate that its position had a reasonable basis in law and fact, and was therefore "substantially justified," it must show that it had a reasonable basis in truth for the facts it claims justified its position, that it had a reasonable or well accepted theory of the law that it urged as support for its position and that there was a reasonable, material connection between the facts asserted and the legal theory urged. *DER v. Wis. Pers.*

***Comm. (Anderson)*, Dane County Circuit Court, 87CV7397, 11/7/88**

A circuit court's decision, in the context of a review under ch. 227, Stats., that the Commission's determination regarding appellant's managerial status was unreasonable, must be taken into consideration in deciding appellant's subsequent fee petition but is not conclusive. In reviewing the request for costs, the issue is not whether the Commission reached an erroneous conclusion of law, but, first, whether respondent relied on a particular contention (cited by the court as legal error by the Commission) as part of its case, and second, if so whether such reliance was substantially justified under the circumstances. *Murray v. DER*, 91-0105-PC, 4/6/95; affirmed by Dane County Circuit Court, *Murray v. Wis. Pers. Comm.*, 95-CV-0988, 12/15/95

An application for fees and costs requires analyzing respondent's position in the administrative proceeding as well as its underlying action. *Davis v. ECB*, 91-0214-PC, 12/5/94

Where it was concluded that respondent was substantially justified in taking its primary positions during the administrative proceeding, it was unnecessary to analyze each specific argument advanced by the respondent in the case. *Davis v. ECB*, 91-0214-PC, 12/5/94

Under a request for attorneys fees/costs under the EAJA, the state agency has the burden of affirmatively proving it was "substantially justified" in its position, or that "special circumstances existed that would make the award unjust," using a standard of proof which falls between arbitrary and frivolous action and automatic award to the prevailing party. The state agency's action at both the prelitigation and litigation stages are analyzed, citing *Escalada-Coronel v. DMRS*, 86-0186-PC, 4/2/87. *Higgins v. Wis. Racing Bd.*, 92-0020-PC, 3/31/94

The Commission will look to both the position of the agency on the underlying transaction that triggered the administrative proceeding and its position in the administrative proceeding for purpose of determining whether the agency's "position" was substantially justified as provided in the law. *Escalada-Coronel v. DMRS*, 86-0189-PC, 4/2/87

The agency has the burden of showing its position had a reasonable basis in law and fact. *Escalada-Coronel v. DMRS*, 86-0189-PC, 4/2/87

The standard of "substantially justified falls in between the common law "bad faith" exception and an automatic award of attorney's fees to prevailing parties, citing *Berman v. Schweiker*, 531 F. Supp. 1149, 1153-1154 (N.D. Ill., 1982). *Escalada-Coronel v. DMRS*, 86-0189-PC, 4/2/87

The Commission concluded that under the law there was a reasonable basis in law and fact for the respondent's position and denied appellant's motion for costs. Respondent's case was far from the strongest and was insufficient to have countered the appellant's case and to have avoided the Commission's conclusions on the merits that there was no rational basis for the inconsistent treatment of the appellant's application. However, the respondent's case was also far from the weakest where the respondent made at least an arguable contention that its conduct was dictated by a prior decision of the Commission and where respondent's conduct was also consistent with a relatively long standing interpretation of its authority in the area rather than being a "one-shot" approach. *Escalada-Coronel v. DMRS*, 86-0189-PC, 4/2/87

521.5 Specific issues

To the extent that a party to a proceeding to which the EAJA applies is properly represented by a non-lawyer, these are the "agents" referred to in the fee award coverage of the statutes. *DER v. Wis. Pers. Comm. (Anderson)*, Dane County Circuit Court, 87CV7397, 11/7/88

Law clerk and paralegal services may properly be awarded under the EAJA's reference to attorney fees. *DER v. Wis. Pers. Comm. (Anderson)*, Dane County Circuit Court, 87CV7397, 11/7/88

Copying charges and the charge for tape recordings of hearings are not recoverable because they are not among the categories of costs specified in §814.04(2), Stats. The "allowed by law" language restricts the costs recoverable to those categories specified in the listing that follows. *DER v. Wis. Pers. Comm. (Anderson)*, Dane County Circuit Court,

87CV7397, 11/7/88

A party before an administrative agency such as the Commission can anticipate that the agency will follow its precedents unless it provides a rational and reasonable basis for departing from them. However, if an agency takes a position contrary to a Commission precedent, while it presumably would be subject to rejection by the Commission, it would not be subject to the imposition of costs pursuant to §227.485, Stats., as long as it had a reasonable basis in law for its position. *Pearson v. UW*, 84-0219-PC, 2/12/97 B

The statutory framework which provides for the submission of an application for costs within 30 days after service of the proposed decision and for submission of a response within 15 working days of respondent's receipt of the application does not prohibit either amendments or replies. *Olson et al. v. DER*, 92-0071-PC, etc., 12/5/94

Appellants were permitted, more than 30 days after the decision on the merits of their appeal, to file an amendment to their fee application to address respondent's assertion that their application was fatally defective because it did not establish that appellants met the maximum income criterion. *Olson et al. v. DER*, 92-0071-PC, etc., 12/5/94

In an appeal from two suspensions which was decided in favor of the appellant on the ground that respondent failed to provide adequate hearings prior to imposing the suspensions, where the parties stipulated to an issue that did not include a separate due process issue, the respondent's contention that appellant's costs should be limited to so much of the costs as could be apportioned to the procedural due process question because the Commission did not reach the just cause question, was rejected. *Rentmeester v. Wis. Lottery*, 91-0243-PC, 9/9/94

Where appellant based her request for a higher fee on a Consumer Price Index baseline from 1982-84, but the EAJA did not become effective until November of 1985, the Commission reduced appellant's hourly fee request by a pro rata amount. *Rentmeester v. Wis. Lottery*, 91-0243-PC, 9/9/94

Photocopying and office costs are not allowable under §814.04(2), Stats. *Rentmeester v. Wis. Lottery*, 91-0243-PC, 9/9/94

Appellant's request for fees at the rate of $100 per hour was rejected due to appellant's failure to show that an increase was justifiable under the allowable factors recited in s. 227.485(1)2., Stats., which includes the factor of limited availability of qualified attorneys. *Higgins v. Wis. Racing Bd.*, 92-0020-PC, 3/31/94

The following expenses are not recoverable under the EAJA: cost for preparing a hearing transcript and a copy of the transcript, respondent's charge for providing copies of appellant's personnel file and professional investigator fees. *Higgins v. Wis. Racing Bd.*, 92-0020-PC, 3/31/94

Respondent demonstrated "a reasonable basis in truth for the facts alleged" where the parties had submitted the merits of their dispute on a stipulation of fact. *Shew v. DHSS*, 92-0506-PC, 3/29/94

Appellant's petition for attorney's fees and costs was granted where respondent narrowly read the meaning of the word "act" in §230.36(3)(c)3., Stats. for which it did not have a "reasonable basis in law for the theory propounded." *Shew v. DHSS*, 92-0506-PC, 3/29/94

Section 814.04(2), Stats. does not cover the cost of medical records, but does provide for payment of postage. *Shew v. DHSS*, 92-0506-PC, 3/29/94

The Commission has authority to award attorney's fees against respondent state agencies after finding liability under the Fair Employment Act and to award fees under the Equal Access to Justice Act, irrespective of the decision in *Wis. Dept. of Trans. v. Wis. Pers. Comm.*, 176 Wis.2d 731, 500 NW2d 664 (1993). *Keul v. DHSS*, 87-0052-PC-ER, 2/3/94

The Commission lacked the authority to consider appellant's supplementary motion for attorney's fees and costs arising from attempts by appellant's counsel to obtain full compliance or a compromise settlement with respect to the remedy ordered by the Commission where the decision and order was served on May 15 and the supplementary motion was filed on August 26. *Arneson v. UW*, 90-0184-PC, 11/13/92

In a consolidated case including an appeal of a discharge decision and a discrimination complaint in which the employe prevailed, the Equal Access to Justice Act

(§227.485, Stats.) does not preempt the Commission's authority to award fees under *Watkins v. Labor and Industry Review Commission*, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984) for a FEA violation. Fees were assessed against respondent under *Watkins* so it was unnecessary to make an EAJA analysis. *Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 10/1/92

The prevailing market rate and the presence of a form of contingency fee contract are not "special factors" to be used as a basis for awarding a fee in excess of $75 per hour. *Arneson v. UW*, 90-0184-PC, 5/14/92

Costs of copying and hearing tapes are outside the costs permitted by §814.04(2). *Arneson v. UW*, 90-0184-PC, 5/14/92

Costs incurred in connection with judicial review proceedings which resulted in the reversal of the Commission's adverse decision are implicitly authorized. *Kumrah v. DATCP*, 87-0058-PC, 4/17/90

Fees to a litigant unrepresented by counsel as compensation for the time he or she spends on the case are not authorized for payment under §227.485, Stats. *Heikkinen v. DOT*, 90-0006-PC, 4/16/90

Compensation for wrongful denial of career advancement is outside the scope of allowable fees and costs under §227.485, Stats. *Heikkinen v. DOT*, 90-0006-PC, 4/16/90

The Commission lacks authority to award fees under §227.485, Stats., arising from a proceeding before another agency. *Duello v. UW-Madison*, 87-0044-PC-ER, 3/9/90

The 30 day filing requirement is mandatory rather than directory and the appellant's application for fees and costs was denied where it was filed more than 30 days after the date of service of the Interim Decision and Order. *Doyle v. DNR & DMRS*, 86-0192-PC, 2/8/89, rehearing denied, 3/17/89

Appellant's request was premature in that it was filed before a decision on the merits was issued. Appellant was permitted to renew his request. *Doyle v. DNR & DMRS*, 86-0192-PC, 87-0007-PC-ER, 11/3/88

Complainant's motion for attorney's fees and costs upon the issuance of an interim decision finding probable cause was

premature. *Snow v. DHSS*, 86-0051-PC-ER, 6/20/88

The Commission adjusted the maximum hourly fee of $75.00 upward to reflect a cost of living increase. *Anderson et al. v. DER*, 86-0098-PC, 11/18/87; affirmed in part, reversed in part by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 87CV7397, 11/7/88 (Note: the effect of the decision was to affirm the Commission's decision in all respects except as to the award of copying charges and the charge for tape recordings of the hearings)

Where attorneys for one appellant submitted nothing as to prevailing market rates, their claimed fees (some of which were in excess of the statutory maximum) were reduced to the level charged by the attorneys for the other appellant. *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 9/10/87

Costs should not be allowed for legal fees accrued before another forum. *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 9/10/87

Appellants' attorneys fees attributable to proceedings before the Commission but not directly related to the appellants' successful motion for summary judgment were not rendered "not in connection with the contested case" or unreasonable. *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 9/10/87

It is not unreasonable to allow recovery for hours spent by a more senior attorney who was serving in a supervisory capacity to the appellants' attorney where it could reasonably be assumed that the involvement by the senior attorney was part of the delivery of legal services to the client and served to advance the clientts interests. *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 9/10/87

The Commission concluded that appellant's motion for costs was not frivolous where in its underlying decision on the merits the Commission concluded there was no rational basis for the inconsistent treatment of applicants resulting from exceptions to a stated policy and where the appellant's motion generated a matter of first impression. The Commission, therefore, denied respondent's counter-motion for costs. *Escalada-Coronel v. DMRS*, 86-0189-PC, 4/2/87

521.7(1) Reclassification/reallocation

No costs were awarded to appellant relating to his successful appeal of the decision to deny his request for reclassification of his position where respondent was substantially justified in relying on information gained from appellant's previous supervisor regarding the time spent by appellant on certain duties, significant areas of dispute existed throughout the administrative proceedings which were unresolved by the hearing record. *Briggs v. DNR & DER*, 95-0196-PC, 10/22/96

Costs were denied where respondent demonstrated a reasonable basis in truth for the facts alleged, a reasonable basis in law for their legal theories and a reasonable connection between the facts alleged and the legal theory advanced. The case involved application of outdated position standards where the legal principles were not clear cut or well defined by precedent. *Fulk, et al. v. DHSS & DER*, 95-0004-PC, etc., 5/28/96

Where the determining factual issue in the case was whether appellants had the requisite supervisory duties, respondent was substantially justified where the documentary evidence lent strong support to respondent's case but the testimony of a witness lent strong support to the appellants' case. *Von Ruden et al. v. DER*, 91-0149-PC, etc., 11/17/95

Fees were denied despite a reviewing court's conclusion that the Commission's decision on a mixed question of law and fact did not pass muster under the standards applicable to review under ch. 227, Stats., where the record reflected that respondent's position with respect to the underlying controversy had a reasonable basis in fact and in law. Although the court concluded that the Commission had reached an erroneous conclusion of law, this conclusion was never advanced by, and could not be attributed to, the respondent. *Murray v. DER*, 91-0105-PC, 4/6/95; affirmed by Dane County Circuit Court, *Murray v. Wis. Pers. Comm.*, 95-CV-0988, 12/15/95

Fees were denied where respondent followed its standard practice in terms of analyzing positions for reallocation and relied on the appellants' official position descriptions as well as management's opinion as to the nature of the work performed and class level. *Olson et al. v. DER*, 92-0071-PC, etc., 3/9/95

Appellant was not entitled to fees where the underlying legal question turned on an interpretation of a policy which respondent had promulgated and administered, there were no provisions in any of the statutes, rules or policies potentially governing the transaction which specifically addressed the question presented by the case, and in its brief of the merits, appellant acknowledged that the "existing regulatory scheme [was] of debatable applicability and… highly ambiguous as regards the situation presented by this appeal." *Zentner v. DER*, 93-0032-PC, 8/18/94

The appellants were not entitled to fees and costs where the application of the classification specifications to the duties and responsibilities of appellants' positions did not lead to an obvious result, the positions were not specifically identified in the position standard and the language of the position standard was general and required the exercise of discretion in its interpretation and application. *Christofferson et al. v. DER & UW*, 90-0058-PC, etc., 2/7/91

Respondent was substantially justified in taking its position relating to the reallocation of the appellants' positions, where respondent conducted the survey in its usual manner, where the type of analysis involved required weighing of evidence, opinion, and argument, Anderson et al. v. DER, 86-0098-PC, 11/18/87, was distinguished. *Manthei et al. v. DER*, 86-0116,etc.-PC, 1/13/88

Respondent lacked a "reasonable basis in law and fact" for its decision to deny reclassification where, *inter alia*, respondent's personnel specialist had little knowledge about the specific responsibilities of those "comparable" positions that were presented by respondent as evidence of the correctness of its decision. *Anderson et al. v. DER*, 86-0098-PC, 11/18/87; affirmed in part, reversed in part by Dane County Circuit Court, *DER v. Wis. Pers. Comm.*, 87CV7397, 11/7/88 (Note: the effect of the decision was to affirm the Commission's decision in all respects except as to the award of copying charges and the charge for tape recordings of the hearings)

521.7(2) Discipline

Where appellant, who did not have the burden of proof, did

not appear at the hearing on whether she was entitled to fees and costs under the Equal Access to Justice Act, she was deemed to have admitted the accuracy of the evidence adduced at the hearing, pursuant to §PC 5.03(8), Wis. Adm. Code. There were no indicators of credibility issues as to the witnesses who did appear, such as inconsistent testimony. *Klemmer v. DHFS*, 97-0054-PC, 10/9/98

Appellant's request for attorney fees and costs was denied in a case arising from a letter of discipline. The letter of discipline became a moot issue when appellant accepted a voluntary demotion and respondent withdrew the letter, but at the subsequent hearing on the question of fees and costs, respondent met its burden of showing it was substantially justified in imposing the disputed discipline. Respondent had a reasonable basis in truth for the facts alleged and for the legal theory advanced. Respondent established that a reasonable connection existed between the facts alleged and the legal theory it advanced. *Klemmer v. DHFS*, 97-0054-PC, 10/9/98

Where the record was insufficient to conduct the analysis of whether appellant was a prevailing party and whether respondent's position was substantially justified, the parties were directed to participate in a conference with the Commission to determine whether an economical method existed for further proceedings. The appeal arose from a disciplinary action. Respondent rescinded the discipline, after the appeal was filed, when appellant voluntarily demoted to a lower-classified position in a different institution. *Klemmer v. DHFS*, 97-0054-PC, 4/8/98

In an appeal of a constructive demotion respondent's underlying action and the positions it advanced during the administrative proceeding were substantially justified, in part because the concept of constructive demotion is not found in the literal language of the civil service code, but relies on an extension of a court decision. *Davis v. ECB*, 91-0214-PC, 12/5/94

Appellant was entitled to fees and costs in an appeal from two suspensions which was decided in favor of the appellant on the ground that respondent failed to provide adequate hearings prior to imposing the suspensions. *Rentmeester v. Wis. Lottery*, 91-0243-PC, 9/9/94

In an appeal from two suspensions, where there was no

factual dispute about the predisciplinary procedures that were involved, there were only a few witnesses as to the alleged facts which served as the basis for the discipline and the law in these areas was rather straightforward, the appellant's allocation of 1/3 of her total legal costs and fees to her appeal was excessive where the appeal was heard on a consolidated basis with two other cases with respect to which appellant did not prevail and the issues surrounding the other cases were much more complicated from both a factual and legal perspective. Appellant's request for 131.5 attorney hours was reduced to 60 hours which was what respondent contended was the maximum amount of time necessary to litigate the appeal. *Rentmeester v. Wis. Lottery*, 91-0243-PC, 9/9/94

Respondent was not "substantially justified" in an appeal of a discharge decision where although the interpretation of the underlying administrative rule could be debated, it was doubtful that it could be interpreted as respondent contended and where respondent failed to provide the appellant a chance to follow its rules at it had interpreted them. *Higgins v. Wis. Racing Bd.*, 92-0020-PC, 3/31/94

Attorney fees were denied where a one-day suspension was reduced to a written reprimand. The one-day suspension was consistent with respondent's progressive discipline policy and a second rationale for respondent's decision, though not convincing, was not without some reasonable degree of support. *Larsen v. DOC*, 90-0374-PC, 8/26/92

Where respondent's decision to suspend the appellant for 30 days and to demote him to a non-supervisory position was rejected due to an inadequate predisciplinary proceeding and where respondent failed to provide appellant with notice of the charges against him and failed to warn him that disciplinary action of any kind was being considered, the appellant was entitled to fees and costs. The decision in *Showsh v. DATCP*, 87-0201-PC, 9/5/91, was distinguished. *Arneson v. UW*, 90-0184-PC, 5/14/92

Fees and costs were denied after the circuit court had reversed the Commission's conclusion that the predisciplinary hearing provided to the appellant had been adequate where the threshold question of the applicability of the due process clause to the subject personnel transaction turned on a legal issue as to which there was conflicting precedent and even upon application of the due process

clause, it was by no means obvious that respondent failed to provide appellant with adequate notice of the charges against him. *Showsh v. DATCP*, 87-0201-PC, 9/5/91

Fees and costs were denied after a decision by the Commission to reduce the duration of a suspension from 10 to 5 days. Respondent had failed to sustain its burden with respect to two of the three incidents of alleged misconduct but still had a reasonable basis for its action where the Commission had disagreed as to whether certain statements made by the appellant were actually threatening and where the respondent had relied on the information available to it at the time the decision was made to impose discipline. *Showsh v. DATCP*, 89-0043-PC, 7/2/90; affirmed by Brown County Circuit Court, *Showsh v. Wis. Pers. Comm.*, 90 CV 1001, 7/25/90

Fees and costs were denied after a decision by the Commission to reduce a 30 day suspension to a written reprimand where the case turned on what had occurred during an altercation involving appellant and another employe between whom there had been a long history of animosity and whose accounts of the incident were diametrically opposed. Although the Commission concluded that respondent failed to sustain its burden of proving the appellant had pushed or tripped the other employe, both witnesses had credibility problems and the respondent had made its suspension decision after conducting an internal investigation and making its own credibility determinations with respect to the differing accounts. *Powers v. UW*, 88-0029-PC, 6/27/90

The appellant was entitled to fees arising from an appeal of a layoff decision where a reviewing court reversed the Commission's decision affirming the respondent's decision and called the Commission's (and by necessary implication, respondent's) interpretation of the administrative rule underlying the respondent's action "unnatural and contorted." *Kumrah v. DATCP*, 87-0058-PC, 4/17/90

In an appeal of a layoff decision, there was no basis for a conclusion not to award attorney's fees on the grounds that respondent's position was "substantially justified" as having a "reasonable basis in law and fact" where there was no basis on which to conclude that DMRS had actually approved the specific rule interpretation that led respondent to take the appealed action. *Kumrah v. DATCP*,

87-0058-PC, 4/17/90

Appellant's application for costs was denied where the respondent's rule interpretation, which served as the basis for the underlying layoff decision, had a reasonable basis in law, where there were several identifiable policy concerns that underlay the respondent's interpretation and where the respondent's interpretation was relatively longstanding. [In its decision on the merits, the Commission had rejected the respondent's interpretation of the rule.] *Givens v. DILHR*, 87-0039-PC, 3/28/88; affirmed by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm. (Givens)*, 88-CV-2029, 1/6/89

Appellants were entitled to costs in appeals arising from discharge actions where respondent did not have a reasonable basis in law and fact for its handling of the predisciplinary proceedings and the respondent's position at the appeal level also was not "substantially justified" because it was saddled with some very significant weaknesses. Respondent's agents misled one appellant as to the severity of the matter and as to whether management was going to pursue a particular work rule violation. As to both appellants there were various failures of notice and failure to follow internal policy as to predisciplinary procedures. The Commission had previously granted appellant's motion for summary judgment and rejected the discharge actions after concluding that the process followed by respondent prior to discharge had denied appellants due process of law. *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 9/10/87

521.7(8) Other

Respondent was substantially justified in taking its position where the Commission did not resolve any factual disputes between the parties but did rely upon an earlier decision of the Commission in another matter to analyze the legal issue and respondent's concerns that an interpretation, such as was ultimately adopted by the Commission, would interfere with its management prerogatives was not without some reasonable basis. *Pearson v. UW*, 84-0219-PC, 2/12/97 B

There were sufficient plausible analogies in case law to support a reasonable argument that respondent had the

lawful authority not to enforce a statutory provision prohibiting a nonresident from competing for a position in the absence of a determination of a critical need, where respondent relied on an attorney general's opinion that the provision was unconstitutional. Respondent was substantially justified in its reliance on the attorney general's opinion. *Smith v. DMRS*, 90-0032-PC, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96

Costs were denied where there was a reasonable basis in law for respondent's argument that a previous decision of the Commission was inapplicable to the appellant's situation and where a second question presented by the case was apparently one of first impression. Appellant had prevailed in an appeal of a layoff where respondent failed to inform appellant of her demotion opportunities. *Lyons v. WGC*, 93-0206-PC, 2/20/95

Appellant's petition for attorney's fees and costs was granted where respondent narrowly read the meaning of the word "act" in §230.36(3)(c)3., Stats. for which it did not have a "reasonable basis in law for the theory propounded." *Shew v. DHSS*, 92-0506-PC, 3/29/94

Appellant's motion for fees and costs in an appeal of a decision with respect to appellant's starting salary was denied where the Commission's decision upholding the respondent's posture that equitable estoppel should not be applied was reversed upon judicial review and where there was nothing in the reviewing court's decision on which to conclude that the Commission's decision did not have some arguable merit. *Siebers v. DHSS*, 87-0028-PC, 6/15/90

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 506 through 508.9

[Previous material] [Next material]

506.03 Particular issues

Respondent was required to provide complainant with a non-redacted version of notes taken by the appointing authority when conducting reference checks regarding complainant. Respondent had redacted the names of the individuals who provided the information to the appointing authority. According to respondent, the appointing authority had informed the references he was speaking with them confidentially. Complainant indicated she intended to depose the individuals providing the references to discover what information they provided that was not reflected in the appointing authority's notes. Complainant's motion to compel was granted. *Kalashian v. Office of the Jefferson County District Attorney*, 97-0157-PC-ER, 2/25/98

The nature of the defense offered by respondent does not define the permissible scope of complainant's discovery inquiry. *Kalashian v. Office of the Jefferson County District Attorney*, 97-0157-PC-ER, 2/25/98

Dismissal, though an extreme sanction, was appropriate where complainant failed to attend his scheduled deposition and the failure was intentional and in bad faith. Complainant refused to attend the deposition that had been scheduled with relatively short notice although it had been scheduled to take advantage of complainant's presence in Wisconsin to attend another Personnel Commission proceeding. The deposition had been discussed during two separate telephone conferences with the designated hearing examiner and the parties. Complainant also refused to

respond to specific questions posed by the designated hearing examiner in a letter to the parties establishing a briefing schedule on respondent's motion to dismiss. *Huff v. UW (Stevens Point)*, 97-0092-PC-ER, 11/18/98

Language in §804.02(1), Stats., relating to the perpetuation of testimony by deposition before an action in court has been filed, is inapplicable to a case that was already pending before the Commission. *Huff v. UW (Stevens Point)*, 97-0092-PC-ER, 11/18/98

Pursuant to §227.46(1), Stats., and §PC 4.03, Wis. Adm. Code, a designated hearing examiner has the authority to act on discovery disputes between the parties to cases pending before the Commission. An examiner's oral ruling is a ruling made with the authority of the Commission. *Huff v. UW (Stevens Point)*, 97-0092-PC-ER, 11/18/98

Information a party provides in response to an interrogatory is not controlling as to that information. While the party propounding the interrogatory is free to rely on the information by offering the answer in evidence, or by not objecting to the answering party's offer, he also can dispute the information contained in the interrogatory answer. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98;

In a complaint arising from the decision not to select the complainant for a vacant Administrative Officer 3 position, where complainant had not asked a preliminary question relating to whether the materials he submitted for the job were received by the employing agency and reviewed by the rating panel, and, therefore, had not established that the raters did not see all of his materials, he was not entitled to discover information about the clerical handling of the application materials. To rule otherwise would create an undue burden for the employing agency. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

Respondent's answer that "no statistics are available," was an inadequate response to a request for the number of times the agency had used a two-page executive summary for screening candidates for positions in 1997. That information is not available already in summary form does not meet the duty to respond. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

The responding party is not required to gather and create a document of the requested information at the responding

party's own expense. However, the responding party has an obligation to produce what exists and if a requested compilation does not exist, the responding party must make available to the requesting party the documents from which the requested compilation could be derived. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

Complainant was not entitled to discover the salary paid to one of the persons involved in the subject hiring decision, either by his current or previous employer, because the inquiry was not reasonably calculated to the discovery of admissible evidence. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

In a complaint arising from a decision not to select the complainant for a vacant position, information as to how the successful candidate came to apply for the job is a topic that could lead to the discovery of admissible evidence. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

In a complaint arising from a decision not to select the complainant for a vacant position, information about connections between the successful candidate and someone who played a part in the hiring decision could lead to the discovery of admissible evidence. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

In a complaint arising from a decision not to select the complainant for a vacant position, a request for all correspondence between two offices, with no limits as to either subject matter or time, was too broad. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

The closed record protections of §230.13, Stats., pertain to keeping personnel matters closed to the public, not to a complainant in the context of litigation where the information is relevant to the complainant's claims. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

Discovery inquiries relating to the names of persons hired or promoted by respondent must be of a reasonable period of time but are not limited solely to the time complainant was not hired. Rather, the period of time may precede and/or follow the date when complainant was not hired. Complainant's motion to compel discovery of the names of persons hired or promoted in the College of Business for a ten year period was granted. *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

Where it appeared reasonable to presume that respondent's personnel office would have access to hiring and promotion information without much difficulty and where respondent presented insufficient information about its record-keeping system to conclude that answering complainant's interrogatory would create an undue burden, complainant's motion to compel discovery of the names of persons hired or promoted in the College of Business for a ten year period was granted. *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

The responding party is not required to gather and create a document of the requested information at the responding party's own expense. Rather, the responding party has an obligation to produce what exists and if a requested compilation does not exist, the responding party must make available to the requesting party the documents from which the requested compilation can be derived. *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

Complainant, in a case arising from a decision not to select her for a faculty position in the College of Business, was entitled to information in the personnel files of persons hired into faculty positions where that information preceded or was associated with each of the individual hires. However, complainant was not entitled to information in the personnel files which post-dated each individual hire, as those post-dated documents could not have played any part in the hiring or promotional decision made. *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

It is not possible, within the context of discovery, to order the production of something that does not exist. Complainant's motion for discovery sanctions was denied. *Nelson v. UW-Madison*, 97-0020-PC-ER, 5/20/98

A party obtaining a report under §804.10 is to provide the report to the adverse party. Section 804.10(3)(a) applies to non-personal injury actions. *Huempfner v. DOC*, 97-0106-PC-ER, 5/6/98

Investigative materials prepared by a personnel manager for respondent, acting as a representative of the respondent's attorney, are subject to protection from discovery under the attorney work product doctrine. The protection extended to statements the personnel manager took from party witnesses as well as the portions of her report that discussed or

summarized information obtained from party witnesses. However, the protection did not extend to copies of statements obtained from non-party witnesses or to other portions of her report. *Winter v. DOC*, 97-0149-PC-ER, 3/11/98

In an appeal of the decision to discharge the appellant in 1997, due to her alleged denial on several employment applications that she had been convicted of any offense, respondent was entitled to obtain information regarding appellant's indictment for homicide in 1980. In the letter of termination, respondent alleged that appellant had been convicted of prostitution, criminal trespass and two city ordinance violations for retail theft. Appellant contended she had understood that the prostitution charge against her had been withdrawn at the same time the prosecutor chose to dismiss the homicide charge. Information about the events which served as the basis for the prostitution and homicide charges could tend to show that it would have been less or more likely for someone in appellant's position to have believed that the prostitution charges had been withdrawn. *Zeicu v. DOC*, 97-0013-PC, 9/10/97

In a reallocation appeal, appellant was required to answer interrogatories which directed her to compare her position to representative positions as described in the classification specification, to identify the reasons she was contending her position was wrongly reallocated, and to compare her position to the position descriptions of two other positions classified at the same level as her position. *Carroll v. DER*, 94-0434-PC, 3/20/96 (ruling by examiner)

Where, in preparation for hearing on appeals arising from reallocation decisions, respondent propounded interrogatories to appellants, through their counsel, seeking to determine which of two allocations the nine individual appellants claimed to meet, five appellants identified the first allocation and four the second, and it was not until after the hearing was underway that appellants asked that they not be bound by their answers, the appellants were held to their answers to the interrogatory. The interrogatory addressed a major issue of litigation strategy and respondent had the right to rely on the answers. Appellants offered no reasons why the initial answers did not reflect their subsequent position or why they did not raise the issue until well after the commencement of the hearing. *Von Ruden et al. v. DER*, 91-0149-PC, etc., 8/31/95

In responding to a discovery request, the party may assert the attorney-client privilege or any other privilege that may apply to the particular document/information being sought. *Jaques v. DOC*, 94-0124-PC-ER, 3/31/95

To the extent a party providing discovery had previously supplied the requesting party with a portion of the requested documents, the party providing the discovery was not required to provide a second copy but was directed to specify those materials it was relying upon as having been previously supplied. *Jaques v. DOC*, 94-0124-PC-ER, 3/31/95

A response to a discovery request for documents relating to claims of discrimination brought against a supervisor which merely stated that Personnel Commission records were open to the public was not responsive because the request related to documents found in respondent's possession and it failed to provide complainant with a method for identifying complaints filed with the Commission which might relate to the supervisor. *Jaques v. DOC*, 94-0124-PC-ER, 3/31/95

In a reallocation appeal, the appellant waived his right to offer evidence relating to the first of two allocation patterns identified at the higher classification level when his answer to respondent's interrogatories indicated he was only pursuing the second allocation pattern and he had reiterated this position in a telephone conference 10 days prior to hearing. The appellant was permitted to present evidence on both allocations solely for the purpose of making a complete record for court review. *Welch v. DER*, 92-0630-PC, 5/16/94

In appeal involving termination for alleged conflict of interest resulting from a personal relationship with representative of regulated industry, discovery relating to this relationship would be permitted since it was clearly relevant to the question of just cause and there was no showing the information was to be provided to any of respondent's employes other than those directly involved in the appeal and there was no showing of a privacy interest which would outweigh governmental interest in obtaining such information. *Giebel v. WGC*, 93-0041-PC, 3/15/94 (ruling by examiner)

Consistent with the precautions described in §230.16(10), Stats., DMRS's request for a protective order was granted

where the request required appellant to return to DMRS exam-related materials provided by DMRS pursuant to discovery request which appellant did not intend to use at hearing, and to return the remaining materials at date of closure of proceeding, with such closure date to reflect any period for pursuing an appeal of the underlying decision. *Goehring v. DHSS & DMRS*, 92-0735-PC, 2/3/94

Because petitioner alleged handicap discrimination, there was no privilege attached to her relevant medical records, and they were subject to discovery by the employer. *Mosley v. DILHR*, 93-0035-PC, etc., 1/25/94

In the absence of an allegation that DMRS carried out the examination process as part of a larger preselection scheme, appellant is not entitled to add DER or DMRS as party respondents simply for the purpose of being able to then obtain discovery more readily from them. *Goehring v. DHSS*, 92-0735-PC, 10/20/93

Appellant's request to meet with agency employes during working hours as part of the preparation of his case is not a discovery request. The Commission went on to conclude that it is within respondent's discretion to refuse to make its employes available to an appellant who has requested a meeting with respondent's employes as part of appellant's investigation or preparation for hearing and the request is not a formal discovery request. However, nothing prevents an appellant from contacting prospective witnesses while they are off work and seeking their agreement for an evening or weekend interview. *Goehring v. DHSS*, 92-0735-PC, 9/24/93

Complainant's failure to file a response to a request for admissions and production of documents in violation of the Commission's order resulted in statements in the request being deemed admitted. The cases were dismissed pursuant to the admission that complainant had agreed to settle the claims. *Garner v. SPD*, 88-0015-PC, 88-0183-PC-ER, 8/11/93

Since DHSS was the only party respondent in the appeal, completed achievement history questionnaires maintained by DMRS but not in the possession, custody, or control of DHSS were not discoverable pursuant to §804.09(1), Stats. *Goehring v. DHSS*, 92-0735-PC, 7/30/93

Complainant's request for an extension of the discovery

deadline was denied where the conference report clearly set forth the discovery schedule and complainant was aware of the deadline date, having filed his first discovery request on that designated date. Complainant's *pro se* status was insufficient in itself to justify an extension. *Stark v. DILHR*, 90-0143-PC-ER, 5/7/93 (ruling by examiner)

Where appellants provided actual notice on March 3 of a deposition of a department secretary and division administrator on March 8, the notice was not unreasonable. Respondent's motion for protective order was denied. *ACE et al. v. DHSS et al.*, 92-0238-PC, 3/10/93 (ruling by examiner)

In ruling on motion for protective order, appellant, whose residence was 90 miles from Madison and whose work place was 150 miles from Madison, was not limited to viewing exam and other materials provided by respondent as the result of discovery only in Madison. Respondent was required to mail such materials to appellant whose use of such materials was limited by terms of protective order. Only the names of non-certified candidates would not be subject to disclosure. *Goehring v. DHSS*, 92-0735-PC, 2/8/93

In a race discrimination case involving complainant's termination from the State Patrol Academy, deposition questions about his earlier termination from the Milwaukee Police Department were within the boundaries of relevance for discovery purposes. *Owens v. DOT*, 91-0163-PC-ER, 9/18/92

Commission hearing examiners are available by telephone to rule on discovery issues that arise during the course of depositions, but to the extent possible advance arrangements should be made and the procedure should not be used for mundane issues of relevance. *Owens v. DOT*, 91-0163-PC-ER, 9/18/92

Counsel is not required to explain the relevance of information sought through deposition at the time the issue arises at the deposition, but attorneys are encouraged to attempt to resolve discovery disputes by informal means to the extent possible. *Owens v. DOT*, 91-0163-PC-ER, 9/18/92

Where respondent's deposition of a witness denominated by complainant as an "expert" did not occur "upon motion"

and by "order" as provided in §804.01(2)(d), the respondent was not obligated to pay expert fees to the witness for the time spent in deposition. *Keul v. DHSS*, 87-0052-PC-ER, 5/14/92

In a complaint arising from the termination of complainant's probationary faculty appointment, the complainant was entitled to review the entire files maintained by various committees which must act on probationary faculty appointments. *Asadi v. UW*, 85-0058-PC-ER, 4/10/92

In a complaint arising from the termination of complainant's probationary faculty appointment, the complainant was entitled to review the academic transcripts of those faculty and academic staff at the campus whose contracts were considered for renewal during the relevant time period. *Asadi v. UW*, 85-0058-PC-ER, 4/10/92

In a complaint arising from the termination of complainant's probationary faculty appointment, the complainant's request to look through entire personnel files of faculty and academic staff was too broad in light of the fact the files contained materials relating to sensitive and personal matters unrelated to the complaint. *Asadi v. UW*, 85-0058-PC-ER, 4/10/92

In a complaint arising from the termination of complainant's probationary faculty appointment, the complainant was not entitled to review the files of students he taught during the course of his employment, in light of the status accorded student records under the family Educational Rights and Privacy Act, commonly known as the Buckley Amendment. *Asadi v. UW*, 85-0058-PC-ER, 4/10/92

In an appeal of a reallocation decision, the appellant was entitled to discover the rating sheets prepared by the individual members of the rating panel, citing the decision in *Mincy et al. v. DER*, 90-0229, 0257-PC, 2/21/91; rehearing denied, 3/12/91. *Hubbard v. DER*, 91-0082-PC, 11/6/91

The attorney-client privilege could not rightfully be claimed for all communications that occurred at meetings where a personnel problem was discussed and advice was sought from a number of persons, one of whom was a lawyer and where it could not be said that the primary purpose of the

communications made by those present at the meeting besides counsel was to facilitate the obtaining of legal advice. Respondent was ordered to provide information on the meetings pursuant to discovery requests except that the respondent was not required to provide information regarding the content of any legal advice rendered by counsel at the meetings. *Iwanski v. DHSS*, 89-0074-PC-ER, etc., 8/21/91

Where respondent asserted that it did not possess the documents being requested, the appellants' motion to compel was denied. *Mincy et al. v. DER*, 90-0229, 0257-PC, 2/21/91; rehearing denied, 3/12/91

Where, in an appeal of a reallocation decision, the work of the rating panel resulted both directly in the decision to reallocate appellants' positions and in the establishment of class specifications and where the specifications were established at the end of the reallocation process and amounted to simply labeling the assessment of positions which already had occurred, the appellants were entitled to discovery which ran to their attempt to show that the rating panel's evaluation was erroneous and resulted in their positions being placed in the wrong cluster and hence at a lower class level than should have been the case. *Mincy et al. v. DER*, 90-0229, 0257-PC, 2/21/91; rehearing denied on other grounds, 3/12/91

In an appeal in which the appellant sought reinstatement and back pay and her claim was based on her allegation that her medical condition prevented her from performing the duties and responsibilities of the position that she held at that time but not the duties and responsibilities of other positions within respondent agency that were available at that time and thereafter, the respondent was entitled to obtain discovery of information relating to appellant's medical condition at the time of, and subsequent to, her termination. *Smith v. DHSS*, 88-0063-PC, 5/1/91

In an appeal arising from the action of the respondent to screen out the appellants during the 1989 Fiscal Supervisor 1 examination process pursuant to a review of their resumes, the appellants were entitled to discovery of the ranking from the previous Fiscal Supervisor 1 examination. *Allen et al. v. DMRS*, 89-0124-PC, 11/2/89

In an appeal arising from the action of the respondent to

screen out the appellants during the 1989 Fiscal Supervisor 1 examination process pursuant to a review of their resumes, the respondent was required to respond to a discovery request in 10 rather than 30 days where a hearing date had already been scheduled for a date which fell within the 30 day period and in light of the Commission's lack of authority to grant interlocutory relief to the appellants while they awaited a hearing. *Allen et al. v. DMRS,* 89-0124-PC, 11/2/89

Appellant's motion to compel discovery of an employe evaluation report for another position was granted in an appeal of a classification decision where the position was at the classification level sought by the appellant and the appellant specifically excluded those portions of the evaluation which related to the quality of performance of the incumbent. The evaluation report was not confidential and was subject to the open records law. The decision includes a weighing of the relevant interests under the open records law. *Behling v. DOR & DER,* 88-0060-PC, 12/14/88

Respondent was directed to perform any photocopying of documents requested by the complainant at the cost of $0.05 per page plus any applicable sales tax, to be paid by the complainant at the time the documents were provided to him. Alternative proposals offered by complainant for photocopying the materials were denied. The cost of copying items as part of a discovery request typically rests with the party requesting production of the documents. (Due to the volume of materials sought in the discovery request, the respondent had previously been granted the option of allowing the complainant to review the requested files themselves rather than photocopying the files). *Asadi v. UW-Platteville,* 85-0058-PC-ER, 4/7/88

Respondent was compelled to respond to certain requests for production where the requests were for notes made by respondent's agents with regard to the Commission's initial determination of probable cause. While the documents were otherwise protected by the attorney-client privilege, the privilege was waived when the supervisor had testified that she had referred to the documents to refresh her recollection prior to the deposition. *Harris v. DHSS,* 84-0109-PC-ER, 85-0115-PC-ER, 4/22/87

Respondent was allowed to withdraw its admissions to

complainant's request for admission and respondent was allowed to substitute its responses even though the 30 day period for responding to the request for admissions had run by the time respondent moved for an extension, or in the alternative, a request for leave to amend or withdraw admissions. Excusable neglect was established where counsel for respondent represented that he was forced to leave his office abruptly for treatment of an illness and this lead to confusion in his office which resulted in the failure to timely respond to the request for admissions. There was no suggestion of bad faith on the part of respondent and there was no prejudice to complainant, save being required to prove what otherwise would be deemed admitted. In addition, the two requests for admission that were in question ran to the merits of the cases and the presentation of the merits would have been subserved if the admissions were not allowed to be withdrawn. *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 4/22/87

In an appeal arising from an examination, the appellant, if he determined he needed to make notes or photocopies of the exam materials (provided to him pursuant to a discovery request) to prepare for hearing or to consult with attorneys or exam experts, was directed to advise the Commission of the names of such attorneys or experts so a copy of the Commission's Order, restricting the dispersal of the materials, could be provided them. *Doyle v. DNR & DMRS*, 86-0192-PC, 3/24/87

Respondent was permitted to substitute some form of coding in lieu of the actual names of the examinees listed on materials to be provided to the appellant pursuant to the Commission's order. *Doyle v. DNR & DMRS*, 86-0192-PC, 3/24/87

§ER-Pers 6.08(l), Wis. Adm. Code, governing the release of information to an examinee, which constitutes an exception to the open records law, is not inconsistent with an order of the Commission extending discovery of certain exam materials to a party to an appeal. *Doyle v. DNR & DMRS*, 86-0192-PC, 3/24/87

The Commission generally has the authority to enter orders regulating and compelling discovery. *Doyle v. DNR & DMRS*, 86-0192-PC, 3/24/87

In an appeal of an examination, the Commission required

respondent DMRS to respond to appellant's discovery request despite §§ 230.13, 230.1600) and (11), Stats., and ER-Pers 6.08, Wis. Adm. Code, by providing him information including: names, scores and ranks of other applicants, applications, examination questions and responses, tapes of oral interviews and benchmark answers. The Commission was to maintain the material on a sealed basis, providing access to the appellant who was directed not to divulge the material beyond the extent necessary for the processing of his appeal. *Doyle v. DNR & DMRS*, 86-0192-PC, 3/4/87

Making the documents requested by the appellant available to the appellant for inspection and copying is an adequate response to certain interrogatories which ask the respondent to "identify" certain documents, in light of the fact that the burden of deriving or ascertaining the answer was substantially the same for both parties in regard to such interrogatories. *Southwick v. DHSS*, 85-0151-PC, 4/16/86

Interrogatories which seek information which could be relevant to the issue in the instant case, i.e. whether respondent's reassignment of the appellant was an unreasonable and improper exercise of discretion, are appropriate. *Southwick v. DHSS*, 85-0151-PC, 4/16/86

A party may utilize both depositions and interrogatories and is not prohibited from seeking to elicit the same type of information through both discovery devices subject to certain limits imposed to prevent unreasonable duplication. *Southwick v. DHSS*, 85-0151-PC, 4/16/86

Appellant's motion to compel was denied to the extent he sought discovery in a case after the parties had agreed to hold the case in abeyance pending investigation of a complaint that was to be filed by the appellant and before the complaint had been investigated. *Wing v. UW System*, 85-0077-PC, 85-0104-PC-ER, 2/6/86

Complainant's motion to compel was granted where complainant sought to invoke the discovery rights encompassed in §PC 2.02, Wis. Adm. Code (1980), in a case filed under the whistleblower law. The Commission found that the existing rule was broad enough to include the parties to a whistleblower complaint. *Wing v. UW System*, 85-0077-PC, 85-0104-PC-ER, 2/6/86

Production and inspection of the notes of the personnel

specialist involved in a reclassification decision was ordered, as against the agency's arguments that the notes were not "public records" or, alternatively, that they were exempt from disclosure under the public records law. *Siegler v. DNR & DER*, 82-206-PC, 3/4/83

While a discovery request is not objectionable because the information sought would not be admissible at trial, the information must, in a broad sense, be relevant to the subject matter of the pending action. In the absence of any articulation by the appellant as to how the requested information was relevant to the proceeding, the Commission denied appellant's motion to compel discovery. *Paul v. DHSS*, 82-PC-ER-69, 82-156-PC, 10/14/83

In an appeal and complaint arising from a hiring decision, the Commission granted the appellant's motion to compel discovery of performance evaluations of the successful applicant but directed the appellant and his attorney to handle the material confidentially and not to disclose the material or any information regarding it to the public, as provided in §230.13(l), Stats. *Paul v. DHSS*, 82-PC-ER-69, 82-156-PC, 10/14/83

On a motion to compel discovery, the Commission noted that the test for relevancy was very broad, relating to the subject matter of the appeal as opposed to the precise issue for hearing, and certain interrogatories were analyzed pursuant to this test. The Commission also determined that certain interrogatories directing the respondent to "identify all documents and give the details of all communications, written and oral, relative to the reassignment…," were too broad but could be amended to be more specific. The Commission also determined that where the information sought had never been compiled but could readily be determined from documents found in specific locations, it was an appropriate response for the respondent to have provided the appellant with the specific location of documents containing the information being sought. *Biddick v. DHSS*, 82-127-PC, 10/14/82

Letters by the Commission requesting two of respondent's employes to appear at a hearing on respondent's motion for a protective order were quashed where the goal of the protective order was to prevent the taking of depositions of the same two employes. This result was based on the inconsistency that would result if the two employes were

required to attend the hearing but were later granted protection from being deposed, and on the view that appellant's interests could be adequately protected by submission of an affidavit. *Kozich v. UW & DP*, 81-77-PC, 6/4/82

Where the appellant's ability to prepare for hearing was directly related to the availability of information controlled exclusively by respondent, and respondent had a valid interest in the confidentiality of certain information, both interests are served by providing that the requested discovery be made available to the appellant under seal. *Rowe v. DER*, 79-202-PC, 6/3/80

The Commission does not have the authority to order DER to rescind a bulletin to the other agencies which provides advice as to the extent of compliance necessary with respect to §PC 1.10(4), Wis. Adm. Code. *Saviano v. DP*, 79-PC-CS-335, 4/4/80

The appellant lacked standing with respect to a motion to enforce §PC 1.10(4), Wis. Adm. Code, where she was not an employe of the agency refusing compliance. *Saviano v. DP*, 79-PC-CS-335, 4/4/80

When the appellant's attorney attempted to interview certain supervisory employes prior to hearing and they were instructed by the institution head not to submit to interviews, the Commission held that this constituted inappropriate interference with the appellant's ability to prepare for hearing. *Dziadosz v. DHSS*, 78-32-PC, 2/15/80

Section PC 2.02, Wis. Adm. Code, which gives parties to appeals the same basic discovery rights as parties to judicial proceedings as set forth in chapter 804, Stats., is not invalid as in excess of statutory authority. *Alff v. DOR*, 78-227-PC & 78-243-PC, 6/13/79

Respondent was not entitled to delay response to a discovery request by the appellant until the appellant responded to what amounted to an interrogatory requesting more detailed statement of appeal. *Alff v. DOR*, 78-227-PC & 78-243-PC, 6/13/79

The Commission upheld the request of the respondent that an exam plan requested by the appellant be kept under seal by the Commission and, when made available to the appellant, the appellant not be permitted to copy it, as the

information could give the appellant an unfair advantage in future exams. *Holmblad v. DP*, 78-169-PC, 1/30/79

506.04 Sanctions

Sanctions under §804.12(2), Stats., were premature where the Commission granted, in part, complainant's motion to compel, and there had been no opportunity to fail to comply with that ruling. In addition, the Commission lacks authority to order a state agency to pay costs and attorney fees for discovery motions filed by a complainant in a proceeding under the Wisconsin Fair Employment Act, citing *Dept. of Transportation v. Wis. Pers. Comm.*, 176 Wis. 2d 731, 500 N.W.2d 545 (1993). *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

Complainant's motion, made during the hearing, to strike certain evidence because respondent allegedly failed to include the information in its responses to complainant's discovery requests, was denied where, despite instructions from the hearing examiner, the complainant failed to provide sufficient specificity to decide the motion. *Rufener v. DNR*, 93-0074-PC-ER, etc., 8/4/95

No motion expenses were awarded where the motion to compel discovery was resolved informally, no order was necessary and none was issued. *ACE et al. v. DHSS et al.*, 92-0238-PC, 10/24/94

Where complainant did not advise respondent or the Commission of her change of address, her representative gave inconsistent statements about complainant's whereabouts at the time the notice of deposition was received, and it was represented that complainant would be unavailable for deposition prior to hearing, the Commission granted respondent's motion to dismiss, citing §804.12(2) and (4), Stats. as authority. *Farr v. DOC*, 93-0065, 0111-PC-ER, 8/23/94

A single unjustified failure by complainant to appear for a properly noticed deposition did not justify sanction of dismissal but did justify the award of reasonable expenses to respondent. *Dorf v. DOC*, 93-0121-PC-ER, 5/27/94

Appellant, who was proceeding *pro se*, unjustifiably refused

to comply with an order compelling discovery. The Commission concluded that "other circumstances" within the meaning of §804.12(2)(b), Stats., made an award of attorney's fees to respondent unjust, since the Commission already had dismissed her handicap claims and barred her from supporting two disciplinary appeals with evidence relating to her medical condition. *Mosley v. DILHR*, 93-0035-PC, etc., 6/21/94

Petitioner's refusal to comply with an order compelling discovery will not result in dismissal of all her cases, inasmuch as she is proceeding *pro se* and her refusal to permit discovery of her medical records did not relate to all her claims. However, her claims of handicap discrimination were dismissed, and she was prohibited from using any evidence concerning her medical condition in connection with her disciplinary action appeals. *Mosley v. DILHR*, 93-0035-PC, etc., 4/19/94

A sanction hearing would be held against appellant's representative who had promised to produce appellant at a scheduled deposition if his motions opposing the deposition were denied. Both motions were denied yet appellant's representative said the client was no longer available for deposition scheduled the following day. The examiner rejected the option of imposing sanctions on the appellant because it was not shown that appellant shared in, or was even aware, of her representative's conduct. The potential sanction at issue would be the costs incurred by respondent for the deposition which appellant failed to attend, and the rescheduled deposition, including the cost of obtaining an expedited transcript to ensure the transcript would be available for hearing. *Lyons v. WGC*, 93-0206-PC, 3/11/94

Discovery sanctions were imposed where complainant's answers to respondent's interrogatories were tardy, incomplete and evasive, and the continued tardiness had the effect of avoiding a Commission order to reply. *Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner)

Complainant's attempts to avoid sanctions were rejected where respondent's questions were relevant to its potential defense and complainant's claim that the interrogatories, consisting of over 100 questions, were overly burdensome should have been raised by a request for a protective order rather than for the first time as a defense to respondent's

motion to compel. *Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner)

Where the complaint arose from a decision not to hire the complainant, the examiner denied respondent's dismissal request but granted its request that complainant be prohibited from presenting any evidence, other than her own testimony, relating to the subject matter of those interrogatories where the responses were incomplete or evasive. *Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner)

Where complainant did not receive the notice of deposition (it was served on his mother) and where there was a relatively short time period between the service of the notice and the date of the deposition, the complainant's failure to appear at the deposition was "substantially justified" so respondent's motion for expenses caused by the failure to attend the deposition was denied. *Pugh v. DNR*, 86-0059-PC-ER, 4/28/88

No sanctions were appropriate where respondent DMRS had failed to comply with an order to provide certain examination materials, because appellant had not appeared by counsel, the appellant rather than respondent would presumably be seeking to offer the subject materials into the record and a default judgment would deprive the appellant of a chance to have his claims adjudicated and would be of limited practical effect given restrictions on the Commission's ultimate remedial authority in the case. In addition, seeking judicial sanctions would generate costs and delays. *Doyle v. DNR & DMRS*, 86-0192-PC, 3/24/87

To enforce its order compelling discovery of exam materials, the Commission could petition circuit court for remedial or punitive sanction under §785.06, Stats., in addition to invoking those sanctions specified in §§227.44(5) and 804.12(2)(a) 3, Stats. *Doyle v. DNR & DMRS*, 86-0192-PC, 3/24/87

As a sanction for failure to comply with the Commission's order for respondent to answer certain interrogatories, the Commission barred the respondent from offering any evidence related to the subject matter inquired into by the unanswered interrogatories and ordered respondent to pay appellant's reasonable expenses, including attorney fees, caused by the failure to comply with the order. Southwick

v. DHSS, 85-0151-PC, 2/13/87

A hearing was ordered scheduled on complainant's request for fees and expenses incurred in connection with his motion to compel discovery where, after the motion was filed, respondent filed answers to the underlying interrogatories. *Hebert v. DILHR*, 84-0206-PC-ER, 84-0242-PC, 9/13/85

A failure to answer or an evasive or incomplete answer to a discovery request is not a basis for a motion for sanctions but is a basis for an order compelling discovery. *Paul v. DHSS*, 82-PC-ER-69, 82-156-PC, 10/14/83

The appeal of a non-selection decision was dismissed where appellant refused to comply with the Commission's order to disclose the name of a potential witness, citing fears of retaliation, where the Commission had entered an order forbidding retaliation against such witness and appellant's allegations were conclusory in nature. *Rowe v. DP*, 79-202-PC, 7/22/81; affirmed by Dane County Circuit Court, *Rowe v. Wis. Pers. Comm.*, 81-CV-4288, 4/13/83

The appellant was not entitled to an order of immediate reinstatement or order quashing testimony of a witness where the respondent refused to produce the witness for deposition on theories that discovery rule (§PC 2.02, Wis. Adm. Code) was invalid as in excess of statutory authority and that respondent was entitled to more detailed statement of appeal before submitting to discovery, but Commission notes such sanctions might be available in future depending on circumstances. *Alff v. DOR*, 78-227-PC & 78-243-PC, 6/13/79

506.50 Proper parties

Appointing authorities, or their designees, actually make appointment decisions to the state civil service. The secretary of the Department of Employment Relations and the administrator of the Division of Merit Recruitment and Selection do not control, and are not accountable for, aspects of the appointment process carried out by state agencies acting as appointing authorities. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

The Personnel Commission reasonably interpreted ch. 230, Stats., to mean that the appointing authority is generally responsible for actions in the selection process which occur after the point of certification. The terms of delegation agreements running from the administrator of the Division of Merit Recruitment and Selection to various appointing authorities did not demonstrate that DMRS had ultimate authority over appointments at the various state agencies where the positions were located. The terms of those agreements as well as the State's Personnel Manual cannot supersede the language of the statutes, and ch. 230, Stats., does not give the administrator authority over the appointment process after the point of certification. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

Employe X filed an appeal of a reallocation decision and later left the position. Employe Y transferred into the position vacated by X and requested to be added as a party to X's appeal, pursuant to s. 227.44(2m), Stats. The Commission concluded that Y had a "substantial interest [which] may be affected" by a decision in X's case and therefore was added as a party. The Commission noted that the case remained an appeal of the decision reallocating X's position, rather than an appeal of the decision setting the class level for the position filled by Y. *Kiefer v. DER*, 92-0634-PC, 5/2/94

In the absence of an allegation that DMRS carried out the examination process as part of a larger preselection scheme, appellant is not entitled to add DER or DMRS as party respondents simply for the purpose of being able to then obtain discovery more readily from them. *Goehring v. DHSS*, 92-0735-PC, 10/20/93

Where the issue for hearing was whether exam materials were objectively rated or scored, DMRS was the proper party and not the hiring agency because no delegation of authority was made by DMRS to the appointing authority. Overall responsibility for the exam and certification process is vested in the Administrator of DMRS, as reflected in §§230.16, .17 and .25, Stats. *Johann v. LRB & DMRS*, 93-0010-PC, 4/30/93

The secretary of DER has no authority with respect to the selection of an individual to a project position in another agency. *ACE et al. v. DHSS et al.*, 92-0238-PC, 1/12/93

Pursuant to §230.05(2)(b), any claim stated against an appointing authority with respect to matters involving authority delegated by the administrator of DMRS also runs to the administrator. *ACE et al. v. DHSS et al.*, 92-0238-PC, 1/12/93

The Commission has no authority to impose liability against the DOA secretary for having provided budgetary authorization for allegedly improper project appointments in other agencies and granted a motion to dismiss for failure to state a claim as to the DOA secretary. *ACE et al. v. DHSS et al.*, 92-0238-PC, 1/12/93

Where appellant's name was removed from the certification list and register due to a physical exam and complainant did not reach the interview stage, he was unable to show that he would have been a successful candidate for the vacancy. The employing agency was not a necessary party for purposes of awarding relief and was dismissed. *Chadwick v. DMRS & DHSS*, 91-0177-PC, 8/26/92

Where the appellants had a substantial interest in the classification of their positions and that interest might be affected by the Commission's decision relative to an appeal filed by another employe alleged to be performing the same duties, the appellants had an absolute right to be admitted as parties to that appeal pursuant to §227.44(2m), Stats. *Eckdale et al. v. DER*, 91-0093-PC, etc., 11/25/91

Where the Commission could not rule out a scenario which could result in an order directing DHSS to appoint the appellant to the vacancy in question, DHSS was retained as a party in an appeal arising from the decision of DMRS to remove the appellant's name from the certification. *Chadwick v. DMRS & DHSS*, 91-0177-PC, 10/21/91

In clarifying several previous decisions in this area, the Commission noted that only where the appellants appear to advance contentions that the employing agency is acting as an agent vis-a-vis the other named respondent, will the employing agencies be included as proper parties. *Chadwick v. DMRS & DHSS*, 91-0177-PC, 10/21/91

DPI was appropriately included as a party respondent with respect to an appeal of an examination where the appellant clearly alleged conduct which, if established at hearing, could result in an order requiring DPI to remove the person

who was filling the position in question. *Taylor v. DMRS & DPI*, 90-0279-PC, 12/11/90

Where the appellant alleged that employes of UW acted to interfere with and delay her efforts to obtain a reclassification of her position, the UW's request to be dropped as a party was denied even though the final authority for setting the effective date for reclassifying the position rested with DER. *Vollmer v. UW & DER*, 89-0056-PC, 8/24/89

An appeal was considered to be a group appeal where the letter of appeal was in the form of a memo to the Commission from "Jeff Holubowicz, Industries Specialist et al IDC" and the body of the appeal contained language which was consistent with a group appeal. Respondent's motion to dismiss all appellants other than Mr. Holubowicz was denied. *Holubowicz et al. v. DHSS & DER*, 88-0039-PC, 7/13/88

The appointing authority was a proper party to an appeal of a reclassification decision (at least as of the time the objection was raised) where, even though the classification sought by the appellant was not delegated for reclassification purposes, the appellant alleged facts concerning certain actions relating to the reclassification at the Department level, which actions are alleged to have affected the outcome at the Division level. *Lott v. DHSS & DP*, 79-160-PC, 3/24/80

508.2 Exchange of witness and exhibit lists

Any prejudice arising from a 7 hour delay in providing petitioner with witness lists and exhibits flowed from petitioner's own actions where he waited until 3 working days before the commencement of a 3 day hearing to visit various law firms to discuss his case and retain an attorney and where petitioner was unavailable, during the following 2 days, to work with any attorney he might be able to retain. The respondent submitted its witness list and exhibits one day later than provided by §PC 4.03, Wis. Adm. Code, but in compliance with the specific directions of the hearing examiner. *Postler v. Wis. Pers. Comm., et al*, Dane County Circuit Court, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

Respondent's motion to dismiss for lack of prosecution was granted where complainant failed to have served on respondent either exhibits or a witness list at any time prior to the hearing. Complainant contended that he understood he could rely on documents already submitted during the course of the investigation without having to satisfy the filing and service requirements of §PC 4.02, Wis. Adm. Code. However, the prehearing conference report explicitly informed the parties of the date for complying with the filing and service requirement. Complainant refused to explain his conclusory statement that there were mitigating circumstances and asked to have the opportunity to consult with counsel. *Smith v. DOC*, 95-0134, 0169-PC-ER, 11/14/96

Where appellant did not request certain documents from respondent until August 23rd, the hearing was scheduled for September 4th, respondent interpreted appellant's request as a subpoena duces tecum and brought the requested documents to the hearing, and appellant offered some of those documents as exhibits, the documents were properly excluded because appellant had failed to comply with the 3 working day requirement in §PC 4.02, Wis. Adm. Code, because appellant was responsible for the delays which resulted in his failure to timely file the documents as potential exhibits and because he failed to provide sufficient justification for this procrastination. *Firlus v. DOC*, 96-0030-PC, 11/14/96

The Commission could not take official notice of a DHSS manual which was not part of the hearing record. The manual, which was attached to a post-hearing brief, was neither a generally recognized fact nor an established technical or scientific fact, within the meaning of s. 227.45(3), Stats. The argument was rejected that the manual was a "generally recognized fact" solely because it was subject to the public records law in s. 19.32(2), Stats. Respondent objected to the document because it was not exchanged prior to hearing. *Harron v. DHSS*, 91-0204-PC, 9/26/92

In order to be consistent with the rule, §PC 2.01 Wis. Adm. Code, (1985) is interpreted to provide for a three step analysis of a party's disclosure or nondisclosure of evidence. The first steps concern whether the disclosure requirements were met and whether there was good cause

for any failure of compliance. If no good cause is shown, the Commission will, at the third level of analysis, exercise its discretion by considering such factors as prejudice or surprise and the ability to cure the prejudice, the extent that waiver of the witness rule could disrupt an orderly and efficient hearing and bad faith or willfulness in failing to comply. *Frank v. DHSS*, 83-0173-PC, 3/13/85

The Commission declined to strictly apply the exchange rule where there was less than one hour out of the normal workday where appellant's counsel had respondent's list of witnesses and respondent's counsel did not have appellant's list, where respondent suffered neither surprise nor prejudice from the delay, where the hearing could proceed without disruption if appellant was allowed to call her witnesses, where the failure to disclose was not done in bad faith, where neither party had filed their lists with the Commission and where an opposite result would have caused dismissal of the appellant's case. *Frank v. DHSS*, 83-0173-PC, 3/13/85

An exhibit offered by the appellant was properly received in evidence where, one week prior to the hearing, appellant filed a letter reserving the right to use as exhibits those exhibits listed by the respondent and where respondent bad previously thereto submitted the document in question as a potential exhibit. *Seep v. DHSS*, 83-0032-PC & 83-0017-PC-ER, 10/10/84; affirmed in part, reversed in part by Racine Circuit Court, *Seep v. State Pers. Comm.*, 84-CV-1705, 84-VC-1920, 6/20/85; supplemental findings were issued by the Commission on 2/2/87; affirmed in part, reversed in part by Court of Appeals District 11, 140 Wis. 2d 32, 5/6/87 [Note: the effect of the Court of Appeals decision was to affirm the Commission's decision in all respects.]

Appellants failed to meet the mandatory disclosure rule when they did not provide respondent with a copy of a 91 page report prepared by their expert witness until after the hearing had commenced. The report had not been completed until shortly before it was offered but the parties had over four months between the prehearing conference scheduling the hearing and the date the hearing commenced. *Kennedy et al. v. DP*, 81-180, etc.-PC, 1/6/84

Appellant's motion to exclude a previously admitted document from the record was denied where the respondent

filed the exhibit one day before the scheduled hearing date but had also filed a copy during the prehearing conference and where appellant offered the exhibit as part of his case. *Plasterer v. DOT,* 83-0007-PC, 9/28/83

An exhibit purported to be a position description prepared by the appellant can be characterized as rebuttal evidence and thus not subject to the prior disclosure requirement where the document had been introduced by respondent's counsel in an effort to rebut or impeach appellant's testimony as to how many students she supervised. *Lloyd v. UW,* 78-127-PC, 8/30/79

508.4 Subpoenas

It is fundamental to a fair hearing that persons may be compelled to testify in proceedings before the Commission. While the attorney's power to subpoena is exercised in the name of the forum, only the Commission has the power to determine whether a person will be compelled to testify. *ACE v. DOA & DMRS,* 94-0069-PC, 6/26/95

Appellant's subpoena of the Secretary of the Department of Administration was quashed in a case in which the issue was whether a project position had been filled in accordance with the civil service code, where the Secretary's role in filling the position was not significant enough to render his testimony necessary and material. The Secretary had advanced the successful candidate's name and had formally appointed him to the position at the conclusion of the hiring process, but otherwise, the duties involving the filling of the position had been delegated by the Secretary to others. In addition, appellant had failed to make use of discovery procedures and rejected, out of hand, the Secretary's proposal to prepare an affidavit. *ACE v. DOA & DMRS,* 94-0069-PC, 6/26/95

In a case in which the issue was whether a project position had been filled in accordance with the civil service code and where affidavits of the Administrator of the Division of Merit Recruitment and Selection and of the Administrator's policy advisor showed they were both involved in reviewing the request from an agency to fill a position on a project basis, the request to quash their subpoenas was denied. *ACE v. DOA & DMRS,* 94-0069-PC, 6/26/95

Letters by the Commission requesting two of respondent's employes to appear at a hearing on respondent's motion for a protective order were quashed where the goal of the protective order was to prevent the taking of depositions of the same two employes. This result was based on the inconsistency that would result if the two employes were required to attend the hearing but were later granted protection from being deposed, and on the view that appellant's interests could be adequately protected by submission of an affidavit. *Kozich v. UW & DP*, 81-77-PC, 6/4/82

Where the appellant declined to cross-examine respondent's expert witnesses who resided in New York, and then served subpoenas on them to testify adversely on an adjourned date, the subpoenas would be quashed unless the appellant paid their fees and expenses. *Alff v. DOR*, 78-227, 243-PC, 10/1/81; affirmed by Dane County Circuit Court, *Alff v. Wis. Pers. Comm.*, 81-CV-5489, 1/3/84; affirmed by Court of Appeals District IV, 84-264, 11/25/85; petition for review by Supreme Court denied, 2/18/86

508.6 Protective order

Where the document in question had been provided to complainant without having been identified as confidential, but with the implication it was *not* considered confidential and was not given to complainant in connection with a protective order issued on another date, respondent's motion for the imposition of sanctions for violating the protective order was denied. *Cygan v. DOC*, 96-0167-PC-ER, 1/28/98

Appellant's subpoena of the Secretary of the Department of Administration was quashed in a case in which the issue was whether a project position had been filled in accordance with the civil service code, where the Secretary's role in filling the position was not significant enough to render his testimony necessary and material. The Secretary had advanced the successful candidate's name and had formally appointed him to the position at the conclusion of the hiring process, but otherwise, the duties involving the filling of the position had been delegated by the Secretary to others. In addition, appellant had failed to make use of discovery

procedures and rejected, out of hand, the Secretary's proposal to prepare an affidavit. *ACE v. DOA & DMRS*, 94-0069-PC, 6/26/95

In a case in which the issue was whether a project position had been filled in accordance with the civil service code and where affidavits of the Administrator of the Division of Merit Recruitment and Selection and of the Administrator's policy advisor showed they were both involved in reviewing the request from an agency to fill a position on a project basis, the request to quash their subpoenas was denied. *ACE v. DOA & DMRS*, 94-0069-PC, 6/26/95

Letters by the Commission requesting two of respondent's employes to appear at a hearing on respondent's motion for a protective order were quashed where the goal of the protective order was to prevent the taking of depositions of the same two employes. This result was based on the inconsistency that would result if the two employes were required to attend the hearing but were later granted protection from being deposed, and on the view that appellant's interests could be adequately protected by submission of an affidavit. *Kozich v. UW & DP*, 81-77-PC, 6/4/82

The Commission can issue a protective order to the respondent to not retaliate against the witness in response to the disclosure of information. *Rowe v. DER*, 79-202-PC, 6/3/80

508.7 Rebuttal

Petitioner was denied the opportunity to present 35 rebuttal witnesses for the purpose of asking them whether they had ever heard him say an offensive remark where the relevant inquiry was not whether petitioner actually lacked interpersonal skills, but whether the interviewers who believed he had such problems had an explanation for their belief other than discrimination, illegality or an abuse of discretion. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al*, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

508.8 Witness fees/reimbursement

A witness was not entitled to receive salary for the period of time he was appearing as a witness at a Commission hearing since he had not been scheduled to work during that period of time. §PC1.13(2), Wis. Adm. Code. However, a state agency is not prevented from voluntarily awarding salary to one of its employes for his or her appearance at a Commission hearing during a period of time he or she is not on work status. *Asche v. DOC*, 90-0159-PC 1/27/93

508.9 Other

There is no precedent or other basis for calling, as a witness in a subsequent hearing, the hearing examiner who prepared a decision issued in a previous case in order to provide his or her interpretation of that decision. The decision speaks for itself. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 521 through 523

[Previous material] [Next material]

522.01(1) Generally

Pleadings are to be treated as flexible and are to be liberally construed in administrative proceedings. *Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 505 N.W.2d 462 (Court of Appeals, 1993)

The failure of the appeal letter to contain specific details of appeal is not a violation of agency head's right to due process of law under Fourteenth Amendment to Constitution as constitutional protection does not extend to state officer in official capacity. *Alff v. DOR*, 78-227-PC, 1/18/79

Pleadings should be liberally construed and are not required to meet standards applicable to judicial pleadings. *Oakley v. Comm. of Securities*, 78-66-PC, 10/10/78

522.01(2) Compliance with rule

Failure of appeal to contain all information set forth in §PC 1.01(2), Wis. Adm. Code does not require dismissal of the appeal; this section is directory and not mandatory. *Alff v. DOR*, 78-227-PC, 1/18/79

522.01(3) Particular issues

An appeal of a suspension and a subsequent discharge pursuant to §230.44(1)(c), Stats., is not required to recite the statutory language that "the decision was not based on just cause." This holding was based on an examination of the dictionary definition of "allege," the requirement that pleadings in administrative proceedings are to be liberally construed, and a conclusion that the relevant statutory language is directory rather than mandatory. *Cravillion v. Wis. Lottery*, 91-0213-PC, 92-0004-PC, 5/7/93

The appeal of the effective date of promotion which was stated to be a grievance under the collective bargaining agreement is construed as an appeal pursuant to §230.44(i)(d), Stats. *Wech v. DHSS*, 79-310-PC, 1/14/80

Despite liberal rules of pleading, the appellant's representative was required to file what would amount to a bill of particulars where there were three separate letters of appeal filed by the appellant and two union officials and each raised some different grounds of error, and a subsequent letter from the party's representative made many conclusory allegations and alleged violations of numerous statutory and contractual provisions. *Nigbor v. DVA*, 79-125-PC, 12/4/79

So long as the appellant objected to the personnel action (transfer) during the course of his grievance proceedings, it was not necessary for him, during the first 3 steps of the procedure, to have specifically raised all those potential grounds for error that were ultimately set forth in a bill of particulars filed at the final step. *Stasny v. DOT*, 78-158-PC, 10/12/79; affirmed by Dane County Circuit Court, *DOT v. Wis. Pers. Comm. (Stasny)*, 79-CV-6102, 6130, 2/27/81

522.01(4) Amendments

The appellant was permitted to amend his original appeal letter two months after it was filed to add that the discharge being appealed from was not based on just cause. *Huesmann v. State Historical Society*, 82-67-PC, 8/5/82

Where the appellant sought to obtain enforcement of a settlement agreement that had been reached, he was prevented from amending his appeal to raise matters that he

had not alleged in his original appeal. *Ramsfield v. DNR*, 78-164-PC, 8/30/79

Amendments relate back to time of filing original pleading if the claim asserted in amended pleading relates back to original transaction appealed. *Fisk v. DOT*, 79-83-PC, 1/23/80; *Oakley v. Comm. of Securities*, 78-66-PC, 10/10/78

Parties should be permitted a good deal of liberality in amending pleadings. *Oakley v. Comm. of Securities*, 78-66-PC, 10/10/78

522.03 Weight of administrative practice

A party before an administrative agency such as the Commission can anticipate that the agency will follow its precedents unless it provides a rational and reasonable basis for departing from them. However, if an agency takes a position contrary to a Commission precedent, while it presumably would be subject to rejection by the Commission, it would not be subject to the imposition of costs pursuant to §227.485, Stats., as long as it had a reasonable basis in law for its position. *Pearson v. UW*, 84-0219-PC, 2/12/97 B

Statements by respondent's employes that respondent has consistently interpreted an administrative rule as they did in the instant case was entitled to little weight where the appeal presented a very narrow issue, there was only one instance of a similar transaction during the 11 years the system was in place, and the other transaction was not the subject of administrative or judicial review. *Dusso v. DER & DRL*, 94-0490-PC, 3/7/96

522.05(1)(a) Elements

The right to assert equitable estoppel does not arise unless the party asserting it has acted with due diligence and the conclusion as to whether or not an employe has exercised due diligence is, in part, a function of the nature of the respondent's action. An employe has a substantially greater responsibility to investigate the employer's information or

action when the information/action is adverse to the employe's interests. *Fletcher v. ECB*, 91-0134-PC, 12/23/91

In determining whether the appellant suffered a detriment, the appropriate focus is on whether, if respondent is not estopped, appellant would be in a worse position than before he acted in reliance on respondent's original salary representation rather than a focus on whether he will be in a worse position if he loses his case, and fails to establish estoppel, than if he wins. *Kelling v. DHSS*, 87-0047-PC, 3/12/91

522.05(1)(c) State conduct

Where the appellant, while employed as an Officer 1 in DHSS, had taken the Officer 3 competitive promotional exam in 1989, had been placed on the resulting register, and was ineligible for promotion to a position within DOC after January 1, 1990 because DOC was made a separate department at that time and the appellant's position had remained as part of DHSS, DOC's action of interviewing the appellant for a vacant Officer 3 position in June of 1990 resulted from an administrative error and there was no basis on which to conclude that respondent's actions resulted from fraud or a manifest abuse of discretion. DOC had issued a memo in January of 1990 announcing that an effort was being made to remove the names of DHSS employes appearing on DOC's agency-wide promotional registers and certification lists. *Augustin v. DMRS & DOC*, 90-0254-PC, 10/3/91

Where the appellant received information from the agency personnel manager regarding her projected salary for the next year, which, although given in good faith, was erroneous, and this influenced her to decide not to appeal a reallocation, the Commission found that there was no fraud or manifest abuse of discretion on the part of the respondent, and hence equitable estoppel was not present as to the respondent, a state agency *Ferguson v. DOJ & DP*, 80-245-PC, 7/22/81

522.05(1)(d) Inference of reliance

Where the agency non-contractual grievance procedure provided that a transaction could be appealed directly or grieved, and appellants grieved, Commission will infer reliance on the directive even though there was no allegation of reliance by the appellants, who were not represented by counsel. *Olson v. DHSS*, 78-11, 8/28/78

522.05(1)(e) Source of misinformation

A person in the employing agency who was clearly functioning in a clerical capacity and who offered to do a purely clerical favor, to forward the appeal to the proper place, was not functioning as an arm of the Commission or of the Department of Employment Relations. There was no procedural aspect to the actions of the clerical employe that might place her actions within the scope of an instruction on petitioner's notice of reallocation to contact his agency's Personnel Officer, "If you have any question on *the procedural aspects of filing an appeal*." Complete reliance such as petitioner gave to the clerical employe was inadequate when working with hard and fast rules and regulatory agencies. *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94

A receptionist in the DOT personnel office was not an agent of DER for purposes of the application of equitable estoppel merely because DER had provided in its notice of reallocation that: [i]f you have any questions on the procedural aspects of filing an appeal, please contact your agency Personnel Officer," and where the appellant asked the receptionist for the Commission's address and she gratuitously offered to have the appeal forwarded to the Commission. *Millard v. DER*, 92-0713-PC, 3/19/93; affirmed, *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94

The doctrine of equitable estoppel cannot be applied where the conduct on which the appellant relied was the conduct of another state agency and not the respondent agency. *Goeltzer v. DVA*, 82-11-PC, 5/12/82

Estoppel does not lie against agency where the appellant was misinformed of his or her appeal rights by a union

official. *Bong and Seemann v. DILHR*, 79-167-PC, 11/8/79; *Snyder v. DHSS*, 79-139-PC, 11/8/79; *Thompson v. DHSS*, 79-98-PC, 6/12/79

522.05(2) Claims denied

A person in the employing agency who was clearly functioning in a clerical capacity and who offered to do a purely clerical favor, to forward the appeal to the proper place, was not functioning as an arm of the Commission or of the Department of Employment Relations. There was no procedural aspect to the actions of the clerical employe that might place her actions within the scope of an instruction on petitioner's notice of reallocation to contact his agency's Personnel Officer, "If you have any question on *the procedural aspects of filing an appeal*." Complete reliance such as petitioner gave to the clerical employe was inadequate when working with hard and fast rules and regulatory agencies. *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94

Equitable estoppel was not present where appellant made certain assumptions based on the experience he had in 1991 in submitting a reclassification request, he relied on those assumptions in filing his 1994 request and the assumptions turned out to be incorrect. The assumptions were not attributable to respondents but were attributable to appellant and respondents were not held accountable for them. *Enghagen v. DPI & DER*, 95-0123-PC, 2/15/96; rehearing denied, 4/4/96

Appellant's reliance was unreasonable where he chose to ignore the information provided by those with the authority to effectuate the reallocation of his position in favor of the information provided by his first-line supervisor who had no such authority. *Meisenheimer v. DILHR & DER*, 94-0829-PC, 4/28/95

Equitable estoppel did not apply in an appeal from a reclassification denial where it took respondent over 5 years to respond to the reclass request. Appellant failed to offer any support at hearing for the "detriment" he claimed to have suffered. *Pettit v. DER*, 92-0145-PC, 10/24/94; *Miller v. DER*, 92-0095, 0851-PC, 9/9/94; *Riley v. DER*, 92-0097, 0849-PC, 9/9/94

Appellant's reliance on a statement by a receptionist in the DOT personnel office that his appeal would be forwarded to the Commission was not reasonable and justifiable, where appellant was aware of the need for timely filing and understood from the receptionist's comments that the receptionist in effect was making a commitment on behalf of a third person who was on vacation and would not be returning for several days, which was during the period when appellant himself was going on vacation. *Millard v. DER*, 92-0713-PC, 3/19/93; affirmed, *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94

A receptionist in the DOT personnel office was not an agent of DER for purposes of the application of equitable estoppel merely because DER had provided in its notice of reallocation that: [i]f you have any questions on the procedural aspects of filing an appeal, please contact your agency Personnel Officer," and where the appellant asked the receptionist for the Commission's address and she gratuitously offered to have the appeal forwarded to the Commission. *Millard v. DER*, 92-0713-PC, 3/19/93; affirmed, *Millard v. Wis. Pers. Comm.*, Dane County Circuit Court, 93CV1523, 1/26/94

Appellant was not entitled to an effective date based upon his verbal request to his supervisor concerning reclassification of his position. Appellant was repeatedly told by his supervisor during a two-year period that his position was not at the higher level but the supervisor never advised the appellant that he needed to file a written request to preserve his desired effective date. The personnel manager for the unit explained to appellant the process for filing a reclass request on his own, said nothing about the need to file a written request to preserve an effective date and said a request initiated by the supervisor had a better chance of approval. The elements of equitable estoppel were not present. *Jones v. DHSS & DER*, 90-0370-PC, 7/8/92

Appellant reasonably relied on a statement made during the employment interview that the position would move to a pay range 12 level in approximately a year, but he did not establish that he suffered any detriment from respondents' conduct. There was no showing that respondents' conduct placed him in a worse position than before he acted in

reliance on the statement, nor evidence that absent the statement, appellant would not have accepted the job offer. *Gold v. UW & DER*, 91-0032-PC, 6/11/92

Respondent's conduct of failing to specifically inform the appellant that its offer of employment was contingent on the receipt of satisfactory reference reports did not work a serious injustice to the appellant so as to outweigh the government's interest in hiring employes who are likely to perform well where, *inter alia*, the appellant had previously been advised of the reference requirement, respondent had indicated at the time of the offer that the offer was contingent upon a satisfactory physical exam and respondent made many efforts to contact the appellant after it received her unsatisfactory references. *Skaife v. DHSS*, 91-0133-PC, 12/3/91

The appellant did not rely to his detriment on DOC's invitation to interview him for a vacant Officer 3 position, even though the appellant was ineligible for appointment, where the only "detriment" the appellant claimed was that he expended time, energy and money to travel to and participate in the subject interview. DOC informed the appellant after the interview that he was not eligible for consideration for the position and the appellant was never offered an Officer 3 position. *Augustin v. DMRS & DOC*, 90-0254-PC, 10/3/91

There was no detriment to the appellant in going to work for respondent at $6.694 per hour even though the respondent had initially represented that his salary would be $7.481 per hour, where the appellant was unemployed at the time he was offered the job. Even though it could be argued that if the appellant had never left the job market he might have been offered and accepted a better job during the period of his employment with respondent, this is not clear and convincing evidence of a detriment. *Kelling v. DHSS*, 87-0047-PC, 3/12/91

Respondent's action establishing the appellant's starting salary was affirmed and appellant's assertion of equitable estoppel denied where there was no way that appellant's reliance could be said to have been to his detriment. *Te Beest v. DHSS*, 88-0086-PC, 5/16/90

Respondent's conduct in setting the rate of pay upon transfer/promotion did not amount to "a fraud or a manifest

abuse of discretion" where as soon as the respondent discovered its error, it took steps to correct it and the appellant was given an opportunity to return to her prior position but declined. Respondent had advised the appellant that the transaction would be a promotion. However, as a consequence of the implementation of the Comparable Worth Plan approximately three months prior to the date of the transaction, the pay range of the classification of the appellant's prior position was upgraded. Respondent did not take the change into account until after the appellant had received a letter of appointment which continued to incorrectly identify the appointment as a promotion accompanied by a pay increase and after the appellant had begun working in the new position. *Meschefske v. DHSS & DMRS*, 88-0057-PC, 7/14/89

Respondent's action to reduce the appellant's starting salary after his appointment but before he received his first pay check was neither illegal nor an abuse of discretion, where the pay rate initially quoted to the appellant was incorrect. Before accepting the job offer, the appellant worked in the private sector. In reviewing the necessary elements of equitable estoppel, the Commission concluded that 1) the appellant's reliance on the wage rate contained in respondent's job offer was not "to his detriment" when there were reasons other than salary that prompted appellant to obtain state employment and there was no adverse pay effect at either pay rate as compared to his salary at his previous job and that 2) the respondent's conduct did not amount to fraud or to a manifest abuse of discretion. *Taddey v. DHSS*, 86-0156-PC, 5/5/88

Estoppel did not apply where the detriment to the appellant was speculative in nature. The appellant in a case relating to the effective date of a reclassification was informed by management that her transfer from position "A" to position "B" would not harm her eventual reclassification. Prior to her transfer, appellant was performing a temporary assignment and temporary assignments are not a basis for reclassification/regrade. Had she remained in position "A" the appellant would have begun performing higher level duties on a permanent basis some time but it was not clear whether those duties would have commenced before she in fact began performing higher level duties two months after her transfer. *Mund v. DILHR & DER*, 84-0213-PC, 11/7/85

Equitable estoppel did not lie against respondent DER in an

appeal arising from 1983 reallocation decision where in 1979 the appellant had laterally transferred into his position and his new supervisor was concerned about the appropriate classification of the position. The supervisor had called DNR's Bureau of Personnel and followed up with a memo but never received a response and it was not known whether the appellant's position description was ever signed by DNR's personnel manager. The Commission held that the appellant could not justifiably rely on these facts to expect a perpetual classification of his position at a certain level. *Eslien v. DER*, 84-0020-PC, 8/1/84

The element of equitable estoppel that "after the inducement for delay has ceased to operate the aggrieved party may not unreasonably delay" was not present where the appellant waited until after a precedent-establishing court case had been decided and the time for its appeal had run before he filed his appeal with the Commission. *Junceau v. DOR & DP*, 82-112-PC, 10/14/82

No estoppel derived from the failure of the agency to advise of appeal rights under §230.44(l)(d), Stats. *Bong and Seemann v. DILHR*, 79-167-PC, 11/8/79

522.05(3) Claims affirmed

Where appellant relied on information given by respondent in deciding whether to tender a voluntary layoff letter or to pursue options in lieu of layoff, the information provided to appellant was incorrect resulting in the injury to appellant that she was deprived of demotion opportunities which appellant, as the most senior in her approved layoff group, would otherwise have had, and the application of the doctrine did not unduly harm the public's interests, equitable estoppel applied to prevent the respondent from relying on the appellant's voluntary layoff letter. *Lyons v. WGC*, 93-0206-PC, 12/5/94

Actions and inactions by appellant's supervisor and personnel manager led appellant to believe that his reclassification request was pending in the personnel office and that no further action by him was necessary. Equitable estoppel elements were established. *Mergen v. UW & DER*, 91-0247-PC, 11/13/92

Respondent's conduct in setting the rate of pay upon selection was "a fraud or a manifest abuse of discretion" where a contract was created pursuant to the letter of appointment which was sent to appellant showing his rate of pay as $8.522 per hour and making his appointment effective on February 2nd, and on February 11th, the appellant was informed that his rate of pay would be set at $8.352 as a result of legislation which became effective on February 1st. A reduction of the appellant's salary would work a severe injustice to the appellant if equitable estoppel were not applied. Appellant was awarded the higher level of pay until he received a raise which brought his pay above the $8.522 level. *Siebers v. Wis. Pers. Comm.*, Outagamie County Circuit Court, 89 CV 00578, 11/9/89

Respondents were equitably estopped from utilizing an effective date based on when appellants submitted their formal written reclassification requests where appellants established that for several years prior thereto, respondent DHSS had induced the appellants to take no action on their own behalf by representing that management was taking care of their reclassification concerns. Management was actively engaged in trying to stall the appellants in their efforts to obtain the higher classification in order to attempt to protect certain federal funding which was understood by management to be tied to the number of positions in the lower classification. *Locke et al. v. DHSS & DER*, 90-0384-PC, 7/11/91

Respondent was estopped from arguing that an earlier effective date for appellant's reclassification/regrade was precluded by the fact she did not submit a written reclassification request to UW-Milwaukee's personnel office before March 9, 1987, where appellant had repeatedly voiced her concerns about the classification of her position, including a letter to her department head, and management gave every indication that appellant's concerns would be addressed and never suggested a need to submit a written request. The employe handbook failed to identify a requirement that requests be filed in writing to the personnel office. *Warda v. UW-Milwaukee & DER*, 87-0071-PC, 6/2/88

Respondents were required to reclassify the appellant's positions more than two years earlier than when respondent received appellantts written reclassification request where appellants were mislead by management's conduct into

assuming their verbal reclassification requests were adequate. *Guzniczak & Brown v. DHSS & DER*, 83-0210, 0211-PC, 5/13/87; petition for rehearing granted and decision reaffirmed, 6/11/87

Respondent DER abused its discretion and was equitably estopped from asserting an objection based on timeliness where the appellant's letter of appeal was addressed to the Commission but listed DER's post office box and where DER failed to forward the letter to the Commission during the two weeks that remained in the 30 day filing period. *Toth v. DILHR & DER*, 84-0009-PC, 2/29/84

Respondent was equitably estopped from asserting a jurisdictional objection based on timeliness of the appeal where the letter informing the appellant of his suspension stated that he could appeal the action to the Personnel Commission but gave the incorrect address for the Commission, and where the other elements for applying equitable estoppel existed. *Zabel v. DOT*, 82-137-PC, 7/24/82

Respondent was equitably estopped from arguing the reclassification appeal was untimely, due to its express written instruction to submit any review request to DOA's personnel office. *Sharpe v. DOA & DP*, 82-117-PC, 7/26/82

Where the appellant was appointed to a position with the respondent after she had been informed erroneously that she could transfer from her prior position with the legislature at not less than her salary with the legislature, the Commission held that the respondent was equitably estopped from relying on the civil service code to reduce appellant's salary several weeks after she began work for the respondent, where the appellant relied on the respondent's representation in accepting the appointment and the representation had been made after the respondent's agent had been told by a departmental personnel specialist that the appellant could transfer at the same salary level if the transfer were between positions in classes with the same pay rate or pay range maximum, and at the time of the agent's representation to the appellant he was not sure of her classification or her status within the civil service, which amounted to a constructive fraud or manifest abuse of discretion. *Porter v. DOT*, 78-154-PC, 5/14/79; affirmed by Dane County Circuit Court, *DOT v. Wis. Pers. Comm.*,

***(Porter)*, 79-CV-3420, 3/24/80)**

Where the employing agency advised the employe he had 30 days to appeal a non-contractual grievance denial at the third step, the agency was estopped from arguing that the 15 day time limit contained in the APM containing standards for non-contractual grievance procedures applied. *Wing v. UW*, 78-159-PC, 4/19/79

Where an agency non-contractual grievance procedure stated that a transaction could be appealed directly or grieved, and the appellants filed a grievance and appealed the denial of the third step to the Commission, the agency was estopped from arguing that the appeal was untimely on the grounds that the transaction was directly appealable and should have been appealed in the first instance. *Olson v. DHSS*, 78-11, 8/28/78

522.05(4) Extent of application of estoppel

Where the appellant was hired at $11.736 per hour but it is conceded that due to equitable estoppel he should have been hired at $12.858 per hour, he is entitled to the pay differential only until the date a regrade brought him to $13.197, since even if he actually had been hired at $12.858, the regrade still would have been to $13.197. *Phillips v. DILHR*, 82-43-PC, 7/7/83

522.06 Double jeopardy

The doctrine of double jeopardy is inapplicable where appellant had been discharged, reinstated upon order of the Commission due to deficiencies in the letter of discharge, and discharged again. Therefore, in justifying the second discharge, the respondents were not barred from relying on events that provided the basis for the first (voided) discharge. *Huesmann v. State Historical Society*, 82-67-PC, 8/5/82

522.07 Conflict between statute and department rule, or failure to

promulgate as rule

***Paul v. DHSS & DMRS*, 82-0156-PC, 82-PC-ER-67, 6/19/86**

Where the respondent failed to promulgate criteria for participating in the Handicapped Expanded Certification program as administrative rules, the failure rendered the criteria invalid as they did not fit within any of the rule-making exceptions found in §227.01(13). *Schaub v. DMRS*, 90-0095-PC, 10/17/91

522.08 Interpretation of directives

A policy that was not directed at line staff and was informal and discretionary in nature was not an administrative rule because it was not "of general application." The policy was only applied by two individuals within respondent agency and it did not include absolute standards but required the exercise of considerable judgment on a case-by-case basis. *Spaith v. DMRS*, 89-0089-PC, 4/19/90

522.10 Representation (including unauthorized practice of law and appointment of counsel)

A party seeking disqualification of opposing counsel has the burden of establishing that counsel's continuation in the case would violate disciplinary rules, and a motion to disqualify should not be granted without a clear showing that continued representation is impermissible, citing *Zions First Natl. Bank v. United Health Clubs*, 505 F. Supp. 138 (E.D. Pa. 1981). *Balele v. DNR et al.*, 95-0029-PC-ER, 6/22/95

Disqualification of agency counsel was not justified at the prehearing stage where counsel had denied having any involvement whatsoever in the hiring which was the subject matter of the proceeding and it was not clear whether counsel would be called as a witness at hearing. Complainant alleged that counsel had made statements, to others, of a discriminatory nature. *Balele v. DNR et al.*, 95-0029-PC-ER, 6/22/95

An attorney for DER was not disqualified because of previous contacts with an employe from representing an agency in litigation against the employe. The attorney previously had been employed at Wis. Lottery, and when she left to go into private practice she handed out business cards to many lottery employes, including complainant. She also had a conversation with complainant at the time she gave him her card in which he said he was concerned about his employment with the Lottery and would commence legal action if the matter wasn't resolved, but no representation or further contacts between them ensued. Complainant also contended that the attorney might be a witness, but failed to identify anything of substance about which she might testify. *Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER-A, 9/17/93

The Commission is not authorized to appoint counsel for a complainant. *Cleary v. UW-Madison*, 84-0048-PC-ER, 11/21/85

522.15 *Amicus curiae* briefs

The authority to consider an *amicus curiae* brief is well within the Commission's implied powers relating to the hearing procedure. *Southwick v. DHSS*, 85-0151-PC, 8/6/86

522.20 Ministerial vs. discretionary acts

Equitable estoppel did not lie with respect to respondent DER's calculation of appellant's starting wage upon restoration to a position in the classified service, where even though the Commission ultimately disagreed with DER's calculation of that wage, DER had an arguable basis for its calculation. Appellant had not relied upon a more prompt response by DER. *Dusso v. DER & DRL*, 94-0490-PC, 5/28/96; petition for rehearing denied, 7/23/96

If an act to be performed by a public official is ministerial, the official is required to comply with the statutory requirement, and does not have the same latitude as does an

official faced with the performance of a discretionary act. *Smith v. DMRS*, 90-0032-PC, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96

The question of whether to allow a nonresident to compete for a position does not require the exercise of discretion, because the controlling statute clearly prohibited it in the absence of a determination of a critical need. *Smith v. DMRS*, 90-0032-PC, 8/3/95; explained further in ruling on request for reconsideration, 1/5/96; affirmed by Dane County Circuit Court; *Smith v. Shaw et al.*, 90 CV 5059, 96 CV 283, 12/10/96

523 Declaratory rulings

The Commission declined to grant a request for declaratory ruling seeking to challenge the validity of an administrative rule where the appellant made no argument why the issue could not be considered in the context of a previously-filed civil service appeal arising from the transaction giving rise to the rule challenge and appellant had, in fact', stated that if the petition for declaratory ruling was denied, he would file a motion seeking the same result within the parameters of the cases already pending. *Petition for Declaratory Ruling (Ronald L. Paul)*, 84-0158-PC, 10/11/84

The Commission has jurisdiction to issue a declaratory ruling on the issue of whether an employe who is reinstated after an unlawful termination is entitled to reimbursement for medical expenses, overtime premium pay and holiday premium pay which would have been earned absent the improper discharge. However, jurisdiction under §227.06, Stats., is discretionary in nature and the Commission is not compelled to grant the request for a declaratory ruling. *Request for Declaratory Ruling*, 78-37, 8/29/78

[Personnel Commission homepage] [PC Digest Introduction]

Sections 510 through 510.90

[Previous material] [Next material]

510.01 Foundation

Sufficient foundation existed for the admission of three position descriptions where a witness testified that he had obtained them from his counterparts on other campuses and respondent was served with copies in advance of the hearing and had the opportunity to have presented any appropriate rebuttal evidence. *Matthews v. UW & DER*, 92-0820-PC, 1/25/94

510.04 Objection -- timeliness of

Appellant's argument, made after the proposed decision was issued, that reliance on information contained in position descriptions without supporting testimony from the incumbent is error, was late. Appellant did not raise a hearsay objection at hearing. *Ostenso v. DER*, 91-0070-PC, 4/13/94; affirmed by Dane County Circuit Court, *Ostenso v. Wis. Pers. Comm.*, 94-CV-1571, 3/18/96; affirmed by Court of Appeals, *Ostenso v. Wis. Pers. Comm.*, 96-1777, 1/29/98; *Sanders v. DER*, 90-0346-PC, 3/29/94; affirmed by Dane County Circuit Court, *Sanders v. Wis. Pers. Comm.*, 94-CV-1407, 11/27/96

510.05 Exhibits

Complainant's summary of information gleaned from a second document was ruled inadmissible where complainant failed to provide a complete version of the second document. Complainant's attempt to submit the entire second document after hearing was rejected. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

An unemployment compensation decision is not admissible in Commission proceedings, pursuant to §108.101(1), Stats. *Garner v. DOC*, 94-0031-PC, 11/22/94; affirmed by Milwaukee County Circuit Court, *Garner v. Wis. Pers. Comm.*, 94-CV-013477, 11/28/95

Where an exam plan was submitted as a sealed exhibit by the Division of Personnel and the appellant was permitted to examine the document in advance of hearing in the Commission offices but was not permitted to make copies or detailed notes of the substance of plan, this was a reasonable arrangement given that the criteria set forth in plan was intended to be used in future examinations and could be an advantage to a person with access to the criteria. *Holmblad v. Div. of Pers., & LAB*, 78-169-PC, 1/30/79

510.06 Hearsay

Evidence, in hearsay form, of the basis for a panel interviewer's belief that petitioner had problems with interpersonal skills, was proper where complainant conceded the underlying facts. If the evidence in question constituted hearsay, the ruling permitting it was consistent with §PC 5.03, Wis. Adm. Code, in light of petitioner's concession. *Postler v. Wis. Pers. Comm., et al*, Dane County Circuit Court, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

The hearing examiner was well within her discretion in barring evidence as to an alleged policy of respondent where the evidence was in the form of opinion evidence from a witness and was based solely on hearsay discussions with other supervisors. *Postler v. Wis. Pers. Comm., et al*, Dane County Circuit Court, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

Evidence was properly admitted relating to the instances cited by the interview panel members as the basis for the opinion that petitioner lacked interpersonal skills. The concept of hearsay was inapplicable to the extent that such testimony was offered to show the basis of an interviewer's belief, as opposed to the truth of the matters asserted. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al,* 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

A chart compiled by complainant to reflect the results of a telephone survey he had made to state agencies to obtain statistical information relating to the use of a resume screen procedure as part of a selection process, was not received in the record, after objection, because complainant could offer no supporting documentation concerning the survey. Therefore, the document was a compilation of summaries of hearsay statements to complainant and could not reasonably be relied on for the purpose complainant intended. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Position descriptions fall within an exception to hearsay as regularly-kept business records dated and signed as correct by the incumbent and the incumbent's supervisor. *Ostenso v. DER*, 91-0070-PC, 4/13/94; affirmed by Dane County Circuit Court, *Ostenso v. Wis. Pers. Comm.*, 94-CV-1571, 3/18/96; affirmed by Court of Appeals, *Ostenso v. Wis. Pers. Comm.*, 96-1777, 1/29/98; *Sanders v. DER*, 90-0346-PC, 3/29/94; affirmed by Dane County Circuit Court, *Sanders v. Wis. Pers. Comm.*, 94-CV-1407, 11/27/96

While the Commission has discretion to permit hearsay, it was proper to exclude a statement that would be particularly prejudicial to the opposing party in terms of being denied the right to cross-examine the declarant. *Ellis v. DER*, 92-0548-PC, 3/9/94

Hearsay testimony was considered in an appeal from a disciplinary action, even though the evidence was multiple hearsay involving the remarks of convicted felons, where in a correctional setting, reasonable persons were more likely to rely on statements made by convicted felons than would be the case in the outside world, there was a good deal of

other hearsay evidence on the same point in the record and the inmates in question were no longer in the institution. *Kode v. DHSS*, 87-0160-PC, 11/23/88

Statements that were made by a supervisor who was responsible for the hiring decision and were conveyed to the testifying witness by the other supervisor who participated in the hiring decision were not hearsay because they were made curing the scope of the employe's employment or agency with respondent, under §908.01(4)(b)4, Stats. *Wolfe v. UW-Stevens Point*, 84-0021-PC-ER, 10/22/86

Statements by a witness that were offered, in part, to impeach another witness' testimony regarding his failure to recall who had attributed certain discriminatory remarks to a supervisor and as such, were not subject to exclusion based on a hearsay objection pursuant to §908.01(4)(a), Stats. *Wolfe v. UW-Stevens Point*, 84-0021-PC-ER, 10/22/86

The record of a prior hearing on jurisdiction was not admissible over objection at a subsequent hearing on the merits since it constituted hearsay. *State v. McFarren*, 62 Wis. 2d 492 (1974).; *Miller v. UW*, 76-238, 8/30/79

The record of an unemployment compensation proceeding is hearsay and in the absence of a particular use that constitutes an exception to the hearsay rule it is inadmissible, *State v. McFarren*, 62 Wis. 2d 492 (1974); *Kleisch v. DHSS*, 78-151-PC, 1/23/79

It was not error to have received over a hearsay objection a report by an accounting firm summarizing its review of various files, particularly where the authors of the report were available for cross examination. *Alff v. DOR*, 78-227, 243-PC, 10/1/81; affirmed by Dane County Circuit Court, *Alff v. Wis. Pers. Comm.*, 81-CV-5489, 1/3/84; affirmed by Court of Appeals District IV, 84-264, 11/25/85; petition for review by Supreme Court denied, 2/18/86

510.07 Polygraph exam

The appellant was not barred from introducing results of her own polygraph examination because of the absence of stipulation, but opposing party was entitled to

cross-examine polygraph examiner as to qualifications and training, conditions under which test was administered, limitations of and possibilities for error, and techniques of polygraphic interrogation, and, at the discretion of hearing examiner, any other matters deemed pertinent to the inquiry, with the ultimate decision on admissibility committed to the hearing examiner. *Glaser v. DHSS*, 79-66-PC, 79-PC-ER-63, 7/31/79

***Christensen v. DHSS & DP*, 77-62, 1/5/78**

Commission will not enter an order over objection directing a polygraph examination of the opposing party's witnesses. *Christensen v. DHSS & DP*, 77-62, 1/5/78

510.08 Relevance

The denial of the use of sick leave benefits and resultant action of treating the absence as unexcused is not a disciplinary action covered by §230.44(1)(c), Stats. However, to the extent the absence was one of the bases of a suspension that was properly appealed to the Commission, evidence relating to the unexcused absence would be relevant. *Kanitz v. UW*, 97-0019-PC, 5/21/97

Where it was undisputed that respondent relied on information contained in a 1988 position description when it classified a comparison position, a 1993 position description for the same position that was admitted into the record had limited relevance. *Tiedeman & Marx v. DHSS & DER*, 96-0073, 0085-PC, 4/24/97

In an appeal of a layoff decision, evidence relating to post-layoff notices of available work was relevant (but not determinative) to appellant's claim of bad faith. *Lyons v. WGC*, 93-0206-PC, 12/5/94

In an appeal of a discharge decision, testimony relating to a previous violation which resulted in the imposition of a written reprimand was relevant, even though the appellant had not appealed from that discipline, where the previous violation was cited in the termination letter. However, the Commission lacked jurisdiction to overturn the prior discipline. *Garner v. DOC*, 94-0031-PC, 11/22/94; affirmed by Milwaukee County Circuit Court, *Garner v.*

***Wis. Pers. Comm.*, 94-CV-013477, 11/28/95**

Because the reallocation decision under appeal concerned a position which appellant occupied as of the effective date of the classification survey, evidence relative to his supervisor and work in a previous position was irrelevant. *Ellis v. DER*, 92-0548-PC, 3/9/94

Duties and responsibilities first assigned after the effective date of a classification decision are not relevant in a review of the correctness of that decision. *Bloom v. DER*, 92-0088-PC, 8/25/93

Evidence concerning the existence of administrative proceedings initiated by one of appellant's witnesses against the respondent was an appropriate factor in evaluating the credibility of the witness. The examiner's ruling sustaining an objection to the evidence was rescinded. *Showsh v. DATCP*, 87-0201-PC, 11/28/88; rehearing denied, 3/14/89; reversed on other grounds by Brown County Circuit Court, *Showsh v. Wis. Pers. Comm.*, 89-CV-445, 6/29/90; affirmed by Court of Appeals, 90-1985, 4/2/91

Within the scope of a non-selection appeal, an appellant could contend that the (pre-certification) examination procedure was evidence of an attempt to appoint a "pre-selected" candidate. The appellant would be permitted to offer any evidence relevant to the non-selection decision, including, possibly, evidence relating to the examination. *Allen v. DHSS & DMRS*, 87-0148-PC, 2/12/88

Where appellant requested reclassification in April of 1984 from ES 4 to ES 5, the fact that appellant's position was reallocated to ES 5 as a result of the approval of new position standards for the ES series in April of 1985 as irrelevant to the issue before the Commission. *Rasman v. DNR & DER*, 85-0002-PC, 8/l/85

During the Commission's hearing on an appeal of a reclassification denial, consideration of the procedure followed by the respondent in making its findings would serve no useful purpose and would have no probative value in relation to the merits of the appeal because the Commission's hearing on an appeal is a *de novo* proceeding and the facts to be considered are not limited to the findings made by the respondent in its review of the request. *Rasman v. DNR & DER*, 85-0002-PC, 8/1/85

Review of the procedure followed by the respondent in reaching a reallocation decision would serve no useful purpose and would have no probative value in relation to the ultimate issue of the appropriate classification of the appellant's positions. *Ellsworth & Parrell v. DP*, 83-0021, 0022-PC, 8/23/83

Where appellant was appealing his non-appointment on the theory that the entire selection process, including the examination, was "wired", and where appellant did not file a timely appeal from action which allegedly occurred during the examination process, appellant is not precluded from introducing evidence relating to the examination which may be relevant to the question of whether the appointment decision was illegal or an abuse of discretion. *Rowe v. DER*, 79-202-PC, 6/3/80

The Commission sustained respondent's objections to evidence seeking to demonstrate that the employer had failed to take any action to place the appellant in new positions in the agency of which the respondent was aware many months prior to appellant's lay off. The Commission overruled respondent's objection to evidence seeking to show that respondent was not diligent in attempting to place the appellant in a position subsequent to his lay off. *Ruff v. Wisconsin Investment Board*, 78-30-PC, 5/15/79

In an appeal of a non-appointment decision, respondent's objection to the consideration of any evidence relating to earlier non-appointments of the appellant was denied. However, the Commission held that it would not be appropriate, in the absence of unusual circumstances, to receive evidence that would require that the whole underlying transaction in essence be litigated and went on to provide examples of admissible and inadmissible evidence. *Glasnapp v. DHSS*, 78-249-PC, 1/16/79

510.09 Motion to suppress/motion in limine

Where complainant, who was asked to resign from her employment as an assistant district attorney (ADA) after her arrest for operating a vehicle while intoxicated and while on call and carrying an office beeper, contended she was held to a different standard while carrying the beeper than two male ADAs, complainant was entitled to offer evidence

tending to show differential treatment of the two male ADAs with respect to other terms and conditions of complainant's employment, including caseload and performance expectations. However, evidence relating to caseloads and performance standards for other ADAs (i.e. other than the complainant and the two specified males) and by the district attorney was cumulative, repetitive and too tangential to the essence of complainant's contentions to have reasonable probative value. Evidence relating to the manner in which drunk driving arrests of employes were handled by other employers would not have reasonable probative value. Respondent's motion in limine was denied in part and granted in part. *Christie v. Office of the District Attorney of Fond du Lac County*, 96-0003-PC-ER, 2/25/98

In investigating possible misuse of state property, respondent was not required to advise the appellant that the information he provided could not be used against him in criminal proceedings, where criminal prosecution was apparently never considered by respondents and was never perceived by the appellant as a hazard. *Oddsen v. Board of Fire and Police Commissioners*, 108 Wis. 2d 143 (1982), distinguished. *Blake v. DHSS*, 82-208-PC, 1/4/84

Complainant's motion, made during the hearing, to strike certain evidence because respondent allegedly failed to include the information in its responses to complainant's discovery requests, was denied where, despite instructions from the hearing examiner, the complainant failed to provide sufficient specificity to decide the motion. *Rufener v. DNR*, 93-0074-PC-ER, etc., 8/4/95

In a reallocation appeal, the appellant waived his right to offer evidence relating to the first of two allocation patterns identified at the higher classification level when his answer to respondent's interrogatories indicated he was only pursuing the second allocation pattern and he had reiterated this position in a telephone conference 10 days prior to hearing. The appellant was permitted to present evidence on both allocations solely for the purpose of making a complete record for court review. *Welch v. DER*, 92-0630-PC, 5/16/94

The fact that a test (Minnesota Multiphasic Personality Inventory), which served as a basis for a psychiatric evaluation, had been lost did not preclude testimony by the psychiatrist about the evaluation or the test, but could affect

the weight accorded the testimony. Motion in limine denied. *Boinski v. UW-Milwaukee,* 92-0233-PC-ER, 92-0702-PC, 4/19/93 (Ruling by examiner)

Petitioner's motion in limine with respect to evidence relating to her visits to the Personnel Commission, her conversations with Commission staff as well as conversations about the petitioner amongst Commission staff was denied where the Commission could not conclude that evidence concerning the observations and concerns of Commission staff that were transmitted to the employer would have no probative value, where they were allegedly part of respondent's motivation for requiring a psychological exam of the petitioner and were allegedly cited in the termination letter. The evidence sought did not fit within the confines of conciliation efforts and no other recognized privilege had been asserted or appeared to be involved. *Iwanski v. DHSS*, 89-0074-PC-ER, etc., 12/2/91

Motion to suppress the information obtained from the investigation was denied. *Blake v. DHSS*, 82-208-PC, 1/4/84

510.10 Expert Testimony

The qualifications of appellant's expert witness who had extensive academic credentials and was a published author in the area of job classification and classification systems did not "distinctly over shadow" the qualifications of respondent's experts who had a number of years of experience working on a daily basis with the state classification system. *Kennedy et al. v. DP,* 81-180,etc-PC, 1/6/84

510.11 Materiality

Where the issue for hearing agreed to by the parties during the prehearing conference referred to the classifications of Program Assistant 2 and Educational Services Intern, and the respondent's representative recounted the discussion which had occurred during the prehearing and noted that respondents had prepared for hearing only on the basis of

the PA 2 and ESI classifications, evidence relating to the PA 3 classification was not considered. *Darland v. UW & DER*, 89-0160-PC, 7/12/90

In an appeal of a layoff decision, the Commission denied respondent's motion to exclude evidence relating to appellant's argument that ostensible program decisions were in fact motivated by an intention to effectuate a layoff decision that would adversely affect the appellant, although the same program decisions may not be reviewed for the purpose of determining if they are defensible from purely a policy standpoint. *Kuter v. DILHR*, 82-0083-PC, 5/23/85

In an appeal of a layoff decision, the Commission denied respondent's motion to exclude evidence of a written commitment made by appellant's superior that the office organizational structure would remain the same as long as the appellant wished to remain in the office. Such evidence relates to a determination of whether respondent's layoff decision was arbitrary and capricious especially in light of respondent's apparent ability to exempt appellant from layoff. *Kuter v. DILHR*, 82-0083-PC, 5/23/84

510.15 Official notice

The Commission rejected a request to take notice of exhibits tendered in a separate case which were not offered at the subject hearing, where the exhibits did not fall within the scope of administrative or official notice established in §227.45, Stats. *Lyons v. WGC*, 93-0206-PC, 12/5/94

Sections in the Department of Employment Relations manual relating to the procedure used by DER in reviewing an agency's request to fill a position do not fall within the scope of administrative or official notice established in §227.45, Stats. *Lyons v. WGC*, 93-0206-PC, 12/5/94

The concept of administrative notice is not so broad as to allow the Commission to rely on information from file documents which were outside the record and unconfirmed at hearing. Appellant requested the Commission to take notice of his "frustration," as reflected in letters in the case file, to support his equitable estoppel claim. *Miller v. DER*, 92-0095, 0851-PC, 9/9/94; *Riley v. DER*, 92-0097, 0849-PC, 9/9/94

The Commission could not take official notice of a DHSS manual which was not part of the hearing record. The manual, which was attached to a post-hearing brief, was neither a generally recognized fact nor an established technical or scientific fact, within the meaning of s. 227.45(3), Stats. The argument was rejected that the manual was a "generally recognized fact" solely because it was subject to the public records law in s. 19.32(2), Stats. Respondent objected to the document because it was not exchanged prior to hearing. *Harron v. DHSS*, 91-0204-PC, 9/26/92

510.20 Attorney-client privilege

A supervisor who, in a deposition, testified that she had refreshed her recollection by referring to her notes which constituted a communication between respondent's agents and respondent's attorney, waived the attorney-client privilege as to those notes. Complainant's motion to compel production of the notes was granted. *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 4/22/87

510.50 Res judicata/collateral estoppel (see also 717.3)

The doctrine of claim preclusion holds that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings. In order for earlier proceedings to act as a claim preclusive bar in relation to the present suit, three criteria must be satisfied: 1) an identity between the parties or their privies in the prior and present suits; 2) an identity between the causes of action in the two suits; 3) a final judgment on the merits in a court of competent jurisdiction. Wisconsin courts apply the transactional rule in determining whether the claims or causes of action in the two cases are sufficiently identical: a basic factual situation generally gives rise to only one cause of action, no matter how many different theories of relief may apply. The cause of action is the fact situation on which the first claim was based. If the present claim arose out of the same transaction as that involved in the former action, the present claim is barred even though the plaintiff

is prepared in the second action to present evidence or grounds or theories of the case not presented in the former action, or to seek remedies or forms of relief not demanded in the first action. In sum, the purpose of the claim preclusion doctrine is to prevent multiple litigation of the same claim, and it is based on the assumption that fairness to the defendant requires that at some point litigation involving the particular controversy must come to an end. *Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0257, 8/10/98

The doctrine of issue preclusion refers to the effect of a judgment in precluding re-litigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action. The doctrine does not operate to provide a basis for a cause of action, but is, instead, an additional means by which all or part of a cause of action may be dismissed. Issue preclusion, unlike claim preclusion, does not require an identity of the parties. Issue preclusion is a narrower doctrine than claim preclusion and requires courts to conduct a fundamental fairness analysis before applying the doctrine. In order for earlier proceedings to act as an issue preclusive bar in relation to the present suit, there must be an identity between the causes of action in the two suits. *Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0257, 8/10/98

The Commission improperly applied the doctrine of *res judicata*. The doctrine is not viable in administrative law, citing Board of *Regents v. Wis. Pers. Comm.*, 103 Wis. 2d 545, 552 (Court of Appeals, 1981). *DER v. Wis. Pers. Comm. (Klepinger)*, Dane County Circuit Court, 85-CV-3022, 1/2/86 & 1/20/86

The Commission lacked jurisdiction to enforce a settlement agreement entered into between the respondent and the former position incumbent (the agreement setting 1979 as the effective date for reallocation of the position) where the case at bar was brought by the current position incumbent and the Commission had found that irrespective of any settlement agreement, the correct effective date for reallocating the former incumbent's position was in 1983. The court held that the settlement agreement did not have a *res judicata* effect on the current incumbent's appeal. *DER v. Wis. Pers. Comm. (Klepinger)*, Dane County Circuit Court, 85-CV-3022, 1/2/86 & 1/20/86

Neither issue preclusion nor claim preclusion arose from the appeal of respondent's decision to deny appellant's request to reclassify his position from Engineering Specialist - Transportation - Advanced 1 to Civil Engineering - Transportation - Advanced 1, effective March 7, 1993, to bar appellant's subsequently processed appeal from the decision to reallocate his position in 1990 to Engineering Specialist Transportation - Advanced 1 rather than Advanced 2. The two cases involved different classifications, different effective dates and different classification actions. *Mueller v. DOT & DER*, 93-0109-PC, 2/27/97

Circuit Court's finding in criminal case in which appellant was defendant had collateral estoppel effect in regard to the factual finding that respondent's activities with respect to certain witnesses constituted improper intimidation of and interference with those witnesses, but not in regard to the conclusion that these activities prevented appellant from getting a fair trial (hearing) and mandated his reinstatement to employment. *Gibas v. DOJ*, 92-0247-PC, 10/5/93

Where discharged employes pursued contractual grievances wherein they alleged that they had been the subjects of racial discrimination, and harassment or retaliation, the doctrine of *res judicata* was applied to prevent them from relitigating these matters before the Commission in a proceeding under §230.45(l)(b), Stats. *Lee & Jackson v. UW-Milw.*, 81-PC-ER-11,12, 10/6/82

Decision in personnel appeal of probationary termination is not conclusive as to companion equal rights case because of different statutes and legal standards governing each proceeding. *Laxton v. DOT*, 79-PC-ER-65, 12/4/79

Certain findings made following prior hearing on jurisdiction may be binding on parties with respect to subsequent hearing on merits. *Miller v. UW*, 76-238, 8/30/79

Personnel board decision of an investigation request was not conclusive as to a commission appeal of the same transaction because appellant was not a party to the investigation request and because of different statutes and legal standards governing each proceeding. *Ray v. UW*, 78-129-PC, 3/9/79

Findings made in an unemployment compensation decision cannot have collateral estoppel effect as to a Commission appeal because of the different statutes and legal standards governing each proceeding. *Kleisch v. DHSS*, 78-151-PC, 1/23/79

An unemployment compensation decision cannot have *res judicata* effect as to a personnel commission appeal because of the different statutes and legal standards governing each proceedings. *Kleisch v. DHSS*, 78-151-PC, 1/23/79

510.90 Other

Where appellant, who did not have the burden of proof, did not appear at the hearing on whether she was entitled to fees and costs under the Equal Access to Justice Act, she was deemed to have admitted the accuracy of the evidence adduced at the hearing, pursuant to §PC 5.03(8), Wis. Adm. Code. There were no indicators of credibility issues as to the witnesses who did appear, such as inconsistent testimony. *Klemmer v. DHFS*, 97-0054-PC, 10/9/98

While a case may not be decided upon evidence or information obtained without the presence of the appellants, the Commission may choose to analyze a case in a manner that is consistent with previous Commission decisions, even though the appellants were not parties to those earlier cases. Prior decisions of the Commission are available to the public and are accessible via the Commission's Digest of Decisions. *Tiedeman & Marx v. DHSS & DER*, 96-0073, 0085-PC, 4/24/97

Complainant's answers to interrogatories were properly admissible as exhibits at hearing rather than being admitted only for purposes of impeachment. *Van Zutphen v. DOT*, 90-0141-PC-ER, 12/20/96

While the Commission can consider to some extent the legal aspects of a decision issued in another case involving the same class specifications, such as its interpretation of the classification specifications, it cannot consider the findings in making its factual determinations. Giving preclusive effect to the findings would not be appropriate because there was no showing that appellant was a party to that proceeding or was in a position to have obtained judicial

review of it. *Vakharia v. DNR & DER*, 95-0178-PC, 12/20/96

Where, in preparation for hearing on appeals arising from reallocation decisions, respondent propounded interrogatories to appellants, through their counsel, seeking to determine which of two allocations the nine individual appellants claimed to meet, five appellants identified the first allocation and four the second, and it was not until after the hearing was underway that appellants asked that they not be bound by their answers, the appellants were held to their answers to the interrogatory. The interrogatory addressed a major issue of litigation strategy and respondent had the right to rely on the answers. Appellants offered no reasons why the initial answers did not reflect their subsequent position or why they did not raise the issue until well after the commencement of the hearing. *Von Ruden et al. v. DER*, 91-0149-PC, etc., 8/31/95

The Commission is not obliged to accept uncontroverted testimony as true. *Thomas v. DER*, 94-0070-PC, 12/22/94

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 600 through 615.5(9)

[Previous material] [Next material]

---

600 NON-DISCIPLINARY ACTIONS OF THE APPOINTING AUTHORITY

605.5(2) Particular applications

Where there was no explicit evidence of the administrator's approval pursuant to §230.29, Stats., of the transfer, but the record contained a copy of a memo to the administrator requesting his approval, and a notation that the administrator verbally had approved the transfer, it will be inferred, in part in keeping with the presumption of administrative regularity, that the required approval had been given. *Harley v. DOT & DP*, 80-77-PC, 11/7/80

Where there was evidence to support a finding that the appointing authority had delegated certain authority to first line supervisors, it would be inferred pursuant to the presumption of administrative regularity, and in the absence of any evidence to the contrary, that this delegation was in writing and on file with the director as required by §Pers 1.02(l), Wis. Adm. Code. *Schmid v. UW*, 78-19, 9/5/79

610.2 As academic staff

In an appeal of a noncontractual grievance relative to the designation by the Board of Regents of two UW-Green Bay

positions as academic staff (as opposed to classified civil service), the scope of the Commission's review is limited to the question of whether there has been a violation of the civil service code (Subchapter II, Chapter 16 (now 230), and Ch. Pers. WAC). The Commission can find nothing in the code that creates a presumption that positions be designated in the classified service, and concludes that there was no violation of the civil service code. *WSEU v. UW*, 74-100, 2/15/80

615.2 Generally

The strict selection criteria designed to predict successful performance on the job required under the competitive examination process described under §§230.15 and .16, Stats., apply only up to the time that the certification list of qualified candidates is developed. Thereafter, the appointing authority is required only to base its selection on more flexible criteria that are reasonably related to the responsibilities of the position in its quest to appoint the best candidate for the position. *Postler v. Wis. Pers. Comm., et al*, Dane County Circuit Court, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

If an agency decides to use handicapped expanded certification, it is not mandated by law to hire a person with a disability. *Byrne v. State Pers. Comm.*, Dane County Circuit Court, 93-CV-3874, 8/15/94

Where it was not established on what grounds the appointing authority acted, improper motives will not be imputed to the appointing authority from the acts of the three person interview panel he appointed, and in any event, the appointing authority is not required to appoint the most qualified candidate. *DHSS v. Wis. Pers. Comm. (Paul)*, Dane County Circuit Court, 81-CV-1635, 9/18/83 (dictum)

Appellant failed to sustain his burden to establish that respondent's failure to hire him for a Youth Counselor position was illegal or an abuse of discretion where he was not hired because he failed to disclose all convictions on the form he completed the day of his interview. *Wedekind v. DOC*, 98-0091-PC, 2/24/99

Respondent did not abuse its discretion by relying upon the conviction disclosure form completed by the appellant as part of the interview process, as opposed to searching for disclosures previously made by appellant when he was a state employe. Respondent's reliance on the conviction disclosure form was not clearly against reason or evidence. Respondent's decision not to consider the appellant further for a vacant position after discovering that appellant failed to make full disclosure of his conviction record was not contrary to respondent's policy. Disqualifying a candidate from further consideration due to falsification of application materials is specifically authorized in §ER-MRS 6.10(7), Wis. Adm. Code. *Wedekind v. DOC,* 98-0091-PC, 2/24/99

The traditional analysis under §230.44(1)(d), Stats., of hiring decisions is whether, based on the record, the appointing authority's decision was clearly against reason and evidence, citing *Harbort v. DILHR*, 81-74-PC, 4/2/82. However, where an appeal relates to the hiring authority's request for certification of additional names, evidence that would tend to show that the agency requested an additional, or a particular type of certification for the purpose of undermining appellant's chances for the appointment would be relevant as would evidence as to whether respondent improperly relied on recommendations in violation of §230.20, citing *Ransom v. UW-Milwaukee*, 87-0125-PC, 7/13/88. *Morvak v. DOT & DMRS*, 97-0020-PC, 6/19/97

Where appellant requested and was given reconsideration following respondent's initial decision not to hire her, respondent's decisional process consisted of two distinct parts. The second part of the decisional process, in which the director of the facility decided to stand by previous decision made by the assistant director of nursing but changed the rationale for its decision to include a new reason, was part of the subject matter of the appeal. The additional reason fell within the scope of the respondent's failure or refusal to hire the appellant and within the stipulated issue for hearing which asked whether respondent committed an illegal act or an abuse of discretion in not appointing the appellant to the vacant positions in question. In addition, respondent waived any objection to the scope of the hearing by never raising this issue until after the promulgation of the proposed decision and order, where respondent specifically addressed the second part of the decisional process in terms of the evidence it presented at

hearing and in terms of the arguments it made in its closing statement at hearing. *Neldaughter v. DHFS*, 96-0054-PC, 2/14/97

Where respondent decided to reevaluate appellant's application for vacancies as a Nurse Clinician and the deciding factor in the second decision not to hire appellant was the fact that she had threatened to file a complaint if she did not get a response from respondent about her denial within two weeks, respondent's second decision was an abuse of discretion. Appellant knew she had certain (time limited) rights with respect to her non-hire and she merely informed respondent that if she did not receive an explanation for its action within a certain time, she would exercise those rights. An applicant for state employment has the statutory right under §230.44(1)(d), Stats., to challenge an agency's hiring decision. *Neldaughter v. DHFS*, 96-0054-PC, 2/14/97

There was no showing that the interview process failed to satisfy any relevant requirement or was not applied in a consistent fashion to each candidate where each interviewee was told they had to turn in their copy of the interview questions prior to the start of their interview, and where another candidate was able to consult his notes during the interview because he took his notes on another piece of paper while the appellant had taken his notes on the paper which contained the interview questions so he was unable to consult them during the interview. *Firlus v. DOC*, 96-0030-PC, 11/14/96

Where there was no evidence in the record relating to the content of the interview questions, interview benchmarks, or responses to the interview questions by the candidates, there was no way to compare the interview performances of the candidates to determine if there was an abuse of discretion in relation to the scoring of the interviews. Evidence that the successful candidate was a friend of, and rode to work with, the supervisor for the position (who was one of the three members of the interview committee) and evidence that even though the vacant position was posted as a second shift position, the successful candidate ended up working only four days on the second shift before the position (and incumbent) returned to the successful candidate's previous shift, was insufficient to support a conclusion of an illegality or an abuse of discretion. *Firlus v. DOC*, 96-0030-PC, 11/14/96

Interviews were not regarded as part of the competitive examination process. The interview questions, which were job-related, need not have been designed to predict successful performance on the job. Respondent conceded the questions were not designed as a scientific measure of success. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al*, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

Respondent did not abuse its discretion when it eliminated petitioner from consideration for the position of supervisor of a particular work unit where respondent had a reasonable basis to believe that some degree of conflict existed between petitioner and the staff of the unit, even though there were only two incidents that respondent cited as the basis for its belief and the most recent incident occurred approximately one and one-half years prior to the interview. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al*, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

Respondent did not commit an illegal act or abuse its discretion when it did not select appellants for a vacant Civil Engineer-Developmental (Plan Reviewer) position where the appellants did not possess an engineering degree and the top five candidates all had such a degree, even though the appellants did have experience reviewing plans. *Ochs & Jensen v. DILHR*, 93-0185, 0219-PC, 9/9/94

Respondent's hiring decisions were sustained where the job announcement had specifically referenced holding a data processing or equivalent degree, the successful candidates had such degrees and appellant did not and during the interview appellant was not well organized and failed to link his background with the duties of the position. *Stewart v. DOR*, 92-0003-PC, 8/18/94

Respondent's hiring decision did not constitute an abuse of discretion where there was conflicting testimony about whether there was animosity between appellant and his supervisor, but in any event the record reflected that the supervisor neither participated in nor influenced the interview panel which ranked appellant third among four

candidates, and that the selected candidate had superior qualifications for the position. *Ransom v. UW*, 92-0234-PC, 2/9/94

In dictum, the Commission noted it was not "clearly against reason and evidence" for the appointing authority to consider the interview panel's recommendation as only one of several selection criteria. The basis for the respondent's selection decision, i.e., that the successful candidate's training in law enforcement was superior to appellant's and that he had been employed at a higher level in the State Patrol than appellant held to be reasonably job-related and accurately assessed. It was also not "clearly against reason and evidence" for respondent to conclude, based on appellant's successful and lengthy employment with the DOT, that he was not eligible for Handicapped Expanded Certification, i.e., that he did not have a "physical or mental disability which substantially limits the person's employment opportunities, including the person's ability to obtain or retain employment." *Byrne v. DOT & DMRS*, 92-0672-PC, 92-0152-PC-ER 9/8/93; affirmed by Dane County Circuit Court, *Byrne v. State Pers. Comm.*, 93-CV-3874, 8/15/94

Appellant failed to sustain his burden to show an illegality or an abuse of discretion where there was nothing in the record relating to the selection process followed by respondent, the selection criteria utilized or the comparative qualifications of the candidates based upon these criteria. *Bauer v. DATCP & DER*, 91-0128-PC, 6/25/93

No abuse of discretion in hiring was found although successful candidate's son-in-law headed institutional department to which she gained employment where respondent did not include successful candidate's son-in-law in selection process, appellant did not show that son-in-law influenced the process, appellant was not better qualified than successful candidate who had previous LTE experience performing similar duties to those assigned to the vacant position, and interview scoring inconsistencies did not significantly affect appellant's ranking. *Schmidt v. DHSS*, 88-0131-PC, 6/4/93; affirmed by Winnebago County Circuit Court, *Schmidt v. Wis. Pers. Comm.*, 93 CV 654, 4/28/94; affirmed by Court of Appeals, 94-1545, 7/19/95

Even though one interviewer asked appellant his marital status, the decision not to hire the appellant was not illegal

where there was no basis for a finding that the question had any effect on the hiring decision. *Bengtson v. DILHR*, 92-0026-PC, 8/26/92

Respondent had a rational basis for its decision not to select the appellant for a supervisory position even though the appellant had very strong supervisory experience and the successful candidate did not, where the successful candidate had program experience and client base experience and the appellant did not. *Bengtson v. DILHR*, 92-0026-PC, 8/26/92

Respondent's decision not to hire the appellant for a staff psychiatrist position in a mental health institute was affirmed where the decision was based on the revocation of the appellant's license to practice medicine 6 years earlier for having engaged in a sexual relationship with a patient, even though the revocation was overturned on appeal based upon the court's conclusion that the applicable statute of limitations had run. The respondent was not required to conduct an independent investigation to determine the accuracy and completeness of the information provided to them by apparently reliable and knowledgeable outside sources. *Puls v. DHSS*, 90-0172-PC, 5/1/92

Where the primary basis utilized by respondent for making hiring decisions pursuant to the contractual transfer process was seniority unless a less senior candidate possessed clearly and substantially different qualifications, and where the appellant failed to show that her relevant qualifications were clearly and substantially different than those of the more senior candidates, the decision not to select the appellant was affirmed. *Molitor v. DHSS*, 89-0086-PC, 89-0105-PC-ER, 5/1/92

Where the appellant failed to show 1) that the three selection criteria were not applied uniformly to the final four candidates or 2) that it was "clearly against reason and evidence" for the respondent to conclude that the successful applicant was the better candidate, she did not sustain her burden of proof. The fact that the appellant was satisfactorily performing in a similar position while serving probation did not mean she was entitled to appointment to the vacant position. Also there was no requirement that the respondent hold up its recruitment and selection process until the appellant was eligible to exercise a mandatory transfer right into the vacancy. *Jorgensen v. DOT*,

90-0298-PC, 6/12/91

Respondent's decision not to select the appellant for a vacant position as a stores supervisor in a prison was affirmed where the questions used by the interview panel were job-related, the questions were asked of all the candidates, the answers were scored using a pre-established benchmark rating system, the actual scores awarded were based on the candidates' responses and the candidate selected received the highest score. Although the person selected was the step-daughter of a payroll and benefits specialist in the prison, and the selectee would end up supervising her mother, neither parent was involved in the hiring process and there was no evidence the hiring process was modified to give the appellant any advantage. An ambiguous comment by the supervisor for the vacant position, who also served on the interview panel, which could be interpreted as an indication of bias against the appellant did not generate an abuse of discretion. *Jahnke v. DHSS*, 89-0094-PC-ER, 89-0098-PC, 12/13/90

Respondent's selection decision was upheld where respondent developed a series of questions which were related to the functions assigned to the position, all candidates were asked the same questions, their responses were rated separately by each panel member, the resulting scores were combined and the candidate obtaining the highest score was offered the position after first checking references. The experience and knowledge of the person selected more closely matched all of the areas which respondent had determined were important in performing in the position than did appellant's experience and knowledge. *Mott v. DOA*, 89-0119-PC, 12/13/90

Respondent abused its discretion when it ceased to consider the appellant for a vacant position primarily because the director of the hiring unit believed appellant had been terminated by that unit from a similar position 10 years earlier and it was policy not to rehire an employe who had been terminated, where the position involved menial tasks which posed relatively low risks for respondent and the Commission found that appellant had resigned and had not been terminated. *Bjornson v. UW*, 90-0004-PC, 10/4/90; rehearing denied, 1/11/91

Respondent abused its discretion when it manipulated the hiring process to avoid hiring the appellant by ignoring the

numerical results of the interview process and substituted a sort of popularity contest which resulted in the lowest-ranked candidate being selected. *Zebell v. DILHR*, 90-0017-PC, 10/4/90

Two selection decisions were sustained where there was an insufficient basis on which to conclude that the selection criteria were unreasonable, were not uniformly applied, were not the actual criteria utilized or that the interviewer's assessments of the candidates were unreasonable in view of the candidates' presentations during the interviews and in view of the selection criteria. The interviewer's comment during the first interview that the respondent did not need people with appellant's negative attitude did not demonstrate animus toward appellant but reflected the interviewer's opinion of the type of attitude required of respondent's employes. *Sonnenberg v. Lottery Board*, 89-0036, 0069-PC, 4/19/90

Respondent abused its discretion when it violated its own in-house selection procedure of obtaining a consensus of the four-person interview panel where two of the four panelists were not consulted prior to the selection of one of the candidates. *Thornton v .DNR*, 88-0089-PC, 11/15/89

Respondent abused its discretion when two of the four interview panelists virtually placed a substantive value on the answer to a question which was not job-related. Appellant was asked during the interview, whether, if he received the appointment to the position in Dodgeville, he would move to that area. Based on his response, two panelists decided the appellant would not comply with the agency's residency requirement. This decision was made before the panelists verified their belief with the appellant and before giving the appellant an opportunity to request an exception from the agency secretary, even though such an exception was specifically provided for in the agency's rules. *Thornton v. DNR*, 88-0089-PC, 11/15/89

No abuse of discretion was shown where all of the questions asked of the candidates were reasonably related to the duties of the position, appellant's qualifications were not clearly superior to those of the successful candidate, the panelists awarded complainant fewer points than the successful candidate and one of the three interviewers characterized the appellant as being "hostile" during the interview in addition to testifying that the successful

candidate did very well in the interview. *Bloedow v. DHSS*, 87-0014-PC-ER, etc., 8/24/89

There was no abuse of discretion even though some of the panelists incorrectly added up the scores for the various questions asked of the candidates where the errors did not result in a change in the ranking of the candidates by either the individual panelists or by the panel as a whole. *Bloedow v. DHSS*, 87-0014-PC-ER, etc., 8/24/89

No abuse of discretion was shown where the criteria used by the respondent in reaching the decision were reasonably related to the duties and responsibilities of the position, the selection criteria were applied uniformly and the respondent was justified in reaching the conclusion that it did as a result of the application of such criteria. *Wali v. PSC*, 87-0081-PC, 87-0080-PC-ER, 4/7/89

No abuse of discretion was shown where there was no basis on which to conclude that the selection criteria were unreasonable, were not uniformly applied, or were not the actual criteria utilized by the respondent or that the interviewing panelist's assessments of the candidates were not reasonable in view of the presentations of the candidates at the interviews and in view of the selection criteria. The failure to appoint the appellant to the position was not illegal where the appellant lacked those mandatory restoration rights claimed by her. *Larson v. DILHR*, 86-0019-PC-ER, 86-0013-PC, 1/12/89

Appellant failed to establish that the respondent acted illegally or abused its discretion in not hiring him to fill a vacancy even though the respondent had previously acted illegally when it offered the position in question to someone who was listed on an expired register. Appellant was unable to rely on the previous illegality to show that the ultimate failure or refusal to appoint him to the vacancy was invalid where the prior offer was withdrawn and the selection process was reinitiated. *Thornton v. DNR*, 88-0012-PC, 1/12/89

Apparently conflicting opinions by a respondent's examining physician and appellant's osteopath did not generate a conclusion that the decision not the select the appellant was clearly against reason. Absent expert testimony on which the Commission could conclude that the procedures or conclusions of respondent's physician setting

lifting and bending restrictions on the appellant were unwarranted or inappropriate, appellant failed to sustain his burden of proof. *Lauri v. DHSS*, 87-0175-PC, 11/3/88

It is not the Commission's role to determine which of an unlimited number of possible selection criteria it would have been best for respondent to utilize but rather to determine whether the criteria used by respondent were reasonably related to the duties and responsibilities of the position to be filled and were uniformly applied. *Royston v. DVA*, 86-0222-PC, 3/10/88

Where 65% of the successful candidate's time would be devoted to supervising and program management responsibility, respondent's reliance on supervisory and program management experience as primary selection criteria was not unreasonable. *Royston v. DVA*, 86-0222-PC, 3/10/88

The existence of an affirmative action plan with affirmative action goals does not establish a requirement that an employer hire a woman, a member of an ethnic/racial minority or a handicapped person for a position. *Royston v. DVA*, 86-0222-PC, 3/10/88

Respondent's selection decision for a Printing Technician position was upheld where the successful candidate had a broader exposure, through course work, to printing than did the appellant and the successful candidate had superior public contact skills. *Jensen v. UW-Milwaukee*, 86-0144-PC, 11/4/87

The successful candidate for a Printing Technician position had sufficient knowledge of the printing craft to perform the functions of the job. Some form of orientation is inevitable in any new job in order to understand the system of operation, i.e., orienting a new employe as to the means of utilizing basic knowledge of the craft rather than teaching the incumbent that basic knowledge required in a position. *Jensen v. UW-Milwaukee*, 86-0144-PC, 11/4/87

Respondent's selection decision was upheld where the successful candidate had more extensive experience in one of the two main responsibilities of the vacant position and "came across better" during the interview, and where the complainant's response to a background questionnaire was incomplete. Nothing supported appellant's contention that the selection decision resulted from threats to the

decision-maker by others. Respondent did not abuse its discretion by not confirming the information on candidate's work history questionnaire or not confirming that the candidates were actually qualified in the two requisite building trades. *Friedrich v. UW-Platteville*, 86-0210-PC, 6/24/87

Respondent's selection decision was affirmed where the criteria utilized in making the decision were reasonably related to the duties and responsibilities of the vacant position and were uniformly applied. The supervisor had mistakenly assumed that the vacancy could be filled via promotion (without competition) and had developed a proposal to promote employe #1. Once the supervisor learned that competition would be required, she obtained a list of certified eligibles including employe #1. Neither employe #1 nor appellant were selected. *Stichert v. UW-Oshkosh*, 86-0197-PC, 6/11/87

It was clearly not against reason and evidence for the appointing authority to conclude that the successful applicant was a better candidate than the appellant for the subject position where appellant lacked enthusiasm for the position, demonstrated resistance to changing the status quo, and where the appointing authority was aware of problems regarding appellant's work performance. In contrast, the successful applicant was enthusiastic and demonstrated great creativity and flexibility while her references did not cite any problems with her work performance. *McIntyre v. DHSS*, 86-0140-PC, 4/15/87

The non-selection of the appellant for a Boiler Safety Inspector I position was not an abuse of discretion even though the appellant already had the necessary certification requirements to independently conduct boiler inspections and the successful candidate could be expected to spend six months or more in a training capacity until being able to pass the certification test, where it was the typical agency experience to hire an applicant who did not possess the requisite certification and the respondent had determined that white males had always occupied the position and there was a resistance in the decision to affirmative action considerations and the person selected was both qualified and a minority. However, the selection decision was found to be illegal. *Kesterson v. DILHR & DER*, 85-0081-PC & 85-0105-PC-ER, 12/29/86

The appointing authority is not required to apply every reasonable criterion in making a hiring decision. It is not the role of the Commission to determine which criteria should have been applied, i.e., to substitute its judgment for that of the appointing authority. *Romaker v. DHSS*, 86-0015-PC, 9/17/86

Respondent did not abuse its discretion in not selecting the appellant for a vacant Institution Security Director I position where the person selected had superior interpersonal skills even though the appellant had far better security and supervisory experience, and where the successful candidate would have an opportunity to pick up the necessary security knowledge during the interval between the hiring decision and the date the first maximum security patients arrived. However, the certification of the successful candidate was found to be illegal. *Paul v. DHSS & DMRS*, 82-156-PC & 82-PC-ER-69, 6/19/86

Respondent's decision not to select the appellant, who ranked number I on the examination and had significant experience in property assessment, for either of two vacant Property Assessment Technician 1 positions was affirmed where the individual who made the decision was not aware of the candidate's test scores or rankings, the positions did not perform assessments but were responsible for performing support services to persons who did the professional assessment/appraisal work, the positions were assigned nearly 50% data processing work on a short-term basis, the two successful candidates had skills in either word processing, data entry or both and there was no indication that the appellant had such skills. *Wilterdink v. DOR*, 85-0072-PC, 2/6/86

The Commission found an abuse of discretion where the person who had the effective authority to make the hiring decision bore an animus toward the appellant, was predisposed not to hire him and manipulated the process to prevent appellant from being hired despite the fact that the appellant was the best qualified candidate. *Pearson v. UW-Madison*, 84-0219-PC, 9/16/85; affirmed by Dane County Circuit Court, *Pearson v. UW & Pers. Comm.*, 85-CV-5312, 6/25/86; affirmed by Court of Appeals District IV, 86-1449, 3/5/87

Respondent's decision not to select the appellant for a vacant BMH 2 position at UW-Stevens Point was affirmed

even though appellant was employed as a BMH 3 at UW-La Crosse, where the employment interviews were conducted uniformly and questions about work experience were not asked because the BMH 2 position is an entry level position. *Kraklow v. UW*, 84-0237-PC, 7/3/85

No abuse of discretion was found where, as to each of five selection decisions, the selection criteria were reasonably related to the duties of the positions and, based upon the application of those criteria, the appellant was less qualified than the successful applicants. *Pflugrad v. DMRS & DHSS*, 83-0176-PC, 6/6/85

Appellant failed to show that respondent's decision to select another candidate was illegal or an abuse of discretion where respondents had concluded 1) that the successful applicant was qualified and 2) that by hiring her, respondent would satisfy a goal of its affirmative action plan. *Hoppenrath v. DOT*, 83-0065-PC, 2/29/84

Decision by respondent to hire someone other than appellant was affirmed, where the successful applicant had more experience that was particularly relevant to the duties of the vacant position and had performed better than the appellant during the oral interview. *Ebert v. DILHR*, 81-64-PC, 11/9/83

Respondent's failure to select appellant for positions in question was neither illegal nor an abuse of discretion where respondent reasonably concluded that appellant was not as well qualified as those sixteen applicants ultimately hired for janitorial positions and where appellant had held six different positions during the prior 4-2 year period and had been terminated once for a personality conflict and once for a verbal attack on a nun escorting a group of children who had walked on a floor complainant had just waxed. *Vesperman v. UW-Madison*, 81-232-PC, 81-PC-ER-66, 3/31/83

The respondent's failure to appoint the appellant to the position in question was neither illegal nor an abuse of discretion where the appellant's reinstatement eligibility was permissive, and there were valid selection criteria, including a better attendance record in prior employment and an excellent, stable employment history, supporting the appointment decision that was made. *Ronne v. UW*, 82-160-PC, 11/11/82

Where the appellant had more technical competence at the time than the appointee, but the employer had legitimate concerns about appellant's communications and interpersonal relations skills, it could not be concluded that the appointment decision was clearly against reason and evidence and therefore an abuse of discretion. *Harbort v. DILHR*, 81-74-PC, 4/2/82

ln an appeal pursuant to §230.44(l)(d), Stats., of a non-appointment with respect to which the appellant alleged sex discrimination and retaliation, the Commission applied the type of analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and found no such discrimination following a discussion of the material circumstances including the relative qualifications of the applicants. *Jacobson v. DILHR*, 79-28-PC, 4/10/81

No abuse of discretion was found where the appellant, an employe of the appointing authority, was evaluated on the basis of his employment with the agency, and where the allegation of anti-union animus was not supported by evidence of more than common-place labor-management friction. *Baker v. Secretary of State*, 80-183-PC, 12/17/80

Appellant failed to show that respondent's failure to appoint her was illegal or an abuse of discretion where both the appellant and the successful applicant were certified and the respondent adduced credible evidence that there were justifiable grounds for selecting the successful applicant as the better qualified applicant. *Spink v. DHSS*, 78-9-PC, 2/9/79

615.5(2) Who is considered

A conclusion that an appointment was made outside the 60 day period referenced in §230.25(2)(b), Stats., would not result in an order voiding the certification or the appointment. *Seitter v. DOT & DMRS*, 94-0021-PC, 3/9/95

Multiple certifications and an appointment were neither illegal or an abuse of discretion, even though the ultimate appointment occurred more than 60 days after the initial certification as provided in §230.25(2)(b), Stats., where an initial appointment, made within the 60 day period was invalidated because the successful candidate was certified

based upon receiving veterans preference points to which he was not entitled, where the appointing authority then worked with DMRS to obtain additional certifications and the appointing authority at least implicitly requested an extension of the 60 day period or a new 60 day period that was implicitly granted. DMRS did not abuse its authority when it did not order the appointing authority to make an appointment within the initial 60 day period, from the group of interested candidates who remained interested in the position, because to do so would have been inconsistent with additional time implicitly granted by DMRS and would have forced the appointing authority to forego the opportunity to have a full slate of certified candidates from which to choose. The reasoning process of DMRS which resulted in a conclusion, some time after the initial appointment was invalidated, that a vacancy had been created which required a new appointment and that a reasonable time to complete this was 60 days, was not an abuse of discretion. *Seitter v. DOT & DMRS*, 94-0021-PC, 3/9/95

Respondent's action was affirmed where it was clear that respondent did not use open recruitment to fill the subject position in order to prevent the appellant from obtaining the position and the appellant failed to establish that respondent engaged in any illegal action or abuse of discretion during the recruiting and hiring process. *Ransom v. UW*, 87-0125-PC, 9/20/89

Respondent's decision to deny appellant's request to be interviewed for a position where, by the time the appellant contacted the agency regarding the vacancy, interviews had been completed and the position had been offered to and accepted by a qualified candidate. *Wing v. DMRS & DPI*, 85-0013-PC, 9/23/87

Respondent's selection decision was affirmed where the criteria utilized in making the decision were reasonably related to the duties and responsibilities of the vacant position and were uniformly applied. The supervisor had mistakenly assumed that the vacancy could be filled via promotion (without competition) and had developed a proposal to promote employe #1. Once the supervisor learned that competition would be required, she obtained a list of certified eligibles including employe #1. Neither employe #1 nor appellant were selected. *Stichert v. UW-Oshkosh*, 86-0197-PC, 6/11/87

The non-selection of the appellant was illegal where the respondent's action of appointing an expanded certification candidate violated certain statutes relating to affirmative action and the Fair Employment Act. *Kesterson v. DILHR & DER*, 85-0081-PC & 85-0105-PC-ER, 12/29/86

The Commission affirmed respondent's decision not to seek interviews with all of the 20 applicants who were eligible for the vacant position. The respondent had utilized five job related factors in screening the applicants based upon their resumes and had eliminated 15 of the 20 eligibles in this manner. *Schmaltz v. UW-Madison*, 85-0004-PC, 10/29/86

The respondent violated §230.03(4m), Stats., when it decided to use expanded certification after comparing the proportion of minority incumbents in the ISD-1 classification to the proportion of minorities in the state population as a whole rather than to the percentage of minorities from amongst all those persons who were "qualified and available" for hire in the ISD-I classification. Respondent also violated §§230.01(2) and .03(4m), Stats., when it made a work force analysis based upon job category ("Officers and Administrators") rather than a classification (ISD-1). Therefore, the resulting decision to appoint someone whose name appeared on the list of candidates due to expanded certification was illegal. *Paul v. DHSS & DMRS*, 82-156-PC & 82-PC-ER-69, 6/19/86

There was no illegal action or abuse of discretion in failing to interview the appellant, who was in layoff status with permissive reinstatement rights to the position in question, where the appointing authority had a reasonable basis for concluding that he was 11not qualified" for the position in question, and there was no necessity to have interviewed anyone who was not certified for the position. *McCabe v. UW*, 82-20-PC, 9/30/82

The Commission determined that there was no illegal action or abuse of discretion with respect to an appointment process where the original register for two vacancies consisted of six names chosen on a competitive promotional employing unit basis, only four names remained for the second position, the agency requested an additional certification, the vacancy was reannounced on a statewide open competitive basis, and after a delay a new register was established. Also, there was no evidence that a candidate

had been given information about the exam in advance thereof, and there was nothing improper about the makeup of the post certification interview panel. *Toigo et al. v. UW & DP*, 80-206-PC, 6/3/81

615.5(4) Who decides

Respondent's hiring decision did not constitute an abuse of discretion where there was conflicting testimony about whether animosity existed between appellant and his supervisor, but in any event the record reflected that the supervisor neither participated in nor influenced the interview panel which ranked appellant third among four candidates, and that the selected candidate had superior qualifications for the position. *Ransom v. UW*, 92-0234-PC, 2/9/94

Respondent's use of a single person (as opposed to a panel) to interview certified candidates was neither illegal nor an abuse of discretion. *Rosenbauer v. UW-Milwaukee*, 91-0086-PC, 91-0071-PC-ER, 9/24/93

It was reasonable for respondent to select a person for the interview panel who had previously acted as supervisor for those duties representing 40% of the vacant position, despite the fact that the person was also first line supervisor of the appellant. *Stichert v. UW-Oshkosh*, 86-0197-PC, 6/11/87

Where the interview process was not part of the competitive examination process for the subject position and the interview process was intended to be advisory only, the person who made the selection decision was authorized to exercise his discretion and to appoint the best candidate from the list of eligibles and the decision-maker was not required to appoint the candidate with the highest interview score. *Romaker v. DHSS*, 86-0015-PC, 9/17/86

615.5(6) Candidate references or recommendations

The action by one of the interviewers to withdraw his recommendation to hire appellant for an elevator inspector vacancy was not an abuse of discretion where, after making

the recommendation, the interviewer received information from a variety of sources indicating appellant was not a desirable candidate for the vacancy. It was not unreasonable for the interviewer to choose to rely on the multiple sources of negative information about appellant's work history, rather than to simply ignore that information and proceed with the hiring process. While the interviewer could have sought even more information about the appellant before he decided to withdraw the recommendation, the abuse of discretion standard did not require him to do more than he did. *Holley v. DOCom*, 98-0016-PC, 1/13/99

A state employe who had inspected appellant's work as an elevator mechanic did not abuse his discretion when he provided negative information about appellant's work to the hiring panel that was considering employing appellant as an elevator inspector. Appellant did not show that the state employe's own work would have been negatively affected if appellant had been hired. The state employe's observations of appellant were corroborated by other persons. Appellant failed to show that any animosity between the state employe and the appellant had a bearing on the reliability of the employe's observations. *Holley v. DOCom*, 98-0016-PC, 1/13/99

Respondent's decision not to hire appellant as a Forestry Technician 5 was upheld. Appellant was ranked highest after all candidates had been interviewed, but three of the four panelists were concerned about appellant's communication style and his interpersonal skills. Respondent's subsequent reference checks of appellant's listed references, firms listed on his resume and respondent's area staff, generated four positive responses and four negative responses. The negative responses included statements that appellant was very quiet, not aggressive and did not get along with other people. The contacts also indicated that appellant had been fired by one employer and did not "work out" for a second employer. The panel decided not to recommend appellant for the position. *Lee v. DNR*, 97-0081-PC, 10/9/98

Respondent did not abuse its discretion by not selecting the appellant for vacant Nurse Clinician positions where the assistant director of nursing had contacted the hospital which had previously employed the appellant, had asked as to the reason for terminating appellant’s employment and had been advised by someone who identified himself as an

attending physician rather than as appellant's supervisor: "As far as I can tell, it had to do with advocating too strongly for patients (clients) (vs. not enough)," and where appellant had not volunteered some information to respondent about her termination at the hospital. While appellant attempted to compare respondent's handling of her situation with that of other candidates, appellant failed to show that her case was really parallel with those of the other candidates in question. However, respondent was found to have abused its discretion when it subsequently reevaluated appellant's application and decided not to hire her for a different reason. *Neldaughter v. DHFS*, 96-0054-PC, 2/14/97

While it was possible that the appellant would have been able to successfully perform as a Registered Nurse in the vacancy in question, it could not be said that the decision not to hire her was an abuse of discretion where a "damning" reference signed by four of the appellant's instructors at her nursing school was quite current and raised concerns which specifically related to the duties of the vacancy. *Skaife v. DHSS*, 91-0133-PC, 12/3/91

No abuse of discretion was found as to respondent's failure to check the appellant's references where all three members of the interview panel were quite familiar with the appellant and her work based on the appellant's five years of employment with the department. Certain inconsistencies in the record (i.e. more candidates' references were actually checked than had been described in testimony and the successful candidate submitted fewer references than had been requested) were insufficiently indicative of an abuse of discretion to support a finding for the appellant. *Jensen v. UW-Milwaukee*, 86-0144-PC, 11/4/87

An abuse of discretion was found where the appointing authority failed to check the current references of an applicant, but instead relied on the comments of her supervisors in a prior job, where the complainant had testified adversely about one of the supervisors before the legislature, and there was a variance between his comments about her to the appointing authority and his written evaluations in her personnel file. *Jacobson v. DILHR*, 79-28-PC, 4/10/81

In determining whether an appointment decision is illegal under §230.20(2), Stats., the Commission's role is to

determine whether the appointing believed that any recommendation considered by the appointing authority provided an objective evaluation of an applicant's character, training, etc., in the sense that it was an evaluation that a reasonable person in an appropriate position would have made. It may be appropriate in a given case for the Commission to consider whether a recommendation could be considered objective and whether "there was a rational basis" for the recommendation. The latter may be relevant to the question of whether the recommendation was objective, which in turn may be relevant to the question of whether the appointing authority in fact believed the recommendation was objective. The Commission found, in the case before it, that the evaluation was objective and the appointing authority believed it was an objective evaluation. *McIntyre v. DHSS*, 86-0140-PC, 4/15/87

In making a selection decision for the position of assistant superintendent of a minimum security correctional facility for men, the decision-maker's reliance on a comparison of the quality of the candidate's work performance in minimum security correctional institutions was reasonable. The decision-maker reasonably relied upon his own knowledge of the candidate's work performance rather than on knowledge he could have gained from contacting references. *Romaker v. DHSS*, 86-0015-PC, 9/17/86

615.5(9) Other issues

A contract was created when a letter of appointment was sent to the appellant after the appellant had verbally accepted an offer of a civil service position. Respondent's conduct in setting the rate of pay upon selection was "a fraud or a manifest abuse of discretion" where the letter of appointment showed his rate of pay as $8.522 per hour and made his appointment effective on February 2nd, and on February 11th, the appellant was informed that his rate of pay would be set at $8.352 as a result of legislation which became effective on February 1st. A reduction of the appellant's salary would work a severe injustice to the appellant if equitable estoppel were not applied. Appellant was awarded the higher level of pay until he received a raise which brought his pay above the $8.522 level. *Siebers v. Wis. Pers. Comm.*, Outagamie County Circuit Court, 89

CV 00578, 11/9/89

Respondent did not fail to fulfill an agreement to hire appellant, even though appellant understood he had been offered a job, where no unconditional employment offer had actually been made to appellant by respondent. There was nothing written tending to support appellant's contention he had accepted a formal offer of employment, and the person who spoke to appellant on the telephone did not have the authority to hire the appellant. That authority rested with the department secretary, and it was undisputed he never took such action. *Holley v. DOCom*, 98-0016-PC, 1/13/99

While it is the better practice to retain records created as part of a hiring process, no legal mandate for retention exists. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al*, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

Respondent appointing authority's action of mailing a letter regarding a post-certification interview to the address which appellant had provided was neither illegal nor an abuse of discretion, nor an obstruction nor falsification pursuant to §230.43(1), Stats. *Morgan v. DHSS*, 93-0089-PC, 9/24/93

Respondent's failure to give all candidates the same opportunity to augment their resumes with details concerning their training and experience constituted an abuse of discretion. *Rosenbauer v. UW-Milwaukee*, 91-0086-PC, 91-0071-PC-ER, 9/24/93

Respondent's decision to promote two other candidates to vacancies in preference to appellant was not an abuse of discretion where respondent had a rational basis for preferring the selected candidates--better rankings on their oral interviews, more positive opinions regarding their past performance, and concerns about certain aspects of appellant's performance--and appellant could not show that these reasons were lacking in substance or unreasonable. There is no requirement that an appointee to a position satisfy on appointment all the prerequisites for reclassification to the class level for the position. *Orr v. OCI*, 92-0018-PC, 92-0025-PC-ER, 10/29/92

The state civil service system is entirely a statutory creation which cannot be overridden by individual contracts of

employment created by and between individual state employes and applicants for employment. Appellant's starting salary was governed by the relevant pay plan, and this could not be altered on the theory that he had a contract with the state as a result of the salary representation in his letter of appointment. *Kelling v. DHSS*, 87-0047-PC, 3/12/91

Respondent's conduct in setting the rate of pay upon transfer/promotion did not amount to "a fraud or a manifest abuse of discretion" where as soon as the respondent discovered its error, they took steps to correct it and the appellant was given an opportunity to return to her prior position but declined. Respondent had advised the appellant that the transaction would be a promotion. However, as a consequence of the implementation of the Comparable Worth Plan approximately three months prior to the date of the transaction, the pay range of the classification of the appellant's prior position was upgraded. Respondent did not take the change into account until after the appellant had received a letter of appointment which continued to incorrectly identify the appointment as a promotion accompanied by a pay increase and after the appellant had begun working in the new position. *Meschefske v. DHSS & DMRS*, 88-0057-PC, 7/14/89

The acceptance of an application for civil service employment does not constitute an employment contract or entitle the applicant to some contractual right which determines the nature of the transaction or the starting pay. *Meschefske v. DHSS & DMRS*, 88-0057-PC, 7/14/89

Respondent's action to reduce the appellant's starting salary after his appointment but before he received his first pay check was neither illegal nor an abuse of discretion, where the pay rate initially quoted to the appellant was incorrect. Before accepting the job offer, the appellant worked in the private sector. In reviewing the necessary elements of equitable estoppel, the Commission concluded that 1) the appellant's reliance on the wage rate contained in respondent's job offer was not "to his detriment" when there were reasons other than salary that prompted appellant to obtain state employment and there was no adverse pay effect at either pay rate as compared to his salary at his previous job and that 2) the respondent's conduct did not amount to fraud or to a manifest abuse of discretion. *Taddey v. DHSS*, 86-0156-PC, 5/5/88

While it is not improper *per se* to consider the performance of an appointee in making an "abuse of discretion" analysis of a selection decision, other factors usually carry more weight in that evaluation and care must be exercised because of the danger that scrutiny of post-appointment performance can lead to an extensive, time-consuming "sideshow", whose costs may exceed its value to the adjudicative process. *Kesterson v. DILHR & DER*, 85-0081-PC & 85-0105-PC-ER, 12/29/86

While it was regrettable that the appellant, who was asthmatic, was not given notice about a chemical exposure training requirement prior to his hire to an Institution Aide 5 position, there was no showing that the requirement constituted an undue health hazard to the appellant. [Note: This conclusion was reached only after the Commission had found the appeal to have been untimely filed; and, therefore, represents dictum.] *Hebert v. DHSS*, 84-0233-PC & 84-0193-PC-ER, 10/l/86

Pursuant to §230.33(3), Stats., an employe such as the appellant who is appointed to a position in the unclassified service from the classified service, cannot receive less than the employe received while actually serving in the classified position; it does not mean that the employe continues to receive what the employe would be receiving in the classified position if the employe had never left the classified position. *Phillips v. DILHR*, 82-43-PC, 7/7/83

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 622 through 690

[Previous material] [Next material]

622.01 Generally

Respondent did not abuse its discretion by considering restoration rights when deciding which of two positions an employe, who was returning from a stint in the unclassified service, should be assigned on a permanent basis, even though the returning employe had, at least arguably, already exercised his restoration rights, where that initial placement had always been intended as a nominal and temporary transaction. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

Respondent did not abuse its discretion by considering seniority when deciding which of two positions an employe, who was returning from a stint in the unclassified service, should be assigned on a permanent basis, even though consideration of seniority as a factor was premised on an incorrect interpretation of that employe's restoration rights and the correct interpretation would have led directly to the same result but through a more circuitous route. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

While it was unfortunate that candidates for a bureau director's position were not advised regarding the former incumbent's restoration rights under §230.33(1), respondent's failure to consider this factor when it decided to return the former incumbent to the bureau director's position and transfer the appellant to the deputy director's position did not constitute a basis for concluding that the appellant's transfer was an abuse of discretion. An appointing authority has no general obligation to inform an employe of his or her status under the civil service code.

***Kelley v. DILHR*, 93-0208-PC, 3/16/95**

Respondent's failure to have consulted with appellant before deciding to return the former incumbent, who had been serving in an unclassified position, to a bureau director's position and to transfer the appellant from the position of bureau director to deputy did not provide a basis for concluding the transfer decision was an abuse of discretion where there was no due process requirement for such a consultation and the appellant failed to identify any particular information which respondent did not have available as a result of its failure to consult with him. The deputy position was in the same classification and pay range as the bureau director position. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

Appellant failed to show that respondent's actions in transferring appellant to a position in another location violated civil service rule or statute. *Stasny v. DOT & DP*, 79-192-PC, etc., 1/12/81

Where there was no explicit evidence of the administrator's approval pursuant to §230.29, Stats., of the transfer, but the record contained a copy of a memo to the administrator requesting his approval, and a notation that the administrator verbally had approved the transfer, it will be inferred, in part in keeping with the presumption of administrative regularity, that the required approval had been given. *Harley v. DOT & DP*, 80-77-PC, 11/7/80

622.02 What constitutes

Appellant was not "transferred" within the meaning of §ER-Pers 1.02(33), Wis. Adm. Code, when her position at one agency became part of a second agency when the second agency was created by statute. *DuPuis v. DHSS*, 90-0219-PC, 9/3/92

Appellant's appointment to a position in pay range 12-03 was properly deemed a transfer rather than a promotion where the classification of the appellant's former position was upgraded to pay range 02-11 as part of the Comparable Worth Plan shortly before the appellant changed positions and where pay ranges 02-11 and 12-03 are counterpart pay ranges. *Meschefske v. DHSS & DMRS*, 88-0057-PC,

7/14/89

The transactions resulting in the move of the appellant to a different location and to a different group of duties and responsibilities constituted a transfer, although there is nothing in the definition of the term "position" which requires that a move must be between two positions having different kinds of duties and responsibilities before it could be categorized as a transfer, nor does the definition of transfer hinge on a geographic move. *Stasny v. DOT*, 78-158-PC, 10/12/79 (Note: This case was affirmed by the Dane County Circuit Court in all respects except for restoration of sick leave. *DOT v. Pers. Comm. (Stasny)*, 79-CV-6102, 6130, 2/27/81

There is no legal requirement under the Wisconsin civil service code that a pre-employment interview of an applicant for transfer by the appointing authority meet the legal requirements for an examination. *Holmblad v. DP & LAB*, 78-169-PC, 3/9/79

622.04 Scope of Commission's review

In reviewing a transfer decision, the decision had to be examined to determine, 1) whether the decision had a rational basis, 2) whether respondent failed to consider any factors which it can be concluded it should have considered, or considered any improper factor, and 3) whether respondent based its decision on any erroneous views of the law. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

On an appeal of a non-contractual grievance relating to a transfer, the Commission's review is limited to the question of whether there was compliance with the relevant statutes and administrative rules with respect to the transfer. *Harley v. DOT & DP*, 80-77-PC, 11/7/80

The Commission will not scrutinize an agency's analysis of its operational needs nor its determination how to allocate its positions to meet those needs. *Stasny v. DOT*, 78-158-PC, 10/12/79; affirmed by the Dane County Circuit Court, *DOT v. Pers. Comm. (Stasny)*, 79-CV-7102, 6130, 2/27/81

625.01 Generally

Respondent's hiring decision did not constitute an abuse of discretion where there was conflicting testimony about whether animosity existed between appellant and his supervisor, but in any event the record reflected that the supervisor neither participated in nor influenced the interview panel which ranked appellant third among four candidates, and that the selected candidate had superior qualifications for the position. *Ransom v. UW*, 92-0234-PC, 2/9/94

The appointment to a PA 2 position of a person who had previously attained permanent status in a PA 1 position and then left state service, would not be considered a promotion but an original appointment since this person was not an "employe" (§ER-Pers 1.02(6), Wis. Admin. Code) and did not hold a state position (§ER-Pers 1.02(27)(a)) at the time of the appointment, and the appointment satisfied the exclusions section of §ER-Pers 14.02. *Davison v. DPI*, 92-0191-PC, 1/27/93

625.02 Particular issues

Respondent did not abuse its discretion when it withdrew a promotion which had been offered and accepted earlier in the day. The withdrawal was based upon information volunteered to a representative of the appointing authority by the personnel manager for the appellant's work unit. The personnel manager described conduct admitted to by the appellant and stated that potential discipline was still pending. There was no showing that the personnel manager was improperly motivated when he volunteered the information. *LaSota v. DOC*, 94-1062-PC, 1/23/96

Appellant's appointment to a position in pay range 12-03 was properly deemed a transfer rather than a promotion where the classification of the appellant's former position was upgraded to pay range 02-11 as part of the Comparable Worth Plan shortly before the appellant changed positions and where pay ranges 02-11 and 12-03 are counterpart pay ranges. *Meschefske v. DHSS & DMRS*, 88-0057-PC, 7/14/89

Personnel transaction was held to be a promotion (so that a 12 month probationary period was appropriate) rather than reinstatement, where the appellant clearly had not been reappointed to a position in "the same class" as previously employed as is required by the definition of reinstatement. *Reis v. DOT*, 83-0002, 0003-PC, 9/20/83

Where the position in question was announced on a service-wide promotional basis, the appointment was illegal under §230.19(2), Stats., where it was determined that the appointee had been serving at the time of her appointment as a project employe pursuant to §230.27, Stats. *Jacobson v. DILHR*, 79-28-PC, 4/10/81

630.02 Permissive probationary period

Establishment of Section 1.02(l), Wis. Adm. Code, provided an adequate basis for the appointing authority to delegate his authority under §Pers 13.05(2), Wis. Adm. Code, to require and effectuate a permissive probationary period. *Schmid v. UW*, 78-19, 9/5/79

630.03 Written performance evaluations

The provision in §230.28(2), Stats., for written performance evaluations of probationary employes is directory and not mandatory in light of the language in §230.37(l), Stats., ("… may not infringe upon the authority of the appointing authority to retain or dismiss employes during the probationary period") and while failure to prepare such a written evaluation is not condoned, it does not void the probationary termination. *Delaney v. Investment Board*, 79-21-PC, 11/8/79

Although §230.28(2), Stats., states that the supervisor of a probationary employe shall complete a performance evaluation and a copy shall be given to the employe a reasonable time before the completion of probation, language contained in §230.37(l), Stats., leads to the conclusion that this provision is directory and not mandatory and that a failure of compliance will not void a probationary termination. *Wegner v. UW*, 79-14-PC,

9/14/79

630.06 Extension of probationary period

As against an argument that the appellant's probation was illegally extended, and that therefore she had attained permanent status by default, the Commission held that the extension was not illegal where the appellant had received two unsatisfactory evaluations during her initial probationary period but the last evaluation indicated that a newly-appointed supervisor would be assigned to work closely with her and to assure adequate training, in an effort to bring her work to a satisfactory level, and the administrator approved a three month extension of her probationary period. *Adams v. HEAB*, 80-54-PC, 4/29/82

630.08 Termination

Appellant, who was terminated while on probation after transferring within the agency, had mandatory restoration rights to his former position in which she had attained permanent status in class. Transfer was held to be between positions in same agency even though DHSS subsequently split into DHSS and DOC during course of appellant's probationary period. *DuPuis v. DHSS*, 90-0219-PC, 9/3/92

The appointing authority complied with §Pers 13.09(2), Wis. Adm. Code, where the employe was informed 18 days before his probationary termination that his two month probationary evaluation rated his performance as unacceptable, he was given a copy of a written evaluation, and he further was notified by letter that his probationary employment would be terminated because of overall unsatisfactory performance, and it can be inferred that he received a copy of his probationary service report which listed areas of unsatisfactory performance and stated that his probationary employment would be terminated. *Dziadosz v. DHSS*, 78-32-PC, 2/15/80; as amended on 5/15/80

Where the appellant's supervisor and the appointing authority discussed the appellant's performance about four months before the completion of probation, and the

appointing authority advised the supervisor that if the appellant's performance did not improve then, her employment should be terminated prior to the end of the probationary period, this conference did not constitute the participation of the appointing authority in the probationary termination which occurred about four months later, but there nonetheless was an effective termination where the supervisor notified the appellant of her termination effective February 3, 1978, in a letter dated January 23, 1978, and in a separate letter dated January 31, 1978, the appointing authority stated his concurrence in that action. *Schmid v. UW*, 78-19, 9/5/79

Where the appellant argued that she had not properly been terminated during her probationary period and therefore had attained permanent status by "default," the Commission rejected her contention, holding that where there is no evidence whether the person signing her termination was an appointing authority, it will be inferred that he was, in keeping with the presumption of administrative regularity. *Kenitz v. Weaver*, 76-29, 2/28/79

Where the appellant argued that she had not properly been terminated during her probationary period and therefore had attained permanent status by "default," the Commission rejected her contention, holding that she was not employed for more than 6 months on account of having been employed 183 days (+17 hours of overtime) between August 11, 1975, and February 10, 1976, since §990.01(21), Stats., provides that months means calendar months. *Kenitz v. Weaver*, 76-29, 2/28/79

Where the appellant argued that she had not properly been terminated during her probationary period and therefore had attained permanent status by "default," the Commission rejected her contention, holding that she was provided with the reasons for her termination through receipt of a copy of her final probationary service report. *Kenitz v. Weaver*, 79-29, 2/28/79

630.09 Restoration after probationary termination

The appellant was not restored to a "similar" position when his probationary period was terminated after a promotion. Prior to promotion, appellant had been employed as a

Ranger 2 and spent 40% of his time performing law enforcement duties and 50% performing maintenance and development duties. Upon restoration, appellant had been assigned to a Facility Repair Worker 3 position with 60% of his time spent on maintenance and development of grounds and trails but without any law enforcement responsibilities. The two positions were not similar within the meaning of ¶ER-Pers 14.03(1), Wis. Adm. Code. ***Stevens v. DNR,*** **92-0691-PC, 5/27/94**

635 Medical leave of absence

Appellant failed to show that respondent's actions denying the extension of his medical leave of absence violated a civil service rule or statute where appellant did not cite any violations nor any substantive criteria relating to the granting of such leaves, and where there appears to be no such criteria. ***Stasny v. DOT & DP,*** **79-192-PC, etc., 1/12/81**

637 Merit increase decisions

The agency employer was required to grant appellant's non-contract grievance request that it review and compare his work with work of others in state doing same type of work where appellant showed that evaluation system utilized was not "uniform" within meaning of §230.37(l), Stats. (Note: This decision preceded change in statutes making merit increase decisions unreviewable.) ***Romanski v. DOR,*** **78-155-PC, 4/19/79**

640 Flex-time

The Commission rejected the employes' claim that the respondent was in violation of §230.215(2), Stats., by providing the parameters for flexible working hours and only permitting first-line supervisors to implement employe work hours within those parameters including temporary changes for the personal convenience of the employe. ***Johnson & Heiser, v. DOR,*** **78-35, 44-PC, 8/29/80**

645 Work Assignment

Respondent's decision limiting to 9 days the amount of work time to be used by the appellant on a research assignment in Norway was upheld where a private donor paid for appellant's travel and living expenses, where the trip took 24 days and where respondent would have preferred that appellant work on existing projects in Madison. An employer has the right to determine, change, schedule and prioritize work assignments, including the right to determine the length of time an employe may spend on a work assignment. *Holzhueter v. State Historical Society*, 83-0166-PC, 4/4/84

650 Hazardous duty (§230.36, Stats.)

The primary purpose of §230.36, Stats., is to provide an extra level of protection to employes performing hazardous duties. *Finn v. Wis. Pers. Comm.*, Dane County Circuit Court, 89-CV-5343, 3/22/90; affirmed by Court of Appeals, 90-1126, 6/13/91

"The process of … investigating," as that phrase is used in §230.36, Stats., is an ambiguous phrase which does not necessarily include travel to and from the site of an investigation because there is no particular danger related to the investigatory process inherent in such travel. *Finn v. Wis. Pers. Comm.*, Dane County Circuit Court, 89-CV-5343, 3/22/90; affirmed by Court of Appeals, 90-1126, 6/13/91

The appellant, a resident care supervisor at a center for the developmentally disabled, was entitled to hazardous duty pay where he was injured when he broke the fall of a sedated resident who accidentally lost his balance as he was transferred from a wheelchair to a vehicle. By referring to "accident" in the definition of "injury" in §230.36(2), Stats., the legislature indicated a statutory intent to cover unintentional injuries and use of the word "act" in §230.36(3)(c)3., Stats., is not inconsistent with this construction. *Shew v. DHSS*, 92-0506-PC, 11/29/93

Under appropriate circumstances an employe can be covered under the hazardous employment law when he suffers an off-duty injury that is sufficiently related to an injury or disease suffered by the employe while on duty. If an employe suffers a covered injury, he or she should be covered notwithstanding that the full results of that injury are not manifested until there is a subsequent precipitating injury that may occur while the employe is not in the course of employment. *Palmeri v. DOC*, 90-0007-PC, 10/4/90

An employe cannot be denied benefits for a second period of inability to work merely because the employe had been able to work for one or more days before then. *Palmeri v. DOC*, 90-0007-PC, 10/4/90

Appellant, a special agent, was not injured while he was performing duties within the scope of §230.36, Stats., where his back injury occurred while removing some materials in the back seat of his car to provide room for two other special agents so all three agents could proceed to an undercover assignment. *Finn v. DOJ*, 88-0125-PC, 8/24/89; affirmed by Dane County Circuit Court, *Finn v. Wis. Pers. Comm.*, 89-CV-5343, 3/22/90; affirmed by Court of Appeals, 90-1126, 6/13/91

The rationale used by the Commission in *Loeffler v. DHSS*, 81-376-PC, 12/17/81, in concluding that the prior version of §Pers 28.04(5), Wis. Adm. Code, conflicted with §230.35, Stats., was erroneous. The new rule was entitled to retroactive application, thereby entitling the appellant to accrual of vacation time while on hazardous duty leave prior to March 1, 1981. *Paul v. DHSS*, 81-323-PC, 10/19/83

A warden receiving hazardous employment injury benefits is entitled to continue to receive 4 hours per week extra pay which had been denominated compensatory time for supervisory/management wardens in recognition of hours worked on unassigned days (days off). *Hill v. DNR*, 82-111-PC, 12/9/82

One intent of §230.36(l), Stats., is to bar the employer from using accrued sick leave, compensatory time, or sick leave credits to cover time off due to a covered (hazardous duty) injury. *Loeffler v. DHSS*, 81-376-PC, 12/17/81

Pursuant to the statutory language in existence at the time of the appellant's injury (October, 1980) an employe suffering

a hazardous employment injury must be credited with vacation time accruing for the period he was in non-work status, notwithstanding §Pers. 28.04(5), WAC (1975), but it was up to the administrator to determine by rule whether sick leave credits would accrue during an absence due to a hazardous duty injury. *Loeffler v. DHSS*, 81-376-PC, 12/17/81

Respondent erred in denying appellant's application for hazardous employment benefits where appellant, though an Administrative Assistant 3-Supervisor, had been delegated police powers, including the power to arrest, was issued a badge and was accepted for enrollment in training program for law enforcement officers during which program he was injured. The Commission cannot accept the notion that an employe whose regularly assigned police officer duties constitute less than 50% of his overall duties is not a "police officer" for purposes of §230.36, if injured while performing a police function. *Loeffler v. DHSS*, 80-367-PC, 7/27/81

The Commission found that the appellant was disabled and should be granted hazardous pay benefits where two undisputably competent, experienced, orthopedic surgeons differed as to the ability of the appellant to perform his job as a special investigator and the Commission gave greater weight to the conclusion of the appellant's treating physician. *Krusche v. DOJ*, 80-152-PC, 4/10/81

655 Code of ethics

A code of ethics constituting an administrative rule but not having been developed and promulgated pursuant to the rule-making procedures of ch. 227, Stats., is invalid and void. *Kraus v. DHSS*, 78-268-PC, 79-63-PC, 12/4/79

660 §230.37: Employe infirmities

Respondent satisfied the requirements of §230.37(2), Stats., when it transferred complainant, placed him on part-time service, and granted him several medical leaves. The record evidence showed complainant was unable to work at all

during the relevant time period and, as a result, it was held that just cause for his termination existed. There was no duty of accommodation because no possible accommodation existed. *Chavera v. DILHR*, 90-0404-PC, 90-0181-PC-ER, 5/21/93; affirmed by Dane County Circuit Court, *Chavera v. Wis. Pers. Comm.*, 93-CV-2441, 8/25/94; affirmed by Court of Appeals, 94-2674, 6/1/95

An employe, diagnosed as having a personality which overall was well within the normal range, but which had certain characteristics (such as being easily irritable and argumentative) that contributed to difficulties the employe experienced at work was not "mentally incapable of or unfit" to perform his job, within the meaning of s. 230.37(2), Stats. Therefore, the employe was not subject to removal or discharge under the statute. *Jacobsen v. DHSS*, 91-0220-PC, 12/9/92 (Ruling on petition for rehearing); affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

While §230.37(2), Stats., gives the appointing authority the right to require an employe to submit to a medical examination to determine fitness to continue in service, an employe does not violate this requirement by failing to agree to the particular course of treatment demanded by the appointing authority. *Jacobsen v. DHSS*, 91-0220-PC, 12/9/92 (Ruling on petition for rehearing); affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

Where petitioner was removed from normal pay status, was no longer allowed to work and to earn a salary, but was not terminated, he in effect was suspended from employment. While respondent's action of suspending the petitioner was less onerous and more favorable to petitioner than outright dismissal, it was not an option permitted by §230.37(2), Stats. *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; rehearing denied, 91-0220-PC, 12/9/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

The employer's action under §230.37(2), Stats., must satisfy three elements. The employe must have infirmities due to age, disabilities, or otherwise; the employe must be physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position; and this incapability or unfitness must be by

reason of, i.e. caused by, the infirmities. *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; rehearing denied, 91-0220-PC, 12/9/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

While the language in §230.37(2), Stats., "due to age, disability, or otherwise," limits the word "infirmities" to conditions internal to the individual rather than those resulting from environmental or situational factors, it does not follow that any condition internal to the individual which causes an inability to adequately perform satisfies the requirement that the inability be "by reason of infirmities due to age, disabilities, or otherwise." *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; rehearing denied, 91-0220-PC, 12/9/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

Petitioner's "ingrained personality characteristics" did not fall within the meanings of infirmity or disability. *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; rehearing denied, 91-0220-PC, 12/9/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

If an employe's work problems are attributable to infirmities due to age, disabilities or otherwise which render the employe physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position, he or she is still subject to a type of discipline, but, in some respects, is afforded more protection than is provided under §230.34(1)(a), Stats. Such employe may be dismissed from the civil service pursuant to §230.37(2) only as a "last resort" if the less onerous options are not feasible. *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; rehearing denied, 91-0220-PC, 12/9/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

Respondent failed to establish just cause for indefinitely suspending the petitioner without pay under §230.37(2), Stats., where it did not establish that he had a condition covered by §230.37(2) or that the condition caused his work place difficulties. *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; rehearing denied, 91-0220-PC, 12/9/92; affirmed by Dane County Circuit Court, *Jacobsen*

***v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94**

Respondent failed to show that its action of treating the appellant as having abandoned her position was authorized by applicable law and was not arbitrary and capricious where the respondent failed to comply with the requirements of §230.37(2), Stats., when it did not consider the option of placing the appellant in another position despite correspondence from the appellant's physician which raised the issue of providing a less arduous position and which could have provided a starting point for a dialogue between the appellant, the respondent and the physician regarding the availability of a less arduous position. *Smith v. DHSS*, 88-0063-PC, 2/9/89

Unlawful discrimination was found where the employe's immediate supervisor failed to carry out instructions from upper-level management to structure employe's duties and responsibilities so as to comply with agency's obligations under §230.37(2). Stats. *Kleiner v. DOT*, 80-PC-ER-46, 1/28/82

Just cause existed for the discharge of an employe on extended medical leave of absence where he was unable to perform the duties of his position, and where transfer and demotion options were ruled out. *Stasny v. DOT & DP*, 79-192-PC, etc., 1/12/81

As used in §230.37(2), Stats., "last resort" means that the agency must exhaust all other reasonable alternatives prior to dismissal. *Stasny v. DOT & DP*, 79-192-PC, etc., 1/12/81

A probationary employe is not an "employe" within the meaning of §230.37(2). Stats., which requires the appointing authority to transfer, demote, or place on a part-time service basis, before discharging, an employe who becomes disabled. *Fuller v. UW*, 78-47-PC, 2/14/79

667 Reinstatement/restoration

The three year eligibility for reinstatement established in §230.31(l)(a), Stats., (1985) was interpreted to refer to the time period for filing a request for reinstatement rather than to mean that reinstatement is to be accommplished within

the three year period. *Frank v. Pers. Comm.*, Court of Appeals, 141 Wis. 2d 431 (1987); affirming decision of Dane County Circuit Court, 85-CV-5490, 3/11/86

The failure of the respondent to consider the appellant for reinstatement following her request for reinstatement filed April 14, 1985, two working days prior to the expiration of her three year reinstatement eligibility, based not only on the conclusion that there was insufficient time to have pursued the normal procedure for processing a request for reinstatement before the three year period expired, but also on concerns about appellant's prior attendance and temper problems while previously employed at the same facility, violated the language of §230.31(l)(a), Stats. (1985). *Frank v. Pers. Comm.*, Court of Appeals, 141 Wis. 2d 431 (1987); affirming decision of Dane County Circuit Court, 85-CV-5490, 3/11/86

Individuals who voluntarily terminate their state employment are entitled to permissive reappointment, i.e. "reinstatement," without the need to take a civil service exam. *Wedekind v. DOC*, 98-0091-PC, 2/24/99

Appellant, who voluntarily terminated his employment with respondent, did not have a right to mandatory reappointment without competition, i.e. "restoration." Restoration is available to certain employes who lose their jobs via layoff. *Wedekind v. DOC*, 98-0091-PC, 2/24/99

Even though a deputy bureau director position was in the same classification and salary range as an employe's former bureau director position, it was not "equivalent" for purposes of restoration, where the director maintained ultimate authority over bureau operations and directly supervised the deputy. Therefore, "restoration" of the employe to the deputy position arguably was in legal effect a reinstatement, with the employe retaining mandatory restoration right to the director's position. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

Where no equivalent position was available, an employe's restoration rights ran to his previous position. *Kelley v. DILHR*, 93-0208-PC, 3/16/95

Respondent abused its discretion when it failed to interview the appellant for a vacant MIS 2 position, where the appellant had reinstatement eligibility, he had specifically requested reinstatement to a MIT 3 position "or a position

of equal or lesser pay range but in the same field," respondent's standard procedure was to inform the employe of the vacancy if one arose, appellant understood that he would be contacted when a vacancy occurred, respondent never advised appellant that he was to monitor vacancies to which his reinstatement rights could apply, and respondent would have informed the appellant about the vacancy and would have provided him an interview opportunity had they remembered his reinstatement request. *Johnson v. DHSS*, 94-0009-PC, 3/3/95

In determining whether respondent had made a valid offer of restoration to appellant after having terminated her permissive probation following her transfer, the Commission had to utilize §ER-Pers 15.055, Wis. Adm. Code. *DuPuis v. DHSS*, 90-0219-PC, 10/4/94

Where respondent offered to reinstate appellant, after having terminated her permissive probation following her transfer, into a position at the same class level, pay range and pay rate at her former place of employment, respondent's action complied with §ER-Pers 15.055, Wis. Adm. Code. However, until respondent provided notice of the starting salary and of appellant's assigned shift, respondent had not complied with §ER-Pers 12.08, which requires the letter of appointment to "include conditions of employment such as starting date, rate of pay and probationary period." *DuPuis v. DHSS*, 90-0219-PC, 10/4/94

Appellant, who was terminated while on probation after transferring with the agency, had mandatory restoration rights to his former position in which she had attained permanent status in class. Transfer was held to be between positions in same agency even though DHSS subsequently split into DHSS and DOC during course of appellant's probationary period. *DuPuis v. DHSS*, 90-0219-PC, 9/3/92

Respondent's decision not to reinstate the appellant to a 50% position in a hospital's Emergency Department was upheld where the appellant had very limited medical experience and knowledge and the interviewer had concerns about appellant's ability to maintain confidentiality. The appellant was not sent a written notification of nonselection because the position remained open. *Thomas v. UW*, 89-0126-PC, 8/22/90

Respondent's decision not to reinstate the appellant to an Institution Aide position was affirmed where, in keeping with policy, respondent reviewed appellant's work record, compared her record with other reinstated employes, obtained recommendations from unit supervisors and considered prior attitude and initiative. Appellant's prior resignation had been without the requisite two week's notice. *Rasmuson v. DHSS*, 85-0124-PC, 10/1/86

Respondent's decision denying reinstatement to the appellant was affirmed where there was a personality conflict between the supervisor and the appellant, there was a difference of opinion between the supervisor and the appellant in terms of processing work, the appellant admitted he lacked respect for the supervisor, the respondent was concerned about possible adverse effects on another employe's ability to function independently and the supervisor believed that appellant intimidated, dominated or agitated other employes. The Commission concluded that the respondent had a rational basis for its decision and that the decision did not constitute an abuse of discretion. *Varriale v. DOJ*, 85-0056-PC, 4/11/86; affirmed by Waukesha County Circuit Court, *Varriale v. State Pers. Comm.*, 86-CV-1324, 6/18/87

Respondent abused its discretion in not reinstating the appellant where appellant was the only person denied reinstatement solely because of sick leave abuse and where there were a number of former employes with poor sick leave records who were reinstated both immediately before and immediately after the appellant was denied reinstatement. *Seep v. DHSS*, 83-0032-PC & 83-0017-PC-ER, 10/10/84; affirmed in part, reversed in part by Racine Circuit Court, *Seep v. State Pers. Comm.*, 84-CV-1705, 84-CV-1920, 6/20/85; supplemental findings were issued by the Commission on 2/2/87; affirmed in part, reversed in part by Court of Appeals District 11, 140 Wis. 2d 32, 5/6/87 [Note: the effect of the Court of Appeals decision was to affirm the Commission's decision in all respects].

Personnel transaction was held to be a promotion (so that a 12 month probationary period was appropriate) rather than resinstatement where the appellant clearly had not been reappointed to a position in "the same class" as previously employed as is required by the definition of reinstatement. *Reis v. DOT*, 83-0002, 0003-PC, 9/20/83

Respondent's action of not considering the appellant for a Planning Analyst 4 - Supervisor position even though the appellant had permissive reinstatement eligibility was a violation of the civil service code inasmuch as DILHR failed to exercise its discretion and therefore abused its discretion. DILHR's assistant personnel manager in charge of staffing had concluded that appellant was eligible for reinstatement to the position and had directed that appellant's application be sent to the appointing authority for consideration along with the certified list of eligibles but the memo was either never received or never reviewed by the appointing authority. Respondent was directed to cease and desist. *Wing v. DILHR & DP*, 80-65-PC, 4/5/83; explained further, 8/4/83

Respondent's decision not to reinstate the appellant was not an abuse of discretion where former supervisor stated that he did not wish to supervise the appellant because of his poor human relations skills and where another supervisor admitted to having made negative comments about the appellant's disposition and interpersonal relations skills. *Lundeen v. DOA*, 79-208-PC, 6/3/81

670 Voluntary demotion

Appellant's voluntary demotion was never effective where respondent failed to comply with §Pers 17.03, Wis. Admin. Code and where the administrator of the Division of Personnel never received anything in writing from the appellant either requesting or accepting the voluntary demotion. The appellant was ordered reinstated to her former pay range and appointed to the next available position in her former classification. *Craft v. DHSS*, 80-159-PC, 6/11/81; affirmed by Dane County Circuit Court, DHSS *(Percy) v. Pers. Comm. (Craft)*, 81-CV-3310, 6/28/83

675 Relief Awarded (see also 130)

Where the Commission found the certification of the successful candidate was illegal (although the selection

decision was not an abuse of discretion) and found that, had the successful candidate not been eligible, the appellant would have been appointed, the Commission ordered the respondent to appoint the appellant, if still qualified, to the disputed position or a comparable promotional position upon the next vacancy. *Paul v. DHSS & DMRS*, 82-156-PC & 82-PC-ER-69, 6/19/86

As a remedy in a successful appeal of a decision not to select the appellant, the respondent was ordered to appoint the appellant, if still qualified, to the disputed position (or comparable promotional position) upon its next vacancy. However, the Commission rejected the appellant's request for back pay. *Pearson v. UW-Madison*, 84-0219-PC, 9/16/85; affirmed by Dane County Circuit Court, *Pearson v. UW & Pers. Comm.*, 85-CV-5312, 6/25/86; affirmed by Court of Appeals District IV, 86-1449, 3/5/87

Where the Commission concluded that respondent's decision to deny the appellant's request for reinstatement was an abuse of discretion, it rejected respondent's action and remanded the matter "for action in accordance with the decision." The Commission held that reinstating the appellant would be an appropriate action under the order, despite the contrary conclusion reached in *DHSS v. Wis. Pers. Comm.(Paul)*. However, the Commission rejected the appellant's request for back pay. *Seep v. DHSS*, 83-0032-PC & 83-0017-PC-ER, 10/10/84; affirmed in part, reversed in part by Racine Circuit Court, *Seep v. State Pers. Comm.*, 84-CV-1705, 84-CV-1920, 6/20/85; supplemental findings were issued by the Commission on 2/2/87; affirmed in part, reversed in part by Court of Appeals District 11, 140 Wis. 2d 32, 5/6/87 [Note: the effect of the Court of Appeals decision was to affirm the Commission's decision in all respects].

675.5 Non-appointment appeals

Back pay is not available under the civil service code for the failure to appoint appellant to a position, citing *Seep v. Personnel Commission*, 140 Wis. 2d 32, 409 N.W. 2d 142(Ct. App., 1987). *Pearson v. UW*, 84-0219-PC, 2/12/97 A

Where, in a decision issued 10 years prior to the parties'

petitions for declaratory ruling, the Commission concluded that respondent's decision not to have promoted appellant constituted an abuse of discretion, and that appellant was entitled as a remedy to appointment to the position in question when it next became vacant, appellant was entitled to an immediate promotion upon the retirement of the incumbent. Respondent had taken no action with respect to the position prior to the retirement of the incumbent. Respondent's assertion that there was no vacancy until it decided to fill the position after the incumbent had retired, was rejected. *Pearson v. UW*, 84-0219-PC, 8/5/96; explained further, 2/12/97 A

As the remedy to a finding that respondent abused its discretion in failing to interview appellant for a vacant position, the Commission ordered respondent to interview him for the next vacancy, the duties of which the appellant would be qualified to perform after the customary probationary period, at the same class level in the same geographic region as the vacancy which generated the appeal. *Johnson v. DHSS*, 94-0009-PC, 3/3/95

Where appellant established that respondent abused its discretion by not giving all certified candidates the same opportunity to augment their resumes with details of their training and experience, but did not establish that she would have been hired if this had not occurred, the appropriate remedy is limited to a cease and desist order. *Rosenbauer v. UW-Milwaukee*, 91-0086-PC, 91-0071-PC-ER, 9/24/93

Where the respondent manipulated the hiring process to avoid hiring the appellant and, absent this manipulation, appellant would have been the successful candidate, the Commission ordered the respondent to appoint the appellant, if still qualified, to the disputed position or a comparable promotional position upon its next vacancy but rejected the appellant's request for back pay and rejected appellant's request that a reprimand be issued to the interviewers. *Zebell v. DILHR*, 90-0017-PC, 10/4/90

Where there was insufficient evidence on which to conclude that the appellant would have been selected for a vacancy had the respondent not abused its discretion, the only appropriate remedy was to order the respondent to cease and desist from continuing those practices in the selection process which were found to constitute an abuse of discretion. *Thornton v.DNR*, 88-0089-PC, 11/15/89

Where in an appeal of a selection decision, the Commission found that the respondent had violated the civil service law in improperly awarding veterans points and improperly using a trainee designation, the Commission was barred by the decision of the Circuit Court from awarding back pay and from requiring respondent to appoint the appellant to the position in question, and was also prevented from ordering the appellant reclassified because the issue of reclassification had not been addressed at the hearing. The only remaining remedy was to order respondent to cease and desist from similar violations. *Martin v. DILHR*, Case No. 74-132, 12/16/81

675.8 Other types of appeals

Where respondent had failed to consider appellant's reinstatement request in violation of §230.31(l)(a), Stats. (1985), the respondent was directed to consider appellant's request. Respondent was not ordered to reinstate the appellant. *Frank v. Pers. Comm.*, Court of Appeals, 141 Wis. 2d 431 (1987); affirming decision of Dane County Circuit Court, 85-CV-5490, 3/11/86

In determining whether respondent had made a valid offer of restoration to appellant after having terminated her permissive probation following her transfer, the Commission had to utilize §ER-Pers 15.055, Wis. Adm. Code. *DuPuis v. DHSS*, 90-0219-PC, 10/4/94

Where respondent offered to reinstate appellant, after having terminated her permissive probation following her transfer, into a position at the same class level, pay range and pay rate at her former place of employment, respondent's action complied with §ER-Pers 15.055, Wis. Adm. Code. However, until the respondent provided notice of the starting salary and of appellant's assigned shift, respondent had not complied with §ER-Pers 12.08, which requires the letter of appointment to "include conditions of employment such as starting date, rate of pay and probationary period." *DuPuis v. DHSS*, 90-0219-PC, 10/4/94

Where respondent acted unlawfully in denying restoration to appellant, appellant was entitled to restoration upon

remand as well as back pay pursuant to §230.43(4), Stats. *DuPuis v. DHSS*, 90-0219-PC, 9/3/92

As a remedy to a successful appeal from a reassignment decision for a career executive, respondent was ordered to reinstate the appellant to his former position within 30 days. Respondent could then attempt to remedy the defect in notice (which caused the original decision to be illegal) and re-effectuate the reassignment, but not on a retroactive basis. *Basinas v. DHSS*, 77-121 (Personnel Board), 6/16/78

680 Processing of non-contractual grievances

While there was some expression of differing opinions and criticisms, and some harsh language, there was nothing said at a 3rd step grievance hearing which would be construed as denying or having the effect of denying appellant an opportunity to be heard, pursuant to § ER 46.01(2), Wis. Adm. Code. *Wing v. UW*, 85-0065-PC, 2/12/86

Where the description of the grievance essentially consisted of a reference to attached documents, and none were attached, this was not an illegal or insufficient basis for management not to accept the grievance. *Wing v. UW*, 81-328-PC, 2/7/83

The grievant's insistence on tape-recording the meeting with his immediate supervisor was not a sufficient basis for management to have denied that meeting. *Wing v. UW*, 81-328-PC, 2/7/83

Management did not err in its determination that the time for answering the first step was extended by the filing of an amended grievance by the grievant. *Wing v. UW*, 81-328-PC, 2/7/83

The grievance procedure provision that the third step decision be rendered in 10 days is of a directory rather than a mandatory nature. Therefore, respondent's denial of appellant's grievance based on appellant's resignation which occurred after the 10 day period for rendering a 3rd step decision had run was upheld. *Miller v. DHSS*, 78-114-PC, 2/5/79

683 Rate of pay

There is no authority under the civil service code for the commencement of the salary in a new position prior to the date of restoration or other form of appointment to the position. *Dusso v. DER & DRL*, 94-0490-PC, 7/23/96

The Commission lacks authority to order *any* back pay award in a restoration appeal, because "restoration" is not listed in §230.44(4), Stats., as a transaction entitled to back pay. *Dusso v. DER & DRL*, 94-0490-PC, 7/23/96

Where the Commission had previously resolved, in appellant's favor, the question of appellant's correct rate of pay upon restoration to the classified service, the higher rate of pay properly began on the date appellant first worked in the classified position to which he was restored, rather than when appellant first requested restoration. Appellant would have been restored to the classified position very soon after appellant requested restoration, but for his concerns over pay and respondents' attempts to address those concerns. The Commission rejected appellants' argument that respondent DER caused the delay in the restoration. DER had responded promptly to appellant's contacts and appellant's dissatisfaction with the wage figure recited in the response did not prevent him from accepting the position at that time as indicated by his subsequent acceptance of the position despite continued dissatisfaction with the wage figure. *Dusso v. DER & DRL*, 94-0490-PC, 5/28/96; petition for rehearing denied, 7/23/96

Compensation plans are more authoritative than bulletins which provide DER's interpretation of the compensation plan provisions. *Dusso v. DER & DRL*, 94-0490-PC, 3/7/96

A compensation plan should control in the event of a conflict with a rule that cannot be harmonized. *Dusso v. DRL & DER*, 94-0490-PC, 3/7/96

An attorney who moved from a classified position to an unclassified position was, upon restoration to the classified service, entitled to receive pay increases arising from an Attorney 13 regrade to point D that he would have received had he remained in his classified position. The attorney was considered as being on an approved leave of absence while

he worked in the unclassified position. The movement of an attorney from one regrade point to another within a pay schedule is not the original "assignment of an attorney to a regrade point" identified by §ER 29.04(4), Wis. Adm. Code. It is a within pay range adjustment "other than [an adjustment] made under subs. (1) through (12) and (15)," as provided in §ER 29.04(13). *Dusso v. DER & DRL*, 94-0490-PC, 11/1/95; explained further, 3/7/96

An employe who served in the unclassified service for seven years retained permanent status in class from his previous classified position during this period. The definition of "permanent status in class" does not require the employe to be actually serving in a position to have the rights and privileges associated with holding permanent status in class. When the employe reinstated upon the end of his unclassified appointment, the employing agency was required to calculate his starting pay based on having held permanent status in class in the interim. *Junceau v. DILHR*, 92-0768-PC, 9/30/93

Respondent did not abuse its discretion in declining to grant add-on compensation to the appellant for 16 credits awarded to the appellant, where the credits were advanced standing credits, i.e. they were awarded by examination of skills acquired through work experience rather than by way of completing academic work at or under the auspices of an educational institution. *Coulter v. DOC*, 90-0355-PC, 1/24/92

Raised minimum rate of $11.072 per hour which was established in October of 1984 for the appellant's position classification (Police Detective) assigned to pay range 13 did not entitle the appellant to a raised minimum rate after the pay range was changed in 1988 from range 13 to 14 with a retroactive effective date to October of 1984, where there was nothing in the record to support a conclusion that pay range 14 was below the market rate for detective in October of 1984. The Commission deferred reaching respondent's jurisdictional objection because it had not been specifically addressed by the parties. *Schmidt v. DER*, 89-0058-PC, 11/1/90

Respondent did not act illegally or abuse its discretion in its offer of a starting rate of pay where the transaction could not be regarded as a promotion under §14.02(5), Wis. Adm. Code, because the appellant had not attained

permanent status in class in her immediately previous position and the offered rate of pay was consistent with the rate required by §29.03(6), Wis. Adm. Code for a reinstatement. *Abing v. UW*, 89-0142-PC, 6/15/90

Where respondent's determination of appellant's starting salary upon promotion was exactly in accordance with the prevailing administrative code rule, the decision, in and of itself, could not have been illegal or an abuse of discretion. Equitable estoppel also did not apply. *Te Beest v. DHSS*, 88-0086-PC, 5/16/90

The removal of a physician's supplemental supervisory pay was arbitrary and capricious where the appointing authority had taken a function that had been performed on an ongoing basis by a position, identified it as a basis for supplemental pay for the sole purpose of being able to bring the starting salary of the position to a level that would meet the salary requirements of the appellant, and subsequently removed the supplemental pay for no convincing reason other than to augment the salary of another employe. *Mirandilla v. DVA*, 82-189-PC, 7/21/83

686 Career executive actions

The term "transfer" found in the statutory provision relating to the career executive program authorizes reassignments of career executives to positions in lower pay ranges. *Southwick v. DHSS*, 85-0151-PC, 8/6/86

The Personnel Board ordered the appellant reinstated to his former position in the career executive program where he had been reassigned to another position without being provided notice of the reasons for that reassignment, in violation of §Pers 30.07(2), Wis. Adm. Code. *Basinas v. DHSS*, 77-121 (Personnel Board), 6/16/78

690 Overtime

Respondent abused its discretion when it applied the policy on the administration of overtime and awarded appellant compensatory time off for the period he worked during a prison lockdown, where the policy referred to employes

who worked overtime "in order to supervise employes" and appellant contended that he worked outside his usual assigned duties and supervised no one and where all three steps of decisions to appellant's grievance failed to address the appellant's potentially valid argument. Based on the record before it, the Commission could not determine whether the appellant was entitled to have been in nonexempt status, thereby entitling him to cash compensation for the period in question and the matter was remanded for further proceedings on the grievance.
***Corcoran v. DHSS*, 86-0175-PC, 4/29/87**

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 700 through 702.18(2)

[Previous material] [Next material]

---

700 FAIR EMPLOYMENT ACT AND RELATED STATUTORY BASES FOR FILING COMPLAINTS

702.005 Generally

The Commission lacks the authority to consider claims under Title IX of the Education Amendments Act of 1972. *Meredith v. Wis. Pers. Comm.*, Dane County Circuit Court., 93CV3986, 8/29/94

The Commission was not barred from determining the validity of rules implementing the career executive program in the context of a complaint under the Fair Employment Act alleging discrimination with respect to the decision to reassign a career executive to another vacant career executive position in the same agency. *Oriedo v. DOC*, 98-0124-PC-ER, 2/2/99

The Commission lacks the authority, under either the Fair Employment Act or the whistleblower law, to enforce the terms of settlement agreements. Where complainant's charge was clearly focused on the terms of, and the enforcement of, a settlement agreement reached in three previously filed complaints which had been dismissed pursuant to the settlement agreement, the respondent's motion to dismiss was granted. The Commission also lacked the authority to reopen the previously closed cases, citing *Haule v. UW*, 85-0166-PC-ER, 8/26/87. *Jordan v.*

***DNR*, 96-0078-PC-ER, 1/30/97**

While it is unlawful for a "person" to discriminate, the Commission's jurisdiction under the Fair Employment Act runs only to the state agency as the employer, pursuant to §111.375(2), Stats., and not to individual agents of the agency in their individual capacities. *Reinhold v. DOA et al.*, 95-0086-PC-ER, 11/14/95

In a claim based on the whistleblower law, a respondent may be a supervisor or appointing authority in his or her individual capacity. *Reinhold v. DOA et al.*, 95-0086-PC-ER, 11/14/95

A stipulation between the Madison Area Technical College and the Madison Equal Opportunities Commission describing MATC as an "agency of the state for purposes of allegations of employment discrimination" is insufficient to create jurisdiction beyond the Commission's statutory grant of authority. *Thomas v. Madison Area Technical College*, 95-0065-PC-ER, 8/4/95

The question of Worker's Compensation Act exclusivity is an issue of subject matter jurisdiction that can be raised at any time and cannot be waived, citing *Powers v. UW-System*, 92-0746-PC, 6/25/93. *Longdin v. DOC*, 93-0026-PC-ER, 7/27/95

The environment of ongoing litigation between the employer and an employe other than complainant does not constitute a "workplace." *Martin v. DOC*, 94-0103-PC-ER, 12/22/94

A discrimination claim can be based upon an allegation of a discriminatorily hostile or abusive environment. *Martin v. DOC*, 94-0103-PC-ER, 12/22/94

Harassment, i.e. a hostile work environment, based on handicap falls within the general prohibition against discrimination in the "terms, conditions or privileges of employment" set forth in §111.322, Stats. *Stark v. DILHR*, 90-0143-PC-ER, 9/9/94

Worker's Compensation Act exclusivity runs to the Commission's subject matter jurisdiction and can be raised at any time. *Powers v. UW*, 92-0746-PC, 92-0183-PC-ER, 6/25/93

The Commission has no authority over claims filed

pursuant to §101.223, Stats., alleging discrimination on the basis of physical condition or developmental disability by post-secondary educational institutions. *Fischer-Guex v. UW-Madison*, 92-0205-PC-ER, 12/17/92

The Commission's jurisdiction pursuant to the whistleblower law was not ousted by DETF's concurrent administrative jurisdiction to hear challenges to DER's determinations as to whether positions qualify for coverage as protective occupation participants, citing *Phillips v. DHSS & DETF*, 87-0128-PC-ER, 3/15/89. *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 2/21/92

Complainant stated a viable claim upon which relief could be granted where he alleged that his position was eliminated due to his friendship with a second employe who had spurned the sexual advances of a third employe, where the third employe was a superior of the complainant. *Christensen v. UW-Stevens Point*, 91-0151-PC-ER, 1/24/92

The Commission has the jurisdiction to hear an allegation that the utilization of a rule promulgated by DER, which established minimum and maximum rates of pay upon reinstatement and required the appointing authority to exercise discretion in setting a particular rate within the available spectrum, has a disparate impact on reinstated employes based upon their protected status. However, where the complainant did not advance at least some theory as to how the rule resulted in a disproportionate effect on one or more protected groups with respect to which the complainant had standing, the disparate impact claim was dismissed. The policy of making discretion available cannot be discriminatory under a disparate impact analysis unless and until there is evidence establishing that the discretion has been exercised in a discriminatory manner. *Butzlaff v. DER*, 91-0043-PC-ER, 8/8/91

In a case involving a claim of handicap discrimination against the Department of Military Affairs with respect to a selection decision for a Security Officer 2 vacancy at an airfield, the Commission denied the respondent's motion to dismiss on the grounds of federal preemption, where the federal regulation cited by respondent for the proposition that the federal government had assumed "exclusive control over the hiring decision" was restricted by its terms to "civilian positions within the Department of Defense."

There was nothing in the federal law cited by respondent that was in conflict with either the law enforced by the Commission, which makes it illegal for a state agency to refuse to hire someone simply because of that person's handicap, or the Commission's processing of the subject complaint. The Commission also concluded that the nonselection decision was not "an internal military decision" under *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). *Leavitt v. DMA*, 88-0094-PC-ER, 12/13/90

The Commission lacks the authority to issue a preliminary injunction with respect to a complaint filed under the Fair Employment Act. *Van Rooy v. DILHR & DER*, 87-0117-PC, 87-0134-PC-ER, 10/1/87

There is no indication in the statutes that the protections of the Fair Employment Act are limited to state residents, nor even to people who are within the United States. *McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/4/86

The Commission's jurisdiction pursuant to §230.45(l)(b), Stats., over charges of discrimination, is not superseded by the operation of §111.93(3), Stats. *Lee & Jackson v. UW-Milw.*, 81-PC-ER-11,12, 10/6/82

702.01 "Employer"/state agency

In a civil action filed in circuit court under §103.10(13), Wis. Stats., defendant's motion to dismiss on the basis of sovereign immunity, was denied. The Personnel Commission had previously considered the merits of a FMLA claim by plaintiff relating to the defendant's decision to terminate his probationary employment. The Commission's decision had been affirmed on judicial review. Plaintiff's new action also alleged a violation of the FMLA with respect to the same personnel decision. The plain language of the statute, "an employe or the department may bring an action in circuit court against an employer to recover damages caused by a violation of sub. (11) after the completion of an administrative proceeding, including judicial review, concerning the same violation," is express legislative permission to sue the state. There is no language in §103.10(13) that indicates that an administrative final order finding a violation of §103.10(11) is a

prerequisite to filing a civil action. The court allowed the case to proceed. *Butzlaff v. Wis. DHFS*, Dane County Circuit Court , 97 CV 1319, 9/3/97

The State of Wisconsin is not considered a single employing entity. *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98

Complainant was not permitted to amend his whistleblower complaint to include the State of Wisconsin as an additional respondent. There is clear evidence of a legislative intent not to permit the State of Wisconsin to be named a respondent in a complaint of whistleblower retaliation filed with the Commission. *Oriedo v. DPI et al.*, 98-0042-PC-ER, 8/12/98

Respondent's decision to deny complainant unemployment compensation benefits after her discharge from employment with the University of Wisconsin Hospital Clinics Board related to the regulatory authority of the respondent (Department of Workforce Development) rather than its authority as an employer. The Personnel Commission lacked jurisdiction to review the Fair Employment Act claim arising from the denial of benefits. *Mosley v. DWD*, 97-0119-PC-ER, 9/24/97

The Commission jurisdiction under the Fair Employment Act is over employment actions by a state agency acting in the capacity of an employer. A state agency that was a defendant in previous litigation in which a garnishment order was obtained and an agency which defended various other agencies in lawsuits filed by complainant did not act in the capacity of an employer within the meaning of the FEA. *Balele v. DOA et al.*, 96-0156-PC-ER, 6/4/97; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm. et al.*, 97-CV-1927, 2/13/98; affirmed by Court of Appeals, 98-0687, 11/19/98 (unpublished)

The Commission has no jurisdiction to review an employer's action of implementing garnishment pursuant to a valid court order resulting from litigation in which the employing agency was not a party. *Balele v. DOA et al.*, 96-0156-PC-ER, 6/4/97; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm. et al.*, 97-CV-1927, 2/13/98; affirmed by Court of Appeals, 98-0687, 11/19/98 (unpublished)

While it is unlawful for a "person" to discriminate, the Commission's jurisdiction under the FEA runs only to the

state agency as the employer, and not to individual agents of the agency in their individual capacities. *Goetz v. DOA & Columbia County District Attorney*, 95-0083-PC-ER, 11/14/95

The Commission's jurisdiction over the employer in Fair Employment Act cases is limited to agencies per se, as opposed to a broader entity such as the State of Wisconsin, citing *Pellitteri v. DOR*, 90-0112-PC-ER, 9/8/93; affirmed, *Pellitteri v. Pers. Comm.*, 94CV3540, Dane County Cir. Court, 7/19/95 *Reinhold v. DOA et al.*, 95-0086-PC-ER, 11/14/95

Madison Area Technical College, a district technical school authorized under ch. 38, Stats., is not an agency of the state for the purpose of the Fair Employment Act. *Thomas v. Madison Area Technical College*, 95-0065-PC-ER, 8/4/95

A stipulation between the Madison Area Technical College and the Madison Equal Opportunities Commission describing MATC as an "agency of the state for purposes of allegations of employment discrimination" is insufficient to create jurisdiction beyond the Commission's statutory grant of authority. *Thomas v. Madison Area Technical College*, 95-0065-PC-ER, 8/4/95

The Lesbian, Gay & Bisexual Campus Center, a registered student organization, is not sufficiently outside the control and governance of the University of Wisconsin-Madison to be considered in legal effect an independent entity such that it would have a capacity as employer independent of the University of Wisconsin-Madison. While the center can independently make decisions regarding its own operation, including the employment of students, such decisions are subject ultimately to the authority of the chancellor and the board of regents. *Haselow v. UW-Madison*, 94-0171-PC-ER, 6/9/95

Private Industry Councils are created by federal, not state law, so they are not a state agency as defined in the Fair Employment Act. *Kemp v. DILHR*, 94-0178-PC-ER, 3/2/95

A complaint arising from the action of the respondent that complainant did not possess the requisite qualifications for status as a mental health professional related to the regulatory authority exercised by the state rather than its authority as an employer. *Mehler v. DHSS*, 94-0114-PC-ER, 12/22/94

The Wisconsin Housing and Economic Development Authority is not a state agency, as defined in §111.32(6)(a), Stats., for purposes of the Fair Employment Act. *Conner v. WHEDA*, 93-0154-PC-ER, 12/14/94

The Commission lacks jurisdiction to hear a claim of discrimination brought by a student who alleged respondent failed him for a doctoral qualifying exam. Complainant's allegations did not relate to respondent's role as an employer. *Hassan v. UW-Madison*, 93-0189-PC-ER, 3/29/94

If the constitution or a law creates both an agency and one or more subdivisions within that agency, each such subdivision is not considered a separate, exclusive employer under the FEA. *Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 11/6/91

The respondent was an employer of the complainant for purposes of the FEA where the complainant was at least nominally a county employe but worked in a program that was a cooperative venture of the county and the respondent and complainant's supervisor, on behalf of the respondent, had and exercised the authority to exert significant control over the incidents of the complainant's employment. The fact that the supervisor did not have final authority to discipline the complainant was not critical. *Betz v. UW-Extension*, 88-0128-PC-ER, 2/8/91

The fact that the complainant was on the payroll of the county rather than of the respondent was not determinative in deciding whether the respondent was an employer under the FEA. *Betz v. UW-Extension*, 88-0128-PC-ER, 2/8/91

The status as an employer under the FEA can be based on control over the opportunity for and conditions of employment, and does not require a traditional or common law employment relationship. *Novak et al. v. Supreme Court et al.*, 90-0111-PC-ER, 2/7/91

The Supreme Court was not an "employer" with respect to certain positions filled by the Wisconsin Equal Justice Task Force. Where the complainants had not alleged that the court played any role or exercised any authority with respect to the staffing process, but merely relied on the fact that the WEJTF was in effect created by the Court, there was an insufficient basis for finding the Court held

"employer" status in the absence of both a traditional employment relationship and any alleged input into or control over the hiring process by the Court. *Novak et al. v. Supreme Court et al.*, 90-0111-PC-ER, 2/7/91

The Wisconsin Equal Justice Task Force is not a state agency as defined in §111.32(6)(a), Stats. *Novak et al. v. Supreme Court et al.*, 90-0111-PC-ER, 2/7/91

The state is to be considered one employer for the purposes of the family leave/medical leave act. Complainant's employment for two state agencies should, therefore, be considered as work for one employer. *Butzlaff v. DHSS*, 90-0097-PC-ER, 9/19/90; reversed on other grounds by Dane County Circuit Court, *Butzlaff v. Wis. Pers. Comm.*, 90-CV-4043, 4/23/91; affirmed by Court of Appeals, 166 Wis. 2d 1028, 1/28/92

Respondent was not acting "as an employer" but merely acted as a conduit for federal funding which ultimately found its way to the organization which had employed the complainant. Therefore, the complaint was dismissed. *Murchison v. DOJ*, 89-0093-PC-ER, 10/4/89

The Commission lacks jurisdiction pursuant to §111.375(2), Stats., over a labor union and, therefore, despite the fact that a discrimination complaint under the Fair Employment Act involved a bargainable subject -- health insurance coverage which falls within the category of fringe benefits -- with respect to which the labor organization had been involved in bargaining, the labor organization cannot be made a party. *Phillips v. DETF & DHSS*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; affirmed by Dane County Circuit Court, *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92

The Medical College of Wisconsin, Inc., is not a state agency for the purpose of processing complaints of discrimination and/or retaliation under the Fair Employment Act. *Niroomand-Rad v. Medical College of Wisconsin, Inc.*, 88-0044-PC-ER, 5/5/88

Complainant's motion to add District Council 24, AFSCME, AFL-CIO as a party to the proceeding was denied as the union is not an agency of the State of Wisconsin acting as an employer. *Acharya v. DHSS*, 82-PC-ER-53, 5/29/86

The Commission lacks jurisdiction to consider complainant's allegation that the Commission discriminated against the complainant by delaying the investigation of a charge of discrimination, where there was no employment relationship between complainant and the Commission. *Poole v. DILHR*, 83-0064-PC-ER, 12/6/85

The Department of Military Affairs is not exempt from the Wisconsin Fair Employment Act when making decisions to terminate the employment of military members of the National Guard. *Schaeffer v. DMA*, 82-PC-ER-30, 11/7/84

Where complainant, as a client of the Division of Vocational Rehabilitation, alleged discrimination on the part of DVR, the Commission concluded that it lacked jurisdiction to review the complaint because DVR may have been acting as an employment agency but not as an employer. The complaint was forwarded to DILHR's Equal Rights Division. *Collins v. DHSS*, 83-0080-PC-ER, 8/17/83

In assigning a classification to a salary range, the administrator is acting as an "employer" as the term is used in the Fair Employment Act, as he is controlling an aspect of the employes' compensation and is involved in the total employment process, even though complainants were employed in agencies other than the Division of Personnel. *WFT v. DP*, 79-306-PC, 4/2/82

With respect to a complaint of discrimination against the UW-Press for refusing to publish a manuscript, it was held that the press was not an employer of the complainant. *Acharya v. UW*, 79-PC-ER-51, 10/1/79

702.03 Employee

It appeared to a reasonable certainty that the Commission was correct in its conclusion that petitioner, a prisoner at the Green Bay Correctional Institution who earned minimum wage and was required to pay taxes while working for the Badger State Industries Private Sector/Prison Industries Enhancement Program, was not an employee as defined by statute. Petitioner alleged his decision to voluntarily terminate his employment with Badger Industries was due to racial discrimination in the work place. The relationship of the petitioner with Badger

Industries arose out of his status as an inmate and not an employee. *Whaley v. Wis. Pers. Comm.*, 97 CV 462, Brown County Circuit Court, 5/13/97

Where it was undisputed that complainant's employment with respondent was terminated effective October 1, 1994, after which he had no relationship with respondent except to use its laboratory resources to search for other employment and to receive references from prior employers, complainant's allegations of discrimination based on race and/or national origin with respect to comments made by his former supervisor in 1995 were dismissed. *Kamath v. UW-Madison*, 95-0104-PC-ER, 11/20/97

Inmates performing work in a correctional institution are not considered "employees" within the meaning of the Fair Employment Act, citing *Richards v. DHSS*, 86-0086-PC-ER, 9/4/86, unless the inmate is employed in an off-site work release program in which their employment has the same attributes as that of non-inmates performing similar work duties. *Whaley v. DOC*, 96-0157-PC-ER, 3/12/97; reviewed in *Whaley v. Wis. Pers. Comm.*, 97 CV 462, Brown County Circuit Court, 5/13/97

Complainant, an inmate at a correctional institution, was not an "employe" for purposes of the Fair Employment Act with respect to his work as part of the Badger State Industries Private Sector/Prison Industries Enhancement Program, for which complainant qualified as a result of his status as an inmate in the state correctional system. *Whaley v. DOC*, 96-0157-PC-ER, 3/12/97; reviewed in *Whaley v. Wis. Pers. Comm.*, 97 CV 462, Brown County Circuit Court, 5/13/97

Complainant, who was an inmate and worked for Badger State Industries within a correctional institution was not an "employe" within the meaning of the Fair Employment Act where his work resulted from his status as an inmate in the correctional system and his work did not qualify as a work release program, citing *George v. Badger State Industries*, 827 F. Supp. 584 (W.D.Wis. 1993) and *George v. SC Data Center, Inc.*, 884 F. Supp 329 (W.D.Wis. 1995). *Pinkins v. DOC*, 97-0010-PC-ER, 3/12/97

Actions which occurred after the termination of complainant's employment relationship with respondent could not, as a matter of law, constitute "disciplinary

action" pursuant to the statutory definition found in §230.80(2)(a), Stats., which refers to "action taken with respect to an employe." *Kuri v. UW-Stevens Point*, 91-0141-PC-ER, 4/30/93

The Commission lacks jurisdiction over a complaint of discrimination filed by a student at the University of Wisconsin-School of Veterinary Medicine due to the absence of an employment relationship cognizable pursuant to §111.375(2), Stats. *Fischer-Guex v. UW-Madison*, 92-0205-PC-ER, 12/17/92

Members of the Wisconsin national guard are state employes under the Wisconsin Fair Employment Act, reaffirming the Commission's decision in *Schaeffer v. DMA*, 82-PC-ER-30, 11/7/84. *Aries v. DMA*, 90-0149-PC-ER, 11/6/91

A military member of the Wisconsin National Guard is an "employe" of the state and a decision to separate someone from guard service falls within the jurisdiction of the Commission under the FEA. The Commission did not address any question of federal supremacy. *Hazelton v. DMA*, 88-0179-PC-ER, 3/14/89

Complainant, an inmate in a pre-release work training program, was not in an employment relationship. As part of the program, complainant was paid $0.75 per hour rather than the prevailing wage to perform work at a county mental health center, he received on-site supervision and workers compensation coverage but he did not have access to an employe grievance procedure and was not provided any other benefits. The program agreement covering the complainant specifically provided that the inmates were not to be considered "permanent party employ[es]." *Dalton v. DHSS*, 87-0168-PC-ER, 9/26/88

While professors involved in a faculty exchange technically remain on the faculties of their respective universities, numerous incidents of the employment relationship are present and to deny status as an "employe" under the act would be inconsistent with the liberal construction policy of the FEA. *McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/8/88

Where complainant's immediate supervisor was within an executive salary group, complainant was not an "employe" under the whistleblower law and was ineligible to file a

complaint under that law. *Crownhart v. Investment Board*, 87-0170-PC-ER, 1/13/88

It could not be said that, as a matter of law, a professor of a South African university would not be considered an employe of the UWWhitewater for FEA purposes if in the status of a visiting professor. *McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/4/86

The Commission lacks subject matter jurisdiction over a complaint filed by an inmate in a Wisconsin prison who alleged discrimination based on conviction record with respect to actions taken by the prison's education director. Complainant contended the actions were contrary to the best interests of the inmates. *Richards v. DHSS*, 86-0086-PC-ER, 9/4/86

The definition of "employe" in §230.80(3), Stats., should be liberally construed to permit claims arising from an earlier employment relationship even if the alleged retaliation occurred after the complainant has stopped working for the employer. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 11/21/85; reconsidering 10/29/85 decision

The Commission has jurisdiction over a complaint charging that complainant's status as a military member of the National Guard was terminated because of handicap; military members of the Guard are employes of the States. However, complainant had dual status as a federal civil service technician and as a Guard member and those aspects of the complaint relating to his technician status are outside the Commission's jurisdiction. *Schaeffer v. DMA*, 82-PC-ER-30, 11/7/84

702.05 Location of employment

The Commission has jurisdiction over a complaint of discrimination with respect to filling a position in the State of Wisconsin budget office within DOA but located in Washington, D.C., where the appointing authority who was responsible for all appointments within the agency, wherever the work, site could be presumed to exercise his authority within the confines of the State. *Leverette v. DOA*, 82-PC-ER-50, 9/3/82

702.07 Terms, conditions or privileges of employment

Employer actions such as investigations can involve an employe's terms, conditions or privileges of employment, notwithstanding they do not affect the employe's tangible conditions of employment, if they adversely affect the employe's work environment to the extent of creating a hostile environment. *Williams v. DOC,* 97-0086-PC-ER, 3/24/99

A "last chance" warning to complainant that certain conduct would result in the termination of his employment was not an adverse employment action under the Fair Employment Act. The complaint was based solely on that one action by respondent and complainant failed to show that a reasonable employe similarly situated to complainant would experience the action as a hostile environment. *Williams v. DOC,* 97-0086-PC-ER, 3/24/99

An allegation that respondent's answer to a complainant "poisoned" complainant's chances to return to work with respondent in a positive atmosphere did not constitute an adverse employment action and could not serve as the basis for a discrimination claim, citing *Larsen v. DOC,* 91-0063-PC-ER, 7/11/91. Complainant had previously resigned from her position with respondent. Respondent's motion to dismiss for failure to state a claim was granted. *Gurrie v. DOJ,* 98-0130-PC-ER, 11/4/98

Alleged action by the Department of Employment Relations and the Division of Merit Recruitment and Selection of failing to respond to or act on complainant's letter of complaint relating to conduct by his employing agency, could not have any adverse effect on complainant's employment. Complainant was not employed by either DER or DMRS. *Oriedo v. DOC et al.,* 98-0124-PC-ER, 11/4/98

Action by the complainant's employing agency to participate in a telephone conference with the Department of Justice and complainant wherein a settlement offer was made to complainant does not arise from the agency's role as complainant's employer. Therefore, complainant had no claim under the FEA regarding that action. *Balele v. DOA et al.,* 96-0156-PC-ER, 6/4/97; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm. et al.,*

97-CV-1927, 2/13/98; affirmed by Court of Appeals, 98-0687, 11/19/98 (unpublished)

The Commission has no jurisdiction to review an employer's action of implementing garnishment pursuant to a valid court order resulting from litigation in which the employing agency was not a party. *Balele v. DOA, et al.*, 96-0156-PC-ER, 6/4/97; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm. et al.*, 97-CV-1927, 2/13/98; affirmed by Court of Appeals, 98-0687, 11/19/98 (unpublished)

An employer can take adverse employment action with respect to "terms, conditions or privileges of employment" by an action which affects the tangible conditions of employment –i.e., employment status per se—such as a transfer to a less desirable position or the assignment of less desirable work, or by an action which has an adverse effect on the employe's work environment—for example, a supervisor calling an employe stupid. In order to be actionable, the actions must be sufficiently opprobrious to create a hostile environment. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97

Respondent's action of requiring complainant to attend a predisciplinary hearing, after which respondent completed its investigation of complainant, concluded that no disciplinary action was warranted and informed complainant of that conclusion, was not an actionable employment action because complainant failed to establish that a reasonable employe similarly situated to complainant would experience the handling of this one predisciplinary process as a hostile work environment. Isolated actions are unlikely to result in a finding of a hostile work environment. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97

While a written reprimand and a two day suspension without pay are adverse employment actions, the act of questioning complainant about his use of "snow days" is not, distinguishing *Klein v. DATCP*, 95-0014-PC-ER, 12/20/95. There was nothing in the record to support complainant's contention that respondent deliberately tried to provoke him. *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97

Complainant made a cognizable claim when she alleged that respondent failed to adequately discipline another employe

who had allegedly harassed the complainant, even though complain-ant had, more than 300 days before she filed her complaint of discrimination with the Commission, transferred out of the institution employing the alleged harasser. *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97

The Commission lacked jurisdiction over a complaint arising from conduct of respondent's counsel in another case pending before the Commission, where counsel disseminated, to the Commission and to complainant, complainant's medical records as part of its answer to the complaint. The information was provided as part of the administrative proceeding rather than as part of the ongoing employe/employer relationship between complainant and respondent, citing *Larsen v. DOC*, 91-0063-PC-ER, 7/11/91, and *Martin v. DOC*, 94-0103-PC-ER, 12/22/94. Complainant alleged FMLA violation as well as retaliation under the whistleblower law, under the public employe safety and health provisions and for having previously filed a complaint of discrimination. Neither the whistleblower law nor the public employe safety and health provisions is more extensive than the Fair Employment Act as to this issue. *Marfilius v. UW-Madison*, 96-0047-PC-ER, 5/14/96

Respondent counsel's E-mail response to an inquiry from an attorney in another state bore no relationship to any ongoing employment of complainant by respondent nor to any pending applications for employment. Counsel's response was related to litigation pending in another state and was too removed from a connection with employment to constitute an "adverse action" and respondent's motion to dismiss for failure to state a claim was granted. *Huff v. UW System*, 96-0013-PC-ER, 5/2/96

An element of a claim of employment discrimination is that the employe have suffered an adverse employment action of some kind. *Klein v. DATCP*, 95-0014-PC-ER, 12/20/95

While respondent did not formally discipline the complainant, its motion to dismiss for failure to state a claim was denied where complainant was directed to appear at a meeting to discuss a possible work rule violation and the letter directing him to appear could be construed as accusatory or even judgmental and complainant alleged that respondent failed to follow established policies for handling potential disciplinary matters. *Klein v. DATCP*, 95-0014-PC-ER, 12/20/95

An answer filed by respondent's attorney in a case to which complainant was not a party was not part of the employment relationship existing between respondent and complainant where the conduct did not serve as the basis for imposing discipline against complainant, nor was there a contention that the comments were disseminated by respondent in the workplace setting. The complainant only gained access to the answer by filing an open records request. The claim relating to the answer was dismissed. *Martin v. DOC*, 94-0103-PC-ER, 12/22/94

An employer's act of asking irrelevant personal questions during a deposition taken in connection with an employe's civil service appeal of a disciplinary action does not fall within "terms, conditions or privileges of employment" and, therefore, is not an adverse employment action prohibited by the FEA. Once the employer and employe become opposing litigants in a statutorily-provided proceeding before a third party agency, the relationship between the parties in the conduct of the litigation is not that of employer and employe. *Larsen v. DOC*, 91-0063-PC-ER, 7/11/91

A group transportation program (van pool) operated by respondent DOA is a "privilege" of employment for a claimant employed by another state agency. The respondent's motion to dismiss for lack of jurisdiction was denied where the complainant alleged discrimination based on national origin with respect to respondent's decision to terminate complainant's participation in the van pool. *Acharya v. DOA*, 88-0197-PC-ER, 5/3/89

The Commission lacked subject matter jurisdiction over allegations that the Personnel Commission and DILHR's Equal Rights Division had failed to expeditiously process complainant's previously filed complaints of discrimination in that the allegations did not relate to an actual or prospective employment relationship between the complainant and either respondent. *Ozanne v. Pers. Comm. & DILHR*, 87-0105, 0108-PC-ER, 12/18/87

A faculty exchange between a Wisconsin university and a foreign university is a "term, condition or privilege" of employment for a professor at a UW campus. *McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/4/86

The Commission lacks subject matter jurisdiction over a complaint filed by an inmate in a Wisconsin prison who alleged discrimination based on conviction record with respect to actions taken by the prison's education director. Complainant contended the actions were contrary to the best interests of the inmates. *Richards v. DHSS*, 86-0086-PC-ER, 9/4/86

In light of the rule of liberal construction, the allegations made by complainant that his supervisor had referred to complainant as an "old" employe and an "old bastard" could, if proven, be said to fall within the prohibition against discrimination in conditions of employment. *Bratley v. DILHR*, 83-0036-PC-ER, 7/21/83

702.10 Age

The Commission lacked jurisdiction under Fair Employment Act protecting individuals from "age discrimination for those between 40 and 65 years of age" over a complaint alleging age discrimination by individual aged 60-2, despite amendment of federal Age Discrimination in Employment Act to protect those up to 70 years of age. *Lundeen v. DOA*, 79-PC-ER-107, 8/5/81

702.17 Family leave/medical leave

The FMLA requires only that the employee be employed by the same employer for more than 52 consecutive weeks and that the employee worked for the same employer for at least 1,000 hours during the 52 week period preceding the disputed action. It does not require an employee to be employed by the same employer for more than 52 consecutive weeks immediately preceding the disputed action. *Butzlaff v. Wis. Pers. Comm.*, 166 Wis. 2d 1028, (Court of Appeals, 1992)

By reinstating an employe to another position in state service, which included reinstatement of the employe's previous benefits, the state indicated a continuation of benefits and rights including accrued sick leave and eligibility under the family leave/medical leave law. *Butzlaff*

***v. Wis. Pers. Comm.*, Dane County Circuit Court, 90-CV-4043, 4/23/91; affirmed by Court of Appeals, 166 Wis. 2d 1028, 1/28/92**

A liberal construction of the "52 consecutive weeks" language of §103.10(2)(c), Stats., is proper where there is not an obvious meaning to this portion of the statute. Therefore, someone has family leave/medical leave eligibility if they have been employed by the same employer for more than 52 consecutive weeks even though subsequent to that period the person had been employed by a different employer. *Butzlaff v. Wis. Pers. Comm.*, Dane County Circuit Court, 90-CV-4043, 4/23/91; affirmed by Court of Appeals, 166 Wis. 2d 1028, 1/28/92

Complainant did not receive continuous treatment or supervision for his back condition where his contacts with a physician consisted of two phone conversations, which were not "direct" and "firsthand," and one visit, which related to an absence 2.5 months earlier, citing *Lubitz v. UW*, 95-0073-PC-ER, 1/7/98. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

In *dictum*, the Commission concluded that an initial contact which involved a recommendation for self-care and instructions to get a return-to-work clearance prior to returning to work the next day, combined with a return-to-work contact that involved no treatment but simply a recommendation that the employe not lift anything heavy for two to three days with no suggestion for follow-up care or treatment, did not satisfy the requirement for "continuing treatment or supervision" involving "continuous, direct, and firsthand contact" after the initial patient contact. The Commission also cited the testimony of two expert witnesses that complainant's back condition was not a sufficient impairment to be considered disabling pursuant to the FMLA. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

The fact that an absence satisfies the requirements for the granting of sick leave under the applicable collective bargaining agreement or other applicable requirements does not mean that the absence is also to be regarded as satisfying the requirements of the FMLA. Such a result would be contrary to the legislative intent expressed in the

FMLA that its protections be limited to disabling conditions which require direct treatment by a health care provider over a period of time. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

Filing a FMLA request and filing two actions with the Personnel Commission constitute protected activities under the FMLA as well as under the Fair Employment Act. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

The fact that complainant grieved the denial of sick leave under the applicable collective bargaining agreement does not deprive the Commission of jurisdiction over a claim filed under the FMLA. The same absence for medical reasons can be both a medical leave under the FMLA and a sick leave under the contract. *Janssen v. DOC*, 93-0072-PC-ER, 10/20/93

Complainant's FMLA retaliation claim was dismissed where complainant, whose employment was terminated more than one year after she commenced a medical leave of absence, did not make any reference to FMLA in her contacts with respondent and she provided no specific allegations as to how she attempted to enforce a right under the FMLA. Rights to medical leave under the language of the FMLA are not coextensive with rights to medical leave which may exist under the provisions of an employe's collective bargaining agreement. *Schmit (Klumpyan) v. DOC*, 90-0028-PC-ER, 91-0024-PC-ER, 9/3/92

702.18(1) Generally

Complainant did not establish that she suffered from a mental impairment due to stresses at work, where she continued to be able to perform her job duties, she did not suggest to respondent that she suffered from a handicap, respondent did not perceive her as handicapped and the claimed handicap was not obvious to a lay person. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

Harassment, i.e. a hostile work environment, based on handicap falls within the general prohibition against discrimination in the "terms, conditions or privileges of

employment" set forth in §111.322, Stats. *Stark v. DILHR*, 90-0143-PC-ER, 9/9/94

Complainant's discharge from his employment as a driver's license examiner was in connection with his acting out in the presence of members of the public, certain behavior related to what was diagnosed as an "immature personality disorder in association with a sexual paraphilia," but which was not diagnosed as a psychiatric illness or impairment, but a personality disorder which did not limit his capacity to work. Therefore, he was not a handicapped individual pursuant to §111.32(8), Stats., since his sexual impulses were not uncontrollable and his behavior did not result from an uncontrollable or irresistible urge or impulse. *Miller v. DOT*, 89-0092-PC-ER, 11/23/93

Complainant's dyslexia was held not to "limit the capacity to work" but to impose "a substantial limitation on a particular life activity" and, as a result, to constitute a handicap. It was held that it did not constitute handicap discrimination per se for the appointing authority not to select complainant even though he was the interview panel's top-ranked candidate; but that it was appropriate for the appointing authority to consider this as one of several selection factors, including the candidates' level and type of education, level and type of experience with the State Patrol, and the goals of the applicable affirmative action plan. It was also held that complainant's argument that, once respondent requested handicapped expanded certification, it was required to hire a handicapped candidate, would lead to an absurd result. *Byrne v. DOT & DMRS*, 92-0672-PC, 92-0152-PC-ER 9/8/93; affirmed by Dane County Circuit Court, *Byrne v. State Pers. Comm.*, 93-CV-3874, 8/15/94

Complainant, who had a diagnosis of depression, had drugs prescribed for its treatment and was perceived as an alcoholic by someone who played a role in the discharge decision, was handicapped. *Bell-Merz v. UW-Whitewater*, 90-0138-PC-ER, 3/19/93

Complainant, who had incurred injuries in an auto accident, which involved a whiplash injury resulting in headaches, neck pain, numbness in both arms and hands, slight back pain, and pain between her shoulder blades, did not satisfy the definition of a "handicapped individual," §111.32(8), Stats., since complainant's injuries caused her to make only

minor changes in her work and life activities and did not render achievement unusually difficult or limit in any significant way her capacity to work. The record also does not reflect that respondent perceived complainant as handicapped. Assuming *arguendo* the existence of a handicap, complainant failed to establish that the reasons given by respondent for her probationary termination were a pretext for handicap discrimination. *Renz v. DHSS*, 88-0162-PC-ER, 12/17/92

Complainant was handicapped where his intellectual abilities were below average and resulted in unusual difficulties for complainant in passing his high school courses, in passing an examination to obtain a driver's license or any other written examination, in learning to balance his checkbook, in following verbal instructions, in adapting to changes, and in planning or exercising independent judgment. *Jacobus v. UW-Madison*, 88-0159-PC-ER, 3/19/92; affirmed by Dane County Circuit Court, *Jacobus v. Wis. Pers. Comm.*, 92CV1677, 1/11/93

Complainant in a nonselection case was not handicapped where he failed to provide any medical evidence that his "speech problem" was a handicapping condition and the interview panelists testified they did not perceive him as handicapped. *Jahnke v. DHSS*, 89-0094-PC-ER, 89-0098-PC, 12/13/90

Complainant was not handicapped in terms of a hearing condition where no medical evidence was presented that the condition constituted a handicap and the complainant merely testified that his physician had determined he had normal hearing in speech frequencies in one ear and a slight loss in the other ear but not to the level of disability in terms of communicating with others. There was no evidence the complainant's supervisors had been advised that complainant had a handicapping hearing condition until the complainant mentioned it at his termination meeting, although some of complainant's co-workers testified they believed complainant had difficulty hearing. *Parrish v. DHSS*, 87-0098-PC-ER, 10/23/90

Complainant was not handicapped in terms of an elbow condition where a physical exam five months after the termination of complainant's employment listed his arms as "okay" and where seven employes, including two of complainant's witnesses and his two supervisors, all

testified they were unaware complainant had any problems with his arms, even though 6 months before his termination, complainant had been given an injection of cortisone and placed on anti-inflammatory medication for tenderness in his left elbow and 4 years earlier he had recurring pain in his right arm. *Parrish v. DHSS*, 87-0098-PC-ER, 10/23/90

A mild form of cerebral palsy which limited the dexterity of the complainant's right hand and foot and which had an effect on her vision and speech and a severe case of sleep apnea which caused daytime drowsiness and depression constituted impairments within the meaning of the Fair Employment Act and limited the complainant's ability to perform the physical aspects of her position. Complainant was found to be handicapped under the law. *Tews v. PSC*, 89-0150-PC, 89-0141-PC-ER, 6/29/90

While an employe's exclusive remedy for the failure to rehire, where the employe has suffered a compensable injury, is under the Worker's Compensation law, exclusivity comes into play only when the refusal to rehire has a causal relationship to the work-related injury. An employe who suffers a work-related injury and subsequently is denied rehiring because of national origin would not be precluded from pursuing a charge of discrimination based on national origin. Also, if the employer found out that same the employe also had an arm condition and refused to rehire on that basis, the employe would not be precluded from pursuing a claim of handicap discrimination with respect to the failure to rehire because of the arm condition. If the employe established that the arm condition played a role in the decision not to rehire, the employer would have to prove by a preponderance of the evidence that it would have reached the same decision relative to non-reappointment even if the arm condition would not have figured into the decision. *Elmer v. UW-Madison*, 88-0184-PC-ER, 8/24/89

Respondent's motion to dismiss for failure to state a claim was granted where 1) at the time complainant applied for a warden position, respondent had a visual acuity standard for initial hiring, 2) complainant's visual acuity did not meet the standard, 3) complainant did not score high enough on the civil service exam to be certified under the standard certification process but was, because of his vision limitation, certified under handicapped expanded

certification, 4) respondent informed the complainant he would not be considered further due to the failure to meet the vision standard, 5) complainant filed a complaint of discrimination and 6) respondent then deleted the vision requirement. Complainant still could not be considered after the vision requirement was deleted because he was no longer eligible for handicapped expanded certification and had not scored high enough on the exam to be considered without expanded certification. The Commission rejected the complainant's argument that the deletion of the vision standard constituted "retroactive law." The Commission retained jurisdiction for 30 days to permit complainant to amend his complaint. *Wood v. DNR*, 88-0019-PC-ER, 5/18/89

The Commission has jurisdiction over a claim alleging "reverse discrimination" on the basis of handicap with respect to the use of handicapped expanded certification. The FEA prohibition against handicap discrimination is not restricted to situations involving adverse employment actions against an individual because of that individual's handicap. *Oestreich v. DHSS*, 87-0038-PC-ER, 6/29/88

Complainant established that his bronchial asthma was a handicapping condition for purposes of a probable cause determination where complainant testified he suffered from asthma that he received a disability payment based in part on being asthmatic and that he had been prescribed specific medications for treatment of asthma and where the examining physician noted on complainant's pre-employment physical exam report: "bronchial asthma -- well controlled with medication." Testimony of a physician was not required. *Hebert v. DHSS*, 84-0233-PC, 84-0193-PC-ER, 10/1/86

Respondent's motion to dismiss the discrimination complaint based on an argument that complainant was not a "handicapped individual" was denied where at the time respondent issued complainant a probationary termination letter, complainant's physician had indicated that complainant should not work for seven days due to a dermatitis condition that had existed in the previous two months and that he should be given work that avoided contact with known irritants. *Humphrey v. UW-Madison*, 84-0040-PC-ER, 7/12/85

Alcoholism is a handicap within the meaning of the

Wisconsin Fair Employment Act. *Burton v. DNR*, 82-PC-ER-36, 8/31/83

702.18(2) Temporary disability

A temporary disability may constitute a handicap pursuant to §111.32(5)(f), Stats. *Goldberg v. DP*, 78-PC-ER-66, 74, 10/17/80

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 773 through 773.04

[Previous material] [Next material]

---

773 Violation of Family Medical Leave Act

773.01 Generally

Section 103.10(4)(c), Stats., sets forth the burden of proof placed upon the employe at the hearing on the employe's claim that the employer refused to allow the employe medical leave in violation of the FMLA. The provision does not address the employe's responsibilities under the FMLA when requesting medical leave. The legislative intent was to place the burden upon the employers to determine, at the time an employe requests sick leave, whether the employe (1) has a serious health condition (2) that renders the employe unable to perform the employe's work duties and (3) that a leave is medically necessary. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

The request for FMLA leave need only be reasonably calculated to advise the employer that the employe is requesting leave under the FMLA and the reason for the request. The employe is not required to give the employer detailed information about the employe's medical condition. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

The FMLA affords employers with three choices of action when an employe requests medical leave: 1) Approve the leave, (2) disapprove the leave or (3) request more

information through the certification process in §103.10(7). *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

The employe in a FMLA case must establish they have met the employe's responsibilities under the FMLA in requesting a planned medical leave and then has the burden of proving the employer violated the FMLA by refusing to grant the requested medical leave. In order to successfully assert that the employer has wrongfully denied the employe medical leave, the employe must prove that the employe was entitled to medical leave under the FMLA. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

To successfully assert that an employer wrongfully denied the employe medical leave, the employe must prove that (1) the employe had a serious health condition (2) which rendered the employe unable to perform the employe's work duties during the requested leave, (3) the leave was medically necessary and (4) the employe requested the planned medical leave in a reasonable manner. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

No medical expert testimony was necessary where there were outward or overt manifestations, easily recognizable by lay persons, that the employe's serious health condition interfered with her ability to perform her work duties. However, where the employe's serious health condition did not manifest symptoms that lay people would recognize as necessitating a leave, medical expert testimony was necessary to establish that the employe's requested leave was medically necessary. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

In *dicta*, the Commission noted it is not possible for an employer to interfere with, restrain, or deny the exercise of an employee's right under the FMLA (per complainant, the right to provide only reasonable or practicable advance notice as opposed to 30 minute advanced notice depending on the timing of an injury prior to the commencement of a scheduled work shift) if the employee never asserts the right or even provides any information relating to the underlying circumstances from which the employer could infer that such a right was being asserted. *Berghoff v. DHFS*, 96-0033-PC-ER, 6/19/97

In *dicta*, the Commission noted that if an employe showed that it was not possible, due to the timing of a FMLA-covered injury or illness, for the employe to meet the advance notice requirements of the employer's attendance policy, it would be a violation of the FMLA for the employer, with knowledge of this situation, to take action against the employe for failure to meet these notice requirements, citing *MPI Wi. Machining Div. V. DILHR*, 159 Wis. 2d 358, 464 N.W.2d 79 (Ct. App. 1990). *Berghoff v. DHFS*, 96-0033-PC-ER, 6/19/97

In *dicta*, the Commission noted that while FMLA liability for improperly requiring advance notice of an absence (i.e., where the absence is unplanned and unintended) does not require that the employer have the intent to violate the law, but the employe has an obligation to provide the information to the employer that lets the employer know the circumstances surrounding his or her failure to call in in a timely manner that take the case into the exception to the FMLA's advance notice requirement. Respondent could not have granted complainant an exception to the 30 minute call-in requirement where respondent did not know until after both the pre-disciplinary hearing and the date of complainant's discharge that he was claiming his absence was unplanned and unintended. *Berghoff v. DHFS*, 96-0033-PC-ER, 6/19/97

The employer's decision to approve complainant's contractual sick leave does not automatically place the leave under the protection of the FMLA. Under the plain language of the contract, that sick leave was more generous, or broader, than the use of medical leave under the FMLA. Complainant had never requested FMLA leave for several of his absences. *Preller v. UWHCA*, 96-0151-PC-ER, 4/11/97

It is not always necessary for an employe to specifically request medical leave under the FMLA a prerequisite to gaining protection under the FMLA, citing *Jicha v. State*, 164 Wis. 2d 94, 473 N.W.2d 578 (Ct. App., 1991). The key is whether respondent received actual or effective notice that complainant's absence was due to a serious health condition, based on a reasonable employer standard. *Preller v. UWHCA*, 96-0151-PC-ER, 4/11/97

The opinion of a treating physician is not necessarily dispositive of the question of whether leave was medically

necessary under the FMLA. An opinion to the contrary from a different medical expert; the treating physician's failure to particularize the basis for her opinion, failure to prescribe leave during a period of time when she regarded the complainant's symptoms as more severe than during the leave period, and failure to document her prescription for leave and its purpose in her treatment notes; and the complainant's participation in college classes and an exam during the leave period, supported a conclusion that the leave was not medically necessary under the FMLA. *Sieger v. DHSS*, 90-0085-PC-ER, 5/14/96; affirmed by Lincoln County Circuit Court, *Sieger v. Wis. DHSS & Wis. Pers. Comm.*, 96-CV-120, 4/4/97; affirmed by Court of Appeals, *Sieger v. Wis. Pers. Comm. & DHSS*, 97-1538, 12/2/97

The presence of emergency or exigent circumstances is not a prerequisite for taking family leave without advance notice, citing *MPI Wis. Machining Div. v. DILHR*, 159 Wis.2d 358, 376-66, 464 N.W.2d 79 (Ct. App. 1979). The only advance notice requirement for taking leave to care for a spouse is if the employe intends to take family leave because of "planned medical treatment or supervision." *Emmons v. DHSS*, 93-0097, 0112-PC-ER, 11/27/95

The employer is not prohibited by the FMLA from requiring contemporaneous notice by an employe who leaves the workplace for unplanned leave. *Emmons v. DHSS*, 93-0097, 0112-PC-ER, 11/27/95

An employe who returned from FMLA leave was offered the opportunity to return to her former position, and declined. The FMLA imposes no obligation to offer alternative employment under such circumstances. *Ripp v. UW-Extension*, 93-0113-PC-ER, 6/21/94

An allegation that an employe was terminated in retaliation for having taken FMLA covered leave states a claim under the FMLA. Additionally, an employe who alleges she attempted to exercise a right under the FMLA and then was retaliated against because of that states a claim under the FEA retaliation provisions, §111.322(2m)(a), Stats. *Ripp v. UW-Extension*, 93-0113-PC-ER, 6/21/94

The requirement in §103.10(8), Stats., that an employer place an employe in the same or an equivalent position after returning from family leave also applies when an employe returns from a partial family leave, i.e. a period when the

employe works part time. *Zimmerman v. UW-Madison*, 92-0224-PC-ER, 6/21/94

Respondent did not violate the FMLA when, on completion of complainant's family leave, respondent temporarily assigned him duties according to the same ratio in effect prior to his leave, and also proposed a new set of duties. It was the proposed duties, which were still being hashed out at the time of complainant's return, that had to be analyzed in terms of whether complainant was being offered a position that was equivalent to his previous one. *Zimmerman v. UW-Madison*, 92-0224-PC-ER, 6/21/94

The FMLA does not give a returning employe a unilateral right to occupy his or her former position upon returning from leave. *Zimmerman v. UW-Madison*, 92-0224-PC-ER, 6/21/94

A request by complainant's superior for information from complainant's physician was not a demand for certification subject to §103.10(7) where complainant had informed management that her physician had encouraged her to take time away from work to make some personal decision including career and education decisions. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

In interpreting the reference to "no more restrictive" in §Ind 86.01(6), Wis. Adm. Code, the Commission will look at all elements of the statutory leave, compare each of those elements to the corresponding elements of the contractual leave provided by the employer and determine whether, in terms of any of those elements, the contractual leave is more restrictive. *Lawless v. UW-Madison*, 90-0023-PC-ER, 6/1/90; precedential value qualified, 1/11/91

Where complainant's contractual leave provisions only permitted the use of accrued sick leave for conditions which require confinement or render the employe unable to work or where work would jeopardize the employe's health or recovery, and where none of these limitations exist when the complainant invokes the statutory family leave provisions, the contractual leave was more restrictive than was available under §103.10(3)(b)1., Stats. *Lawless v. UW-Madison*, 90-0023-PC-ER, 6/1/90; precedential value qualified, 1/11/91

773.02(2) Finding of *no* probable cause

No probable cause was found with respect to complainant's FMLA claim where the stated reason for complainant's discharge was complainant's failure to notify his employer, if he was going to be absent due to illness, at least 30 minutes before the commencement of his shift, where complainant was working under the terms of a "last chance" agreement and where complainant's version of events relevant to his contention that a re-injury prevented him from complying with the 30 minute advance call-in requirement was not credible. *Berghoff v. DHFS*, 96-0033-PC-ER, 6/19/97

There was no probable cause with respect to respondent's exercise of discretion setting complainant's starting rate of pay where the person who made the decision was not aware of the complainant's identity. *Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92

773.03(1) Finding of discrimination

Complainant's probationary termination violated the FMLA because it was based in part on leave taken that was subject to the FMLA, notwithstanding that complainant's total absence from employment exceeded the 80 hours permitted during a 12 month period pursuant to §103.10(4), Stats. The latter provision does not mean an employe loses all protection under the FMLA once he or she exceeds 80 hours. It simply places an annual limit on the number of hours of statutory leave an employer is required to provide under the FMLA. *Meyer v. DHSS*, 91-0006-PC-ER, 6/11/92

Respondent's termination decision was overturned where 30 hours of the 62.5 hours of absence and 2 tardy days that were recited in the termination letter involved serious health conditions covered by the employe's FMLA statutory leave and where respondent failed to offer any evidence that it would have terminated complainant's employment if it had not considered the FMLA protected absences. *Meyer v. DHSS*, 91-0006-PC-ER, 6/11/92

The FMLA definition of a serious health condition (§103.10(1)(g), Stats.) was not satisfied by a "groin pull" which did not required follow-up care after the initial contact with a health care provider. The definition was satisfied by a condition for which complainant was seen in the emergency room and which was diagnosed as gastroenteritis and hyperbilirubinemia, with a recommendation that complainant see his personal physician in two days, and where he was hospitalized for three days commencing four days after that for the same symptoms. The period for which he was hospitalized, with a diagnosis of acute peptic ulcer disease, was also covered by the statutory definition. *Meyer v. DHSS*, 91-0006-PC-ER, 6/11/92

773.03(2) Finding of *no* discrimination

The record established that respondent did not retaliate against complainant for taking FMLA leave, but instead that he was given a negative performance evaluation and merit award reduction as the result of his failure to make up canceled classes or to secure coverage by colleagues, as well as his failure to make satisfactory progress on the requirements of his tenure-review plans, and that he was required to return to a five-day work week because respondent was concerned about recent legislative attention and was seeking to avoid potential conflicts with state work reporting and leave requirements. *Lubitz v. Wis. Pers. Comm. & UW System*, Court of Appeals, 99-0628, 2/24/00, affirming *Lubitz v. UW*, 95-0073-PC-ER, 1/7/98

Respondent did not retaliate against complainant under the Family Medical Leave Act or the Fair Employment Act for having filed prior FMLA claims when it terminated his employment where respondent's action was consistent with the manner in which respondent treated other apparently similarly situated employes and where there was no showing that respondent's action was *per se* unreasonable. Complainant had chronic attendance problems over a lengthy period of time and the record did not support a conclusion that complainant's termination resulted from anything other than complainant's lengthy and continuing history of attendance problems. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County

Circuit Court, 98-CV-2387, 12/6/99

No discrimination based on sex, sexual orientation or race, violation of FMLA, nor retaliation based on FEA activities was found with respect to respondent's decision to discharge the complainant where respondent concluded that complainant had violated various work rules when she gave a suggestive note to a coworker, telephoned the same coworker at home, admitted to using profanity towards various other coworkers and about a client. *Mitchell v. DOC*, 95-0048-PC-ER, 8/5/96

Despite complainant's contentions to the contrary, respondent did not have a policy which required pregnant police officers to go on light duty or to take leave. Complainant notified her supervisors of her desire to be placed on light duty and it was management's clear understanding that she had made a request to be taken off patrol duty and placed on light duty for the duration of her pregnancy. Respondent's policy of placing pregnant police officers on light duty only upon their request was not discriminatory. *Bower v. UW-Madison*, 95-0052-PC-ER, 8/15/96

No FMLA retaliation was found with respect to respondent's actions of requesting additional information after complainant had filed her request to return to work on light duty at the end of her scheduled medical leave, of contacting complainant's physician to clarify the physician's prior letter, requesting medical clearance from complainant's physician and asking complainant to provide an outline of her general leave plan for the subsequent six month period. *Bower v. UW-Madison*, 95-0052-PC-ER, 8/15/96

The opinion of a treating physician is not necessarily dispositive of the question of whether leave was medically necessary under the FMLA. An opinion to the contrary from a different medical expert; the treating physician's failure to particularize the basis for her opinion, failure to prescribe leave during a period of time when she regarded the complainant's symptoms as more severe than during the leave period, and failure to document her prescription for leave and its purpose in her treatment notes; and the complainant's participation in college classes and an exam during the leave period, supported a conclusion that the leave was not medically necessary under the FMLA. *Sieger*

v. DHSS, 90-0085-PC-ER, 5/14/96; affirmed by Lincoln County Circuit Court, _Sieger v. Wis. DHSS & Wis. Pers. Comm._, 96-CV-120, 4/4/97; affirmed by Court of Appeals, _Sieger v. Wis. Pers. Comm. & DHSS_, 97-1538, 12/2/97.

The decision to terminate the complainant's employment was based on complainant's failure to carry out one of the supervisor's orders rather than complainant's requests for leave to care for his wife and children. _Butzlaff v. DHSS_, 90-0097-PC-ER, 1/23/96; affirmed by Dane County Circuit Court, _Butzlaff v. State of Wis. Pers. Comm._, 96-CV-0431, 3/19/97

Complainant failed to establish that respondent violated the FMLA when it terminated his project employment where respondent had discharged complainant because he left the employing institution before the end of his shift and without notification that he was leaving. _Emmons v. DHSS_, 93-0097, 0112-PC-ER, 11/27/95

Respondent was justified in maintaining complainant on a Performance Improvement Program due to her failure to meet performance expectations where the record showed that complainant's performance did not improve in any significant manner during the period of time she was on PIP, despite continuing feedback and training, and complainant failed to show that her productivity was reasonable in view of the classification level of her position or her experience, or consistently met numerical standards once such standards were established. Complainant failed to establish retaliation under the Family Medical Leave Act. _Rufener v. DNR_, 93-0074-PC-ER, etc., 8/4/95

Respondent did not violate the FMLA when, on completion of complainant's family leave, respondent temporarily assigned him duties according to the same ratio in effect prior to his leave, and also proposed a new set of duties. It was the proposed duties, which were still being hashed out at the time of complainant's return, that had to be analyzed in terms of whether complainant was being offered a position that was equivalent to his previous one. _Zimmerman v. UW-Madison_, 92-0224-PC-ER, 6/21/94

Respondent did not violate the FMLA when it offered complainant a revised set of duties upon his return from leave without providing complainant an extensive written description of the duties and even though they were still

being clarified, where complainant preemptively rejected the proposed duties "whatever" they might be and where the evidence did not support complainant's contention that the proposed duties were, as a consequence of the source of funding, less secure or part of a dead-end position. *Zimmerman v. UW-Madison*, 92-0224-PC-ER, 6/21/94

The respondent did not retaliate against the complainant when it suspended her for one day for unauthorized leave where there was no showing that the leave was authorized by the respondent or by the FMLA. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

The respondent did not retaliate against the complainant when it cut back her position to 70% where the essence of the decision had been made prior to complainant's request for FMLA leave. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent did not retaliate against the complainant when it subjected the complainant's leave requests to increased scrutiny where the respondent was justified in concluding that complainant was a leave abuser. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent did not retaliate against the complainant when it proposed a new work schedule where the respondent revised the schedule as recommended by complainant. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent did not retaliate against the complainant when it denied her leave/tuition reimbursement request for three college courses where the courses were not job-related. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent did not retaliate against the complainant when it

instructed the complainant to revise a travel expense reimbursement form where this procedure was consistently followed by complainant's supervisor when the claimed amount was in excess of the maximum allowed. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent did not retaliate against the complainant when it required documentation for a travel expense reimbursement form where such documentation was standard practice for the respondent. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent did not retaliate against the complainant when it refused to reimburse her for a course where the person who processed the complainant's request was unaware of the complainant's FMLA leave request. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

773.04 Prima facie case

Complainant, who suffered from migraine equivalent attacks that were temporarily disabling and rendered him incapable of functioning during an attack, had a disabling condition under the FMLA. *Lubitz v. Wis. Pers. Comm.*, Portage County Circuit Court, 98-CV-0031, 12/14/98; reversed on other grounds by Court of Appeals, 99-0628, 2/24/00

Complainant's condition qualified as involving outpatient care requiring continuing treatment where complainant had several contacts, both in person and by phone, with several physicians at a second clinic regarding his condition, where complainant had been referred by a physician at his first clinic to a local physician for management of the prescription for his condition, and where complainant's contact with the first clinic was in person for examination, diagnosis, treatment and supervision, as well as by letter and telephone. These contacts occurred over a period of

more than 10 years. *Lubitz v. Wis. Pers. Comm.*, Portage County Circuit Court, 98-CV-0031, 12/14/98; reversed on other grounds, Court of Appeals, 99-0628, 2/24/00

Complainant did not receive continuous treatment or supervision for his back condition where his contacts with a physician consisted of two phone conversations, which were not "direct" and "firsthand," and one visit, which related to an absence 2.5 months earlier. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

In *dictum*, the Commission concluded that an initial contact which involved a recommendation for self-care and instructions to get a return-to-work clearance prior to returning to work the next day, combined with a return-to-work contact that involved no treatment but simply a recommendation that the employe not lift anything heavy for two to three days with no suggestion for follow-up care or treatment, did not satisfy the requirement for "continuing treatment or supervision" involving "continuous, direct, and firsthand contact" after the initial patient contact. The Commission also cited the testimony of two expert witnesses that complainant's back condition was not a sufficient impairment to be considered disabling pursuant to the FMLA. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

Where complainant did not contend that any of the instances of tardiness or any of the absences underlying the personnel actions at issue resulted from his sleep apnea or from his morbid obesity (other than that his obesity exacerbated his lower back pain), there was no causal connection established as to these alleged health conditions. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

The fact that an absence satisfies the requirements for the granting of sick leave under the applicable collective bargaining agreement or other applicable requirements does not mean that the absence is also to be regarded as satisfying the requirements of the FMLA. Such a result would be contrary to the legislative intent expressed in the FMLA that its protections be limited to disabling conditions which require direct treatment by a health care provider over a period of time. *Preller v. UWHCB*, 96-0151-PC-ER,

etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

Filing a FMLA request and filing two actions with the Personnel Commission constitute protected activities under the FMLA as well as under the Fair Employment Act. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

A wage claim, two grievances concerning safety issues and an application for FMLA leave constitute protected activities under at least one statute among the FEA, occupational safety and health provisions and the FMLA. *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97

Complainant did not receive "continuing treatment or supervision by a health care provider" where there was no evidence he received inpatient care for "mild episodes of back strain" and he only saw his physician 6 times in 15 years for the condition, including a 9 year hiatus. There had been a 1 year hiatus prior to the first absence in question and complainant did not see a doctor at all for another absence for which he sought FMLA leave. *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97

Complainant demonstrated that his wife had a serious health condition where the record reflected that she was suffering from acute alcohol dependence. *Emmons v. DHSS*, 93-0097, 0112-PC-ER, 11/27/95

In a situation involving an acute, chronic condition such as acute alcohol dependence, once the complainant has established the existence of the status or condition for the period in question, complainant has met his burden of proceeding as to this issue. Where there was no showing by respondent that the condition had changed for the better as of the specific date it took the adverse personnel action, complainant was not required to have shown specifically that all the elements of the serious health condition were extant on that date. *Emmons v. DHSS*, 93-0097, 0112-PC-ER, 11/27/95

Where complainant's wife suffered from acute alcohol dependence and was discharged from a hospital on January 13th with a plan of treatment that required ongoing professional outpatient treatment, she was receiving "[o]utpatient care that requires continuing treatment or supervision by a health care provider," §103.10(1)(g),

Stats., at the time of complainant's discharge on April 23rd, even though she missed her appointment in the fourth month of the program. *Emmons v. DHSS*, 93-0097, 0112-PC-ER, 11/27/95

An employe who returned from FMLA leave was offered the opportunity to return to her former position, and declined. The FMLA imposes no obligation to offer alternative employment under such circumstances. *Ripp v. UW-Extension*, 93-0113-PC-ER, 6/21/94

An allegation that an employe was terminated in retaliation for having taken FMLA covered leave states a claim under the FMLA. Additionally, an employe who alleges she attempted to exercise a right under the FMLA and then was retaliated against because of that states a claim under the FEA retaliation provisions, §111.322(2m)(a), Stats. *Ripp v. UW-Extension*, 93-0113-PC-ER, 6/21/94

Respondent did not violate the FMLA where the complainant did not request leave for the period in which it was alleged to have been denied him. On other occasions, respondent had granted the complainant family leave even though he failed to comply with respondent's procedures for requesting leave. *Georgia v. DOR*, 90-0091-PC-ER, 1/24/92

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 702.20 through 702.90

[Previous material] [Next material]

702.20 Honesty testing device

Requiring an applicant to certify that his answers to an exam are true does not constitute the administration of an honesty testing device as defined by the FEA. *McCoic v. Wis. Lottery*, 88-0157-PC-ER, 12/17/92

702.22 Marital status

"Marital status," as defined in the Fair Employment Act, includes the identity of a person's spouse, citing *Ray v. DHSS & Group Insurance Board*, 83-0129-PC-ER, 10/10/84, and *Earnhardt v. DHSS*, 89-0025-PC-ER, 11/19/92. *Purifoy v. DOC*, 92-0044-PC-ER, 12/22/94

The Commission has jurisdiction over a complaint alleging discrimination based on marital status filed by an employe who was denied "single coverage" health insurance because complainant's spouse was also a state employe and was already enrolled in a "family coverage" health insurance plan. The Commission held that the complainant was entitled to protection from discrimination under the Fair Employment Act even though the action complained of was not based on the fact he was a married person but on the fact that he was married to another employe of the State of Wisconsin. *Ray v. DHSS & Group Insurance Board*, 83-0129-PC-ER, 10/10/84; affirmed by Dane County Circuit Court, *Ray v. Pers. Comm.*, 84-CV-6165, 5/15/85

The definition of marital status must be read broadly enough to include the identity of the spouse. Therefore, the Commission has jurisdiction to hear a complaint based on the fact the complainant is married to an employe of the State of Wisconsin. *Ray v. DHSS & Group Insurance Board*, 83-0129-PC-ER, 10/10/84; affirmed by Dane County Circuit Court, *Ray v. Pers. Comm.*, 84-CV-6165, 5/15/85

702.23 Military reserve membership

An allegation that complainant was displaced from a civil service position by a returnee from military leave and forced to accept a transfer to another institution failed to state a claim under the FEA. The intent of including guard or reserve membership as a FEA protected status was to protect individuals from being discriminated against because of their membership in the guard or reserve, not to prohibit the state as employer from complying with a long-standing state law (§230.32) requiring the restoration of employes returning from military leave. *Gandt v. DOC*, 91-0168-PC-ER, 1/8/92

702.24 National origin/ancestry

The Commission declined to dismiss a complaint where it could not conclude as a matter of law that there was no possibility the respondent's policy of denying faculty exchanges with the Republic of South Africa could be deemed an action taken on the basis of national origin. *McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/4/86

An agency's refusal to hire a person as a limited term employe because her father was a state employe is not within the meaning of "ancestry" as that term is used in §111.32(5)(a), Stats. *Kawczynski v. DOT*, 80-181-PC, 11/4/80

702.26 Occupational safety and health

Complainant, an officer at a correctional institution, was not required to file a request with the Department of Commerce about health or safety issues at work in order to engage in a protected activity under the public employe safety and health law. Complainant's action of reporting to management that a sergeant had attempted to incite inmates against complainant and complainant's subsequent report to management that she had been warned by an inmate to "be careful" constituted the exercise of rights under the statute, citing *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89. *Cygan v. DOC*, 96-0167-PC-ER, 9/10/97

Workplace violence is regulated under the general duty clause of the federal Occupational Safety and Health Act. Because the comparable state law (§101.055, Stats.) was intended to give state employes "rights and protections. . . equivalent to those granted to employes in the private sector" under federal law, respondent's motion to dismiss complainant's public employe safety and health claim relating to workplace violence was denied. *Cygan v. DOC*, 96-0167-PC-ER, 9/10/97

Complainant's occupational safety and health retaliation claim was not defeated by his failure to report unsafe conditions to the Department of Commerce, citing *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89. Complainant had filed an incident report with management and his union of unsafe working conditions. *Leinweber v. DOC*, 97-0104-PC-ER, 8/14/97

Workplace violence is regulated under the general duty clause of the federal Occupational Safety and Health Act and, because Wisconsin's public employe safety and health provisions were intended to give covered state employes the same protections as employes in the private sector, complainant's incident report to management and his union relating to threatening telephone calls and the absence of any staff member, other than complainant, a social worker, on a floor at a hall in the Drug Abuse Correctional Center, related to dangers protected under state law. *Leinweber v. DOC*, 97-0104-PC-ER, 8/14/97

The Commission lacked jurisdiction over a complaint arising from conduct of respondent's counsel in another case pending before the Commission, where counsel disseminated, to the Commission and to complainant, complainant's medical records as part of its answer to the

complaint. The information was provided as part of the administrative proceeding rather than as part of the ongoing employe/employer relationship between complainant and respondent, citing *Larsen v. DOC,* 91-0063-PC-ER, 7/11/91, and *Martin v. DOC,* 94-0103-PC-ER, 12/22/94. Complainant alleged FMLA violation as well as retaliation under the whistleblower law, under the public employe safety and health provisions and for having previously filed a complaint of discrimination. Neither the whistleblower law nor the public employe safety and health provisions is more extensive than the Fair Employment Act as to this issue. *Marfilius v. UW-Madison,* 96-0047-PC-ER, 5/14/96

702.30 Retaliation

Complainant's alleged request for respondent to stop the "probe" of his mental health potentially could be characterized as opposing a "discriminatory practice" within the meaning of §111.322(3), Stats. *Prochnow v. UW (La Crosse),* 97-0008-PC-ER, 8/26/98

Although the pleading requirements of a complaint of discrimination/retaliation are extremely minimal, where respondent had filed a motion to dismiss which specifically cited complainant's failure to identify a protected fair employment activity and, even so, complainant did not identify in his written response to the motion any protected fair employment activity and none could be fairly implied, the FEA charge should be dismissed. *Pfeffer v. UW (Parkside),* 96-0109-PC-ER, 3/14/97

Complainant had no basis to pursue a fair employment retaliation claim where the grievances she filed and those of her boyfriend were not proceedings under subch. II, ch. 111, Stats. (Note: the alleged discriminatory acts pre-date April 28, 1990, the effective date of 1989 Wis. Act 228 which expanded the prohibition against retaliation.) *Schmit (Klumpyan) v. DOC,* 90-0028-PC-ER, 91-0024-PC-ER, 9/3/92

Complainant's allegation, that respondent believed her boyfriend, a co-worker, filed many union grievances and complaints and, therefore, complainant would engage in similar activities, fell within the scope of §111.322(2m)(d), Stats. *Schmit (Klumpyan) v. DOC,* 90-0028-PC-ER,

91-0024-PC-ER, 9/3/92

Complainant's prior contractual grievance regarding respondent's alleged refusal to compensate for holiday pay related to the enforcement of a right to recover wages due as provided in §109.03, Stats., which serves as a protected activity under §111.322(2m)(a), Stats. The grievance could serve as a basis for complainant's claim that respondent's decision not to continue her medical leave constituted FEA retaliation. Complainant's other prior grievance relating to her attire was not a protected activity, however. *Schmit (Klumpyan) v. DOC,* 90-0028-PC-ER, 91-0024-PC-ER, 9/3/92

Complainant assisted other individuals in a proceeding filed under the Fair Employment Act when he provided advice to three black males who had not passed a state examination, helped them contact the ACLU and paid the fee necessary for them to retain an attorney and where the three unsuccessful examinees then filed actions in Federal Court as well as actions with the Personnel Commission including a complaint of discrimination. *Poole v. DILHR,* 83-0064-PC-ER, 12/6/85

The Commission has jurisdiction over a complaint of discrimination on the basis of retaliation for having opposed discriminatory practices as to race, or for having filed a complaint of race discrimination. (Note: This case involved a charge of discrimination filed before the effective date of Chapter 334, Laws of 1981, which made this explicit, see §111.322(3), Stats. (1981-82).) *Lott v. DOR*, 81-PC-ER-71, 3/4/83

Where the complainant had published in a professional journal an arguably controversial commentary on an article on prostitution in Nevada, this was not covered by §111.32(5)(g)2, Stats., "… opposed any discriminatory practices under this section or because … has made a complaint, testified or assisted in any proceeding under this section." *Rubin v. UW*, 78-PC-ER-32, 2/18/83

702.32(2) Inclusion of sexual harassment

Two alleged references by a program manager to "choking this chicken" as well as hand gestures by the same program

manager mimicking masturbation, all made during the same meeting with complainant and two others, were not sufficiently severe or pervasive to satisfy the statutory definition of sexual harassment. The statements were mere offensive utterances which occurred on the same day. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Sexual harassment or sexual advances by supervisory employes may constitute discrimination under the Fair Employment Act, citing *Hamilton v. DILHR*, 94 Wis. 2d 611 (1980). *Glaser v. DHSS*, 79-PC-ER-63, 79-66-PC, 7/27/81

702.50 Whistleblower (subch. III, ch. 230, Stats.)

Filing a complaint of whistleblower retaliation is itself a protected activity under the whistleblower law. Therefore, a disciplinary action threatened or imposed after respondent learned of complainant's charge of whistleblower retaliation could constitute illegal retaliation under the whistleblower law. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Even though complainant had not submitted copies of the written disclosures that served as the basis for his complaints of retaliation, he described the disclosures in a manner that was sufficiently specific to withstand respondent's motion to dismiss for failure to specify the "information " he had disclosed. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Qualifying disclosures under the whistleblower law need not be made to a first-line supervisor in order to qualify as a disclosure to a supervisor within the meaning of §230.81(1)(a), Stats. Qualifying disclosures may be made instead to a second-line supervisor, third-line supervisor, or higher level supervisor in the employe's supervisory chain of command. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

When a faculty member is the "employe" making a whistleblower disclosure, it is reasonable to interpret "supervisor" to include the campus chancellor, the college dean and the department chair of the department containing the employe's position. *Benson v. UW (Whitewater)*,

97-0112-PC-ER, etc., 8/26/98

Where complainant, a faculty member, alleged that respondent had removed his secretary, i.e. denied him all secretarial services, respondent's alleged conduct qualified as a disciplinary action. Respondent's motion to dismiss was denied as to this allegation. However, complainant's allegation that respondent removed a particular photocopy machine, but continued to provide him with photocopying options, was not considered a disciplinary action. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged conduct of removing complainant from his role as a faculty advisor to a student organization related to the "removal of any duty" under §230.80(2), Stats., and fell within the scope of a disciplinary action. Respondent's motion to dismiss was denied as to that allegation. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

Where complainant, a faculty member, alleged respondent refused to pay him for working with a visiting professor, it was comparable to an allegation that complainant's pay had been reduced, thus having the effect of a penalty within the scope of a disciplinary action. Respondent's motion to dismiss was denied as to that allegation. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

Where complainant was a faculty member, his whistleblower allegation that respondent had threatened to remove his endowed chair fit within the scope of a disciplinary action. Respondent's motion to dismiss was denied as to that allegation. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

Where complainant, a faculty member, alleged that respondent did not promptly respond to his proposal that an artist serve as "artist in residence for a few days," the allegation did not rise to the level of a disciplinary action because it resulted in no loss of pay, position, upgrade or transfer or in any other consequences commonly associated with job discipline. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

Where complainant, a faculty member, alleged that respondent did not adequately respond to efforts to have several students from a foreign university attend UW-Whitewater, the alleged conduct did not rise to the

level of a disciplinary action because it resulted in no loss of pay, position, upgrade or transfer or in any other consequences commonly associated with job discipline. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Complainant's whistleblower allegation that campus administrators tried to convince a third party to commence a civil action against complainant was not a consequence commonly associated with job discipline, so it did not satisfy the requirement of disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of reminding complainant that all guest editorials had to be coordinated through the administration did not rise to the level of a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Alleged actions taken by complainant's superiors (or at their direction) to steal a fax sent to complainant, flatten the tires on complainant's car, steal his cell phone from his office, leave anonymous and derogatory notes in complainant's office, vandalize his car, prevent complainant from retrieving his personal belongings, and to take a bottle of copy machine toner that complainant had purchased, all allegedly in response to his protected activities, constituted "physical harassment" under §230.80(2)(a), Stats. Respondent's motion to dismiss was denied as to those allegations. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of responding inadequately to complainant's request relating to a public expenditure was not a disciplinary action where complainant's request was made "as a taxpayer." The allegation did not involve the employment relationship. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged statement that personnel files and records of individual faculty members were public documents and were available for inspection upon demand was not a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of making a notation on a document did not rise to the level of a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of completely barring complainant from using the university's mail system rose to the level of a disciplinary action, assuming the complainant alleged it had a drastic effect on his ability to perform his responsibilities as a member of the faculty and that it was taken in response to complainant's protected activities. Respondent's motion to dismiss was denied as to that allegation. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of asking complainant to clarify whether complainant's activities in Cuba were undertaken as a private citizen or as a representative of the respondent was not a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged activity in the nature of a public criticism by an employer of an employe's or group of employes' approach to a controversial issue is outside the scope of verbal or physical harassment, citing *Kuri v. UW (Stevens Point)*, 91-0141-PC-ER, 4/30/93. Administration officials were quoted in two newspaper articles relating to the complainant, a faculty member. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant was a member of the faculty, respondent's alleged action of temporarily suspending complainant's photocopying privileges at the campus library until respondent reviewed complainant's justification for his copying requests was not a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant was a faculty member, respondent's alleged action of failing to support or approve complainant's request for a one year sabbatical rose to the level of a disciplinary action. Respondent's motion to dismiss was denied as to this allegation. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant was a faculty member, respondent's alleged action of removing complainant's printing and labeling privileges rose to the level of a disciplinary action, assuming complainant alleged it had a drastic effect on his ability to perform his responsibilities and assuming it was taken in response to complainant's protected activities. Respondent's motion to dismiss was denied as to this allegation. *Benson v. UW (Whitewater)*, 97-0112-PC-ER,

etc., 8/26/98

A memo informing complainant that he was still required to obtain approval from the administration for any expenditure request was not a disciplinary action. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

Respondent's action of merely preventing complainant from using the employer's mail service for 2 specific memos did not rise to the level of a penalty or disciplinary action as listed in §230.80(2), Stats. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

The action of the dean of the college not to include complainant in a list of 8 individuals who were congratulated in a memo for receiving grants or donations was not a disciplinary action. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

The possibility that respondent might forward the name of a candidate for complainant, a faculty member, to consider for hire as a LTE was neither a disciplinary action nor a threat thereof. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

Filing a complaint with an agency's EEO office and initiating an investigation of that complaint are not disciplinary actions. *Benson v. UW (Whitewater),* 97-0112-PC-ER, etc., 8/26/98

Complainant's memo reciting discrepancies of "almost 1%" and "almost 2%" between certain affirmative action report figures and certain veteran report figures were not major differences and his memo did not satisfy the requirements of a disclosure of "information." *Sheskey v. DER,* 98-0063-PC-ER, 8/26/98

The decision to investigate and to hold an investigatory meeting does not qualify as a disciplinary action under the whistleblower law. Questions asked of complainant during that meeting did not go beyond the simply uncomfortable or inconvenient and, therefore, did not constitute language or conduct egregious enough to have a substantial, negative impact on complainant's conditions of employment. *Bruflat v. DOCom,* 96-0091-PC-ER, etc., 7/7/98

Where the only actual change in duties or responsibilities that could reasonably be implied related to complainant

having less independence in setting the schedule for his audits of fire departments, it was not a sufficiently significant change to qualify as a "removal of duties" or a "reassignment" within the meaning of §230.80(2). *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Complainant stated that all employes in his work unit had been granted home stations in 1994, but that he did not make the move to his home area of Hayward at that time for personal reasons. Approximately two years later, complainant requested relocation to Hayward. Complainant's allegation that respondent denied his request to change the geographic location from which he performed his job was sufficiently akin to a transfer or reassignment (or to their denial) to qualify as a disciplinary action within the meaning of §230.80(2). *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

A delay in processing a travel voucher does not have the permanence or the long-term impact of penalties cited in §230.80(2), as disciplinary actions. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Where it was undisputed that a decision had been made to change the duties and responsibilities of complainant's position, such an action could be equivalent to removing a duty from a position or reassignment so as to constitute a disciplinary action within the meaning of §230.80(2). *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

A decision to investigate an incident or to conduct a predisciplinary or investigatory meeting, is not a disciplinary action within the meaning of 230.80(2), since it has no inherent negative impact on an employe. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Two alleged comments by a program manager during a meeting with complainant, even if offered as a criticism of complainant's work performance, were too tenuous and conjectural to support a conclusion that they rose to the level of a penalty on a par with those disciplinary actions enumerated in §230.80(2). Complainant alleged that the manager asked, "How long are we going to keep choking this chicken, Dave?" and then repeated the question, using hand gestures to mimic masturbation. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Two alleged statements, standing alone, were not

sufficiently severe or pervasive to support a conclusion that the conditions of complainant's employment were affected to the extent required for a finding of verbal harassment within the meaning of §230.80(2)(a). Complainant alleged that the manager asked, "How long are we going to keep choking this chicken, Dave?" and then repeated the question, using hand gestures to mimic masturbation. Even when considered with complainant's remaining allegations of verbal harassment, the cumulative effect of the allegations was insufficient to support a finding that the requirements of §230.80(2)(a), had been met. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

A letter to the president of the University of Wisconsin-System which related to a disagreement by certain UW-Parkside custodians with a decision by management to transfer all third shift custodians to the day shift involved a "failure to act in accordance with a particular opinion regarding management techniques" within the meaning of §230.80(7), Stats., and did not, therefore, satisfy the disclosure requirements of the whistleblower law. *Pfeffer v. UW (Parkside)*, 96-0109-PC-ER, 3/14/97

A written request for a meeting to discuss employe concerns not specifically articulated in the writing does not constitute a protected disclosure. *Pfeffer v. UW (Parkside)*, 96-0109-PC-ER, 3/14/97

Complainant's claim alleging retaliation because of certain disclosures made by complainant concerning management's alleged abuse of authority, mismanagement, and violation of law must be dismissed pursuant to §230.88(2)(c), Stats., where her federal court complaint covered essentially the same subject matter as was before the Commission. *Nichols v. UW-Madison*, 96-0084-PC-ER, 3/12/97

A note from complainant to his supervisor in which complainant merely asked to meet with the supervisor at a specified time "to discuss some issues" was a scheduling document rather than a written disclosure as described in §230.81(1)(a), Stats. The fact that the meeting scheduled in the note was to serve as a forum to address substantive issues relating to the work performance of one of complainant's coworkers did not transform the scheduling document into a covered disclosure. The decision in *Canter v. UW-Madison*, 86-0054-PC-ER, 6/8/88, was distinguished. *Elmer v. DATCP*, 94-0062-PC-ER, 11/14/96

A disclosure need not be made to a first-line supervisor, but may be made instead to a second-line supervisor, third-line supervisor, or higher level supervisor in the employe's supervisory chain of command in order to qualify as a disclosure to a supervisor within the meaning of §230.81(1)(a), Stats. However, merely because an individual processed grievances originating in the UW-Hospital did not qualify him as a supervisor of complainant, who worked for the hospital, and complainant did not make a protected disclosure. *Williams v. UW-Madison*, 93-0213-PC-ER, 9/17/96; affirmed by Dane County Circuit Court, *Williams v. Wis. Pers. Comm.*, 96 CV 2353, 11/19/97

A union grievance filed by complainant qualified as a protected whistleblower disclosure to her collective bargaining representative within the meaning of §230.81(3). Williams v. UW-Madison, 93-0213-PC-ER, 9/17/96; affirmed by Dane County Circuit Court, *Williams v. Wis. Pers. Comm.*, 96 CV 2353, 11/19/97

The Commission lacked jurisdiction over a complaint arising from conduct of respondent's counsel in another case pending before the Commission, where counsel disseminated, to the Commission and to complainant, complainant's medical records as part of its answer to the complaint. The information was provided as part of the administrative proceeding rather than as part of the ongoing employe/employer relationship between complainant and respondent, citing *Larsen v. DOC*, 91-0063-PC-ER, 7/11/91, and *Martin v. DOC*, 94-0103-PC-ER, 12/22/94. Complainant alleged FMLA violation as well as retaliation under the whistleblower law, under the public employe safety and health provisions and for having previously filed a complaint of discrimination. Neither the whistleblower law nor the public employe safety and health provisions is more extensive than the Fair Employment Act as to this issue. *Marfilius v. UW-Madison*, 96-0047-PC-ER, 5/14/96

In ruling on respondent's motion, filed after the initial determination was issued but before any hearing on the merits of the complaint, to dismiss certain issues relating to whistleblower retaliation for failure to satisfy the statutory definition of "disciplinary action" within the meaning of §230.80(2), Stats., the available information was viewed in the light most favorable to complainant. The motion was

denied with respect to issues relating to: 1) the assignment of additional duties to complainant's position; 2) respondent's directive for complainant to move to a different workstation five feet away where the new workstation was equivalent in all significant respects to complainant's current workstation but where complainant felt and communicated to respondent that the association of the workstation with an employe to whom she had developed an aversion could significantly affect her health and her ability to function in her job; and 3) respondent's action to deny complainant the use of leave time for a day of absence resulting in the loss of a day's pay. *King v. DOC*, 94-0057-PC-ER, 3/22/96

Where complainant filed a written disclosure with an employe of respondent's affirmative action office and contended it was with complainant's understanding that the employe would provide a copy of the writing to someone in complainant's supervisory chain of command, respondent's motion to dismiss was denied. *Kortman v. UW-Madison*, 94-0038-PC-ER, 11/17/95

A conversation by complainant with a representative of respondent's Bureau of Personnel and Human Resources was not a protected disclosure under §230.81, Stats. *Duran v. DOC*, 94-0005-PC-ER, 10/4/94

In ruling on a motion for failure to state a claim, appellant's memo, which referred to the absence of a maintenance agreement for the equipment in two offices, could be said to satisfy the requirements for a written disclosure of "mismanagement." *Duran v. DOC*, 94-0005-PC-ER, 10/4/94

Complainant's testimony in federal court was not a disclosure protected by the whistleblower law because it did not fit within any of the communications enumerated in §230.81, Stats. *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant made a protected disclosure to her legislator where she sent him a copy of a letter she sent to her employer concerning her request for reassignment to her previous route as a handicap accommodation. While the letter did not explicitly allege a violation of state laws, considered in the context of other communications with the legislator and using a liberal construction of the statute, the

communication met the requirement of "information gained by the employe which the employe reasonably believes demonstrates a violation of any state . . . law." *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant's consultations with her attorney concerning her request for accommodation constituted a covered disclosure pursuant to §§ 230.80(5)(a), 230.81(1) and (3), Stats. *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Where respondent DER received a letter from complainant (who was not a DER employe) regarding the reclassification of his position and protection under the whistleblower law, and, in response, referred complainant to the Personnel Commission as the agency specified in the whistleblower law as having responsibility for receiving and deciding complaints of whistleblower retaliation, respondent DER met its obligation under the whistleblower law and would not be liable for retaliation if complainant had been the victim of retaliation by the employing agency. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95,; affirmed by Court of Appeals, 95-0747, 2/29/96

A threat alleged to have been made by a member of management before he even knew complainant, and which was allegedly directed to those who this manager believed had been spreading certain rumors, was held not to constitute a "disciplinary action" within the meaning of §230.80(2), Stats. *Chelcun v. UW-Stevens Point*, 91-0159-PC-ER, 3/9/94

To be a "disciplinary action," the employer's act must, at the very least, be related to the complainant's employment. Allegedly retaliatory actions taken against complainant's attorney, and public statements made by supervisor which were not related specifically to complainant or to his employment did not constitute "disciplinary action." However, an alleged failure by respondent to promptly investigate allegations of sexual harassment, alleged reductions in complainant's responsibilities and alleged negative aspects of a performance evaluation constitute "disciplinary action." *Getsinger v. UW-Stevens Point*, 91-0140-PC-ER, 4/30/93

Actions which occurred after the termination of complainant's employment relationship with respondent could not, as a matter of law, constitute "disciplinary action" pursuant to the statutory definition found in §230.80(2)(a), Stats., which refers to "action taken with respect to an employe." *Kuri v. UW-Stevens Point*, 91-0141-PC-ER, 4/30/93

To meet the definition of "disciplinary action," the employer's act must be related to the complainant's employment status. The law does not cover harassment of an employe's attorney. *Kuri v. UW-Stevens Point*, 91-0141-PC-ER, 4/30/93

The whistleblower law's prohibition of "verbal or physical harassment" does not include most any public criticism by an employer of an employe's or group of employes' approach to a controversial issue. *Kuri v. UW-Stevens Point*, 91-0141-PC-ER, 4/30/93

The filing of a FEA complaint with the Personnel Commission is not a protected activity under the whistleblower law that entitles a complainant to protection under §230.80(8)(a), Stats. The court system and, by necessary implication, the system of administrative law, are excluded from the category of "law enforcement agency" in §230.81(2). *Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92

Complainant's two letters to the Commission alleging, among other things, that respondent retaliated against him for lawful disclosures, were protected conduct under the whistleblower law. Complaints of whistleblower retaliation filed with the Commission provide protection from retaliation to the person who filed them. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 11/19/92; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

The fact that complainant's letter to the Commission, alleging, among other things, that respondent retaliated against him for lawful disclosures, was not perfected as a complaint until several months later does not mean it cannot be considered a "complaint" for purposes of whistleblower retaliation. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 11/19/92; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court

of Appeals, 95-0747, 2/29/96

While §230.83(2), Stats., acts to exempt certain disclosures from protection against whistleblower retaliation, it does not have an effect on the protected status of a whistleblower complaint which is filed with the Commission. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 11/19/92; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

Complainant's action of showing his supervisor a note with complainant's exam score on it was not a disclosure of "information" as defined in §230.80(5), Stats. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 11/19/92; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

Complainant's letter to the Commission was a protected disclosure under §230.81, Stats., where the letter alleged illegal retaliation. Where that letter was the first protected action taken by the complainant, any alleged retaliatory actions must post-date the day respondent received notice of this letter. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 11/19/92; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

The whistleblower law covers disclosures to legislators and the legislature, and thus includes a disclosure to a private sector auditor providing services for the legislature. *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 10/16/92

Complainants' disclosure was not protected under the whistleblower law, because it fell within the exception set forth in §230.83(2), Stats., for disclosures for personal benefit. Complainants' disclosure was that their positions lacked the appropriate arrest authority notwithstanding that their position descriptions called for law enforcement certification, and the lack of such authority jeopardized their continued law enforcement certification and protective occupation status. The provision in §230.83(2), that the law does not apply to an employe whose disclosure is made to receive something of value, clearly applies to an employe who makes a disclosure in order to perpetuate the receipt of

benefits to which the employe is not entitled. Here, complainants appeared to contend that once the disclosure was made, their employer should have proceeded to assign them the enforcement authority that was described on their inaccurate position descriptions. This would result in the receipt of something of value--i.e., their retirement benefits would be greater in protective occupation status. *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 10/16/92

Complainants alleged that respondent's settlement offer constituted a threat to terminate their protective occupation status and constituted a threat of retaliation under the whistleblower law. Respondents contended, in support of their motion to dismiss for failure to state a claim, that their action was not prohibited by the whistleblower law. The Commission held that since the offer presented two options (depending on whether or not the offer was accepted), both of which were penalties, the offer can be seen as a vehicle for retaliation, and covered by the whistleblower law. *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 10/16/92

The filing of a §1983 action in a court of record deprives the Commission of jurisdiction, by operation of §230.88(2)(c), Stats., over a complaint of whistleblower retaliation based on the same allegedly retaliatory conduct as the §1983 action. *Dahm v. Wis. Lottery*, 92-0053-PC-ER, 8/26/92

A disclosure to an agent of the legislature is equivalent to a disclosure to the legislature. The complainants alleged they had made a protected disclosure to an auditor employed by a private accounting firm serving as an agent of the legislature because the legislature was required to perform a security audit of the Wis. Lottery in order to fulfill its oversight responsibilities. *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 2/21/92

The Commission's jurisdiction pursuant to the whistleblower law was not ousted by DETF's concurrent administrative jurisdiction to hear challenges to DER's determinations as to whether positions qualify for coverage as protective occupation participants, citing *Phillips v. DHSS & DETF*, 87-0128-PC-ER, 3/15/89. *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 2/21/92

The Commission's authority under the Whistleblower law does not extend to an individual outside the employing agency who may have played some precipitating role in a disciplinary action but who has no legally-recognized role as an appointing authority or employer. The complainant, a Correctional Officer 3 employed by the Department of Corrections and assigned to the Security Ward at the UW-Hospital and Clinic alleged that he had been reassigned to another facility and harassed as a result of complaints of sexual harassment made by UW-Hospital and Clinic employes. UW-Madison was dismissed as a party. *Martin v. DOC & UW-Madison*, 90-0080-PC-ER, etc., 1/11/91

Complainant's whistleblower claim was dismissed where her attorney made no allegation that she made a disclosure other than a verbal disclosure. However, complainant was still entitled to protection from retaliation for having filed her complaint. *Iwanski v. DHSS,* 88-0124-PC, etc., 6/21/89

Respondent's motion to dismiss for failure to state a claim was denied where there was no basis on which to conclude 1) that the complainant did not disclose "information" to her attorney as contended by complainant, or 2) that notes to complainant's supervisor, though neutral on their face, acted to inform the supervisor that the writer wished to identify improper governmental activities. *Canter-Kihlstrom v. UW-Madison*, 86-0054-PC-ER, 6/8/88

A letter, written by complainant's attorney and serving to inform the respondent that the complainant contended that she had engaged in a protected activity under the whistleblower law by making a disclosure to the attorney, need not itself meet the requirements of a lawful disclosure. *Canter-Kihlstrom v. UW-Madison*, 86-0054-PC-ER, 6/8/88

A settlement offer made in the context of an ongoing administrative review of an employment decision did not fall within the scope of the prohibition against retaliation because the conditions of settlement required acceptance by the complainant before they could go into effect. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 11/21/85; reconsidering 10/29/85 decision

Application of the whistleblower law to alleged acts of retaliation which occurred after the law's effective date, but which related to disclosures which occurred before its effective date, does not constitute a retroactive application

of the law. *Hollinger & Gertsch v. UW-Milw.*, 84-0061, 0063-PC-ER, 8/15/85

The stated policy of the whistleblower law to encourage disclosure and protect employes is furthered by a construction that provides protection to an employe who made a disclosure prior to the effective date of the act and alleges he was retaliated against after the effective date. *Hollinger & Gertsch v. UW-Milw.*, 84-0061, 0063-PC-ER, 8/15/85

There is no requirement that the person alleged to have retaliated be, in all cases, in the supervisory chain over the complainant. *Vander Zanden v. DILHR*, 84-0069-PC-ER, 9/12/84

702.90 Bases other than those listed in statutes

None of the statutory provisions which serve as the basis on which the Commission may exercise jurisdiction encompass an allegation of "racketeering." *Balele v. DILHR et al.*, 95-0063-PC-ER, 10/16/95

The Commission dismissed a charge of discrimination listing "nepotism" as the basis for the charge where there was no contention or indication that groups specifically protected by the Fair Employment Act suffered in disparate impact from respondents' actions in hiring BMH 2's. Nepotism is not one of the prohibited bases of discrimination covered by the Act. *Morkin v. UW-Madison*, 85-0084-PC-ER, 8/1/85

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 774 through 774.05

[Previous material] [Next material]

774 Disability [formerly identified as handicap] discrimination

774.01 Generally

Employment as a Youth Counselor at Ethan Allen School, a type 1, maximum-security institution, involves a special duty of care for the safety of the general public. Youth counselors carry out security responsibilities and their roles are comparable to those of correctional officers employed at a prison. *Wille v. DOC*, 96-0086-PC-ER, 1/13/99 (appeal pending)

Respondent correctly relied on the specific medical restrictions imposed by complainant's medical condition, rather than on the name of the disabling condition, to determine whether to employ individuals in youth counselor positions. There was no general prohibition against employing disabled individuals in such positions, nor was there a prohibition against employing persons with certain identified medical conditions. Complainant's contention that there was no case-by-case evaluation of complainant's circumstances was rejected. *Wille v. DOC*, 96-0086-PC-ER, 1/13/99 (appeal pending)

Complainant failed to establish a hostile work environment based on his handicap where another newly arrived employe who was treated differently on a social basis already had 5 years of social relationships built up with some members of the work unit, where complainant was not invited to staff meetings because they were specifically called to deal with the ongoing training of the complainant, where there was nothing to suggest that a comment ("We take care of our

own.") was in any way directed at the complainant, where a comment by complainant's supervisor which referred to the complainant as being on a different wavelength was made in the context of the supervisor's concerns relating to complainant's aptitude for the duties he had been assigned to perform, and where other actions by complainant's co-workers reflected inevitable frustration arising from the level of complainant's work performance. *Stark v. DILHR*, 90-0143-PC-ER, 9/9/94

In a handicap discrimination claim, evidence of complainant's employment after his termination could be relevant to the issue of complainant's ability to perform the duties of the position from which he was discharged and to the issue of accommodation, in terms of complainant's ability to perform other positions to which he could have transferred. Respondent's motion in limine was denied. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 3/19/93

An objective standard is used to determine if the employer was correct in concluding that a handicapped employe is unable to effectively perform and that no accommodation is feasible. That the employer may have acted in good faith in assessing the handicapped employe's abilities is not a defense. Accordingly, evidence which postdates the personnel transaction which may have no relevance to the employer's intent when the employer made its assessment, may be admissible as relevant to the employe's capacity to perform and accommodation. Respondent's motion in limine was denied. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 3/19/93

The first step in determining whether a handicap has been established is to determine whether there is a real or perceived impairment and, if so, whether it makes, or is perceived to make achievement unusually difficult or limits the capacity to work. *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

Complainant's problematic personality characteristics did not fall within the parameters of an actual or perceived handicap where his mental status was otherwise considered to be "well within the normal range." Merely because the enokiter contended complainant's condition would satisfy the criteria in §230.37(2), Stats., it does not follow that the

condition constituted a perceived handicap. Where the personality characteristics did not fall within the meaning of the term "impairment," there was neither an actual nor a perceived handicap. *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

In terms of the second element of analysis, the determination of whether the complainant can perform the duties of the position has to refer to the duties of the position as currently constituted rather than after any modifications necessary to permit accommodation. *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

A typical handicap discrimination case involves the following analysis: 1) whether the complainant is a handicapped individual; 2) whether the employer discriminated against the complainant because of the handicap; 3) whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job responsibilities of his or her employment (a case-by-case evaluation) pursuant to §111.34(2)(b), Stats.; and 4) if a "sufficient relationship" was established in 3), whether the employer failed to reasonably accommodate the complainant's handicap. *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88

There is a special duty of care associated with the safety of the general public that applies to employment in the prison setting. *Conley v. DHSS*, 84-0067-PC-ER, 6/29/87

774.02(1) Finding of probable cause

Probable cause on the basis of handicap or retaliation existed regarding respondent's conduct of providing incorrect information about complainant's appeal rights where the allegation was not addressed by respondent at hearing. *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95

Probable cause was established as to a decision not to hire the appellant where there was little evidence supporting the decision of the physician who conducted the physical to set a 15 to 20 pound lifting restriction and a restriction against

frequent bending, stooping or twisting. There was no indication on the record that the physician was aware, among other things, that the appellant was currently performing similar duties. Also, appellant's osteopath was of the opinion that no type of lifting restriction was indicated. *Lauri v. DHSS*, 87-0175-PC, 11/3/88

Respondent failed to show the complainant could not adequately undertake his job responsibilities where there were no observations or reports of complainant's actual job performance and where letters from complainant's physicians and from complainant himself, though seemingly inconsistent, were reasonably explained. Therefore, probable cause was found as to respondent's decision to place complainant on a leave of absence. The Commission concluded that complainant's subsequent pursuit of a worker's compensation claim of disability and an unemployment compensation claim where he asserted certain medical limitations on his capacity to work, was not inherently inconsistent with his discrimination complaint where he argued that he was capable of doing his job satisfactorily at the time of his leave of absence. *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

Complainant, an asthmatic, established the causality element for purposes of a probable cause determination arising from his separation from employment. The complainant's asthmatic condition was exacerbated by complainant's exposure to mace and a further adverse reaction to other gases could be expected if he were to be exposed to them as was required by the training procedure. *Hebert v. DHSS*, 84-0233-PC, 84-0193-PC-ER, 10/l/86

Probable cause existed where respondent failed to even consider the appropriateness of safety equipment as a means of accommodating complainant's handicap of epilepsy, and where respondent acknowledged that special life jackets were available and would be a good safety measure in many instances. *Giese v. DNR*, 83-0100-PC-ER, 1/30/85

774.02(2) Finding of *no* probable cause

No probable cause on the basis of handicap or retaliation was found regarding respondent's requirement that he obtain a psychological evaluation and a situational

assessment at respondent's expense, where respondent had incomplete information from complainant's physicians about complainant's ability to return to work at full performance and the accommodations needed. *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95

No probable cause on the basis of handicap or retaliation was found regarding respondent's decisions that complainant could not return to his former position and to offer the complainant a position as a voluntary demotion, where the position to which teh complainant could demote was the only position available which fit the criteria noted in a psychologist's evaluation of complainant. *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95

Respondent's hiring of complainant as part of a program for "slow learners" and assignment to him of least complex duties to which a lower productivity standard was applied, established that respondent aware of complainant's handicap. In view of expert testimony that complainant's mental impairment would not prevent him from performing duties of Library Services Assistant position once such duties were learned, his performance deficiencies, rather than his handicap, was the basis for his termination. *Fischer v. UW-Madison*, 84-0097-PC-ER, 7/22/92

Complainant, who had been employed as an Assistant State Public Defender, could not or would not adequately undertake the job-related responsibilities of his employment, based on his substantial problems with regard to his attendance, his aversion to working with certain clients, his accessibility and his reluctance to handle jury trials. *Shevlin v. Office of Public Defender*, 87-0101-PC-ER, 4/17/90

No probable cause was found with respect to the decisions to issue complainant a written reprimand, suspend him and discharge him, as well as to certain conditions of employment where complainant repeatedly called in sick, left work and ultimately failed to appear at work. Prior to the discharge, respondent was advised that the complainant was receiving treatment for alcohol problems and he was placed on a medical leave. When complainant failed to report back to work on the designated date, the respondent was not required by the FEA to extend the complainant's leave of absence if it had ascertained he was unable to work because of alcoholism, citing *Squires v. LIRC*, 97 Wis. 2d

648 (Court of Appeals, 1980). It was not a situation where the complainant was unable to contact his employer. *Rose v. DOA*, 85-0169-PC-ER, 7/27/88

No probable cause was found where complainant, who has uncorrected vision of 20/500 for both eyes, was ranked 36th following the written exam for Conservation Warden 1 which was too low a ranking to be considered for appointment under respondent's normal procedures. Complainant could only have been considered further if he had been certified under the Handicapped Expanded Certification (HEC) program but respondent rejected complainant for this program because it was determined he was not handicapped. Respondent could not be considered to have discriminated against the complainant because of his handicap when respondent had determined he was not handicapped under the HEC program. *Wood v. DNR*, 86-0002-PC-ER, 2/19/88

No probable cause was found as to complainant's discharge where complainant, who suffered from an organic mental disorder, did not perform his work properly, made threatening statements/gestures to co-workers, supervisors and non-employes, and had unexcused absences, where the complainant's handicap was reasonably related to his ability to carry out his responsibilities and respondent made an effort to accommodate his handicap. *Brummond v. UW-Madison*, 84-0185-PC-ER, 85-0031-PC-ER, 4/1/87

No probable cause was found with respect to the termination of the complainant's employment where complainant's job performance was erratic, the quality and quantity of her work was inconsistent and her judgment in the office was questionable. *Kaufman v. UW-Madison*, 84-0065-PC-ER, 8/6/86

No probable cause was found with respect to the termination of complainant's employment, where complainant, a probationary employe who was handicapped, missed four consecutive days of work after he was arrested, complainant could not say when be would be released from jail and return to work and where there was an immediate need to have someone perform the complainant's duties. No evidence was presented showing that complainant was treated differently than other probationary employes who missed several work days. *Brummond v. UW-Parkside*, 83-0045-PC-ER, 5/30/86

No discrimination was found where the complainant took a multiple choice exam and was certified for a number of program assistant positions but did not receive an appointment. The Commission noted that the hiring decisions were separate and independent and that there were legitimate reasons for each selection. *Markham v. DHSS*, 79-PC-ER-151, 2/9/82

No probable cause was found as to the decision not to select the complainant for a vacant permanent position of English teacher, where the successful candidate had a higher score on the questionnaire and complainant, who had been filling the position as an limited term employe, had an inferior job reference based on respondent's first-hand knowledge of complainant's work performance. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

The complainant, who had an arrest record of which the respondent was aware, and who was discharged, failed to establish his job performance was satisfactory, where he did not complete his assigned work, was verbally abusive and threatening to both coworkers and supervisors, was threatening toward and made off-color remarks about members of the public with whom he came into contact and had unexcused absences/tardiness. Even if he had established a prima facie case, complainant failed to establish that the unsatisfactory work record was pretextual. *Brummond v. UW-Parkside*, 83-0045-PC-ER, 5/30/86

No probable cause existed with respect to respondent's decision to terminate the employment of complainant, an insulin dependent diabetic, where complainant had essentially abandoned his job and refused to return, complainant could safely perform his work with a minimum of risk to himself and to others and where respondent perceived complainant's physician to have indicated that complainant could work safely. *Lueders v. DHSS*, 84-0095-PC-ER, 5/29/86

No probable cause was found as to the respondent's decision not to select the complainant for vacant Building Maintenance Helper 2 positions where the interviewers did not know of complainant's handicap at the time they scored the complainant's interview and where each successful applicant had a higher score than the complainant and a more stable work record. *Brummond v. UW-La Crosse*, 84-0178-PC-ER, 10/10/85

No probable cause was found where, due to a handicapping condition of mental illness, the complainant was unable to adequately discharge the duties and responsibilities of his position of Building Construction Superintendent. *Burnard v. DOA*, 83-0040-PC-ER, 1/30/85

No probable cause was found as to allegations of discrimination based on color, handicap and race, where complainant's employment was terminated based on his unsatisfactory work performance due to consistent failures to meet deadlines for the completion of assignments. *Johnson v. DHSS*, 83-0032-PC-ER, 1/30/85

No probable cause was found where complainant, an alcoholic, was terminated primarily because of chronic absenteeism, tardiness, and low productivity, where respondent made extensive efforts to accommodate complainant's handicap via treatment programs and where complainant was terminated after the treatment program was unsuccessful and complainant refused to agree to change treatment programs or to alter the existing program. *Burton v. DNR*, 82-PC-ER-36, 8/31/83

No probable cause was found where just one of three persons comprising the interview panel for a vacant position was aware of complainant's handicap and where that person, who actually made the hiring decision, based the decision in large part on the rankings and comparisons by the other two panel members. In addition, complainant's answers to questions posed by the panel were inconsistent, at least in part, with the policies and responsibilities of the employing unit and there was no evidence in the record establishing that complainant was better qualified than the successful applicants. *Bisbee v. DHSS*, 82-PC-ER-54, 6/23/83; affirmed by Dane County Circuit Court, *Bisbee v. State Pers. Comm.*, 617-636, 10/3/84

The Commission found no probable cause in regard to the termination of complainant's employment where there was ample evidence of the complainant's inadequate performance, there was little if any evidence that her asthmatic condition was causative with respect to her performance problems, and although the complainant's supervisor was aware of certain complaints by the complainant to the vice-chancellor, this was considered of little significance against her record of inadequate

performance. *Way v. UW*, 78-122-PC, 79-PC-ER-4, 3/8/82

There was no probable cause to believe that respondent had discriminated against the complainant on the basis of handicap where it was difficult to see how respondent could have accommodated complainant in the position in question and where complainant clearly was "physically unable to perform his duties" within §111.32(5)(c) and, therefore, was subject to termination, subject to the requirements of §230.37(2), Stats. *Stasny v. DOT & DP*, 79-192-PC, etc., 1/12/81

774.03(1) Finding of discrimination

Respondent failed to accommodate complainant's disability within a reasonable period of time where there was no evidence offered by respondent to explain or justify the lapse of time in providing complainant a chair with a headrest. In March of 1994, complainant submitted a Disability Accommodation Report form for such a chair. Respondent's affirmative action compliance officer informed complainant in September of 1994 that respondent would provide him with the chair but then did not follow up until January of 1996. *Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98

Discrimination was found where complainant, who had a history of mental depression, was not selected for a typist position at a state correctional camp and where handicap was found to have "made a difference" in the decision to hire a woman. *DHSS v. Pers. Comm. (Busch)*, 81-CV-2997, 3/9/82, affirming with respect to handicap discrimination the Commission's decision in *Busch v. DHSS*, 78-PC-ER-8, 3/15/81

The employer failed to meet its responsibility for accommodation where it failed to determine whether an appropriate job opening was available through transfer and to offer any such vacancy to complainant. Instead, respondent left the pursuit of such matters to the complainant. Complainant was discharged for medical reasons connected to his handicap which left him unable to perform as a Correctional Officer. *Keul v. DHSS*, 87-0052-PC-ER, 6/23/93

Respondent failed to sustain its burden with respect to accommodation where it refused to continue to employ the complainant in any capacity at the University of Wisconsin Hospitals and Clinics based upon a physician's evaluation which did not rule out the likelihood of another psychotic episode, where the evaluation was qualified by the facts that there had been a limited opportunity for evaluation, the complainant had received no treatment, and the physician testified he had successfully treated physicians with the same kind of illness as complainant who had been able to continue their employment at the same work site. *Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 11/6/91

Where administrative rule required that only persons who had been certified as having a disability could be included in the certification of eligibles to be considered and, with respect to the vacancy in question, the respondents failed to verify the existence of disabilities prior to certification, the respondents violated the administrative rule and discriminated against the complainant, who was not handicapped, based on handicap. The net effect of the respondents' action was that three individuals who scored lower than the complainant on the qualifying exam but who were included on the certification list under handicapped expanded certification even though their handicaps had not been verified as required, were actually considered for the vacant positions. *Oestreich v. DHSS & DMRS*, 87-0038-PC-ER, 2/12/91

Discrimination was found where complainant, who was visually handicapped, was rejected from employment on a hospital's food tray line as soon as she stated she was unable to read the menu cards on the trays in the existing workplace configuration. At hearing, the respondent failed to offer evidence rebutting the testimony of complainant's expert witness that certain specific accommodations would have allowed the complainant to have performed the job duties. Nothing suggested that, at the time complainant's employment request was rejected, the appointing authority actually considered whether there any reasonable accommodations were available and it appeared that the supervisor who was effectively responsible for the hiring decision was unaware of the duty of accommodating handicapped applicants. *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

Unlawful discrimination was found where employe's

immediate supervisor failed to carry out instructions from upper-level management to structure employe's duties and responsibilities so as to comply with agency's obligations under §230.37(2), Stats, relating to employes who are unable to perform their duties. *Kleiner v. DOT*, 80-PC-ER-46, 1/28/82

774.03(2) Finding of *no* discrimination

The granting of veterans preference points does not violate §111.32(8), Stats., relating to handicap discrimination. *Nettleton v. State Personnel Board*, Dane County Circuit Court, 159-201, 8/13/79

Complainant, who had longstanding back problems, underwent surgery in February of 1995, and was on medical leave without pay from February of 1995 until June of 1996, was not discriminated against on the basis of disability when his employment was terminated due to continuing medical problems. Complainant was unable to perform the Youth Counselor 2 duties as they were accurately reflected in the relevant position description. The position description specifically referred to lifting 125 pounds, an independent medical exam in September of 1995 concluded that complainant had a lifting limit of 35 pounds and should avoid repetitive bending, and complainant's physician indicated in April of 1996 that complainant was permanently and totally disabled with respect to complainant's job and was incapable of lifting more than 50 pounds and making certain repetitive motions. Complainant acknowledged he would have to decline a supervisor's request to provide assistance with a large-scale disturbance at the institution. *Wille v. DOC*, 96-0086-PC-ER, 1/13/99 (appeal pending)

Complainant failed to establish a prima facie case of disability discrimination regarding alleged adverse terms and conditions of employment where she failed to present any evidence that she was treated differently than non-disabled co-workers in similar circumstances. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Alleged one-time conduct by complainant's supervisor of touching complainant and putting arms around her did not meet the requirements of sustained and non-trivial actions

so as to constitute harassment based on complainant's disability. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

No disability discrimination was found with respect to the decision to terminate complainant's employment where the institution had recommended that complainant's probationary period be extended but, less than a

week thereafter, respondent learned that complainant had been absent due to the effects of drinking alcohol and that another employe overheard complainant say he felt "like a postal employe." *Figueroa v. DHSS*, 95-0116-PC-ER, 3/11/98

Complainant did not establish that he had provided respondent, as of the date the relevant hiring decisions were made, with a medical release from the light duty restrictions that existed during his previous employment with respondent. Therefore, no handicap discrimination was found. *Van Zutphen v. DOT*, 90-0141-PC-ER, 12/20/96

Respondent did not discriminate against complainant based on his handicap when it provided information to complainant about his appeal rights and options during two telephone calls where there was no evidence of wrongdoing by the employer, such as an intent to conceal information or a legal duty to fully disclose such information. Furthermore, the failure to provide certain information was cured by a follow-up letter. *Krueger v. DHSS*, 92-0068-PC-ER, 7/23/96

Respondent did not discriminate against the complainant based on handicap when it terminated her employment as a Residential Care Technician in a center for the developmentally disabled. Formal standards required RCTs to lift 55 pounds, complainant acknowledged her job required her to lift in excess of that amount and there were various lifting restrictions placed on complainant by medical providers, ranging to a maximum of 45 pounds. Respondent could not have reasonably accommodated complainant because excluding her from all those work activities which required her to lift in excess of her limitations would be to establish a special position for her, would measurably exacerbate problems of cost, staffing, contractual agreements and employe morale and would eliminate an essential function of the RCT position. The 55 pound weight lifting requirement was formally initiated well

before the event that precipitated complainant's termination. *Van Blaricom v. DHSS*, 93-0033-PC-ER, 5/2/96

A few tense conversations between complainant and his supervisor do not amount to opprobrious or severe mistreatment so as to alter the conditions of his employment and create an abusive working environment. Complainant failed to establish harassment based on handicap. *Eddy v. DOT*, 93-0009-PC-ER, 9/14/95

No discrimination based on age or handicap was found regarding respondent's decision to permit three other employes to complete recruit training school before the complainant, where complainant never requested to attend the school on a full-time basis. *Hogle v. UW-Parkside*, 93-0120-PC-ER, 4/28/95

No discrimination based on age or handicap was found regarding respondent's decision to deny complainant's request for refresher training in firearms, where complainant was not eligible for such training. *Hogle v. UW-Parkside*, 93-0120-PC-ER, 4/28/95

No discrimination based on age or handicap was found regarding respondent's decision to terminate the complainant's employment due to negligence in carrying out his duties as a limited term police officer, failure to follow instructions and making false statements. *Hogle v. UW-Parkside*, 93-0120-PC-ER, 4/28/95

No handicap discrimination was shown where the complainant did not argue he was more qualified for the position than the successful candidate. Complainant's belief that he would have been hired if written justification for not hiring had to be provided to respondent's Affirmative Action officer was unsupported by the evidence. *Bertram v. DILHR*, 92-0241-PC-ER, 9/21/94

No handicap discrimination was established regarding the decision to terminate complainant's probationary employment where there were numerous instances where complainant's work performance was inadequate, numerous complaints received about his performance and these problems had to be viewed in the context of complainant's status as a probationary employe. During the course of a 30 day review period, additional training was provided to the complainant and his work performance was carefully analyzed. *Stark v. DILHR*, 90-0143-PC-ER, 9/9/94

Any inference of discrimination or pretext raised elsewhere in the record was dispelled entirely by complainant's admission that he really did not believe respondents' decision to institute "hiring above the minimum" after complainant had already been hired was based in any part on his handicap. Complainant's handicap was merely coincidental to complainant's status of one of two individuals who were employed by respondent DOJ before the HAM hires. *Thorpe v. DOJ & DER*, 93-0093-PC-ER, 7/25/94

It was not handicap discrimination to discharge complainant from his position as a sheet metal worker because medical evidence showed he could no longer perform the job safely due to weakness in his left leg caused by stroke. Complainant's deficits in his left leg were "reasonably related" to his ability to adequately perform his job and returning complainant to the job would place his personal safety at risk. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 6/21/94

The rationale for the imposition of a requirement of a physician's verification for absences was not shown to be pretextual where this requirement was imposed in accordance with a collective bargaining agreement and other applicable requirements, and complainant was not treated differently than any other similarly situated employe. *Miller v. DHSS*, 91-0106-PC-ER, 5/27/94

The rationale for the extension of complainant's probation was not shown to be pretextual where the record did not support complainant's contention that he had not been worried about the possible results of his absenteeism, and it was not necessary for respondent to demonstrate that complainant's absences had a negative impact on the operation of his unit in order to enforce its absenteeism policies. *Miller v. DHSS*, 91-0106-PC-ER, 5/27/94

While complainant could establish that the termination of his employment was on the basis of handicap by showing a causal link between his handicaps and his attendance record, he failed to establish on the record that any of his unscheduled absences were caused by his handicaps. Even if some relationship were inferred between his absences due to illness and his handicaps, he had a number of other absences unrelated to illness. *Miller v. DHSS*,

91-0106-PC-ER, 5/27/94

Numerous incidents which complainant alleged constituted a pattern of harassment against her because of her handicap and in retaliation for pursuing an accommodation request and making disclosures covered by the Whistleblower Law were analyzed and it was found that complainant failed to satisfy her burden of proof. As to two matters for which respondent's explanations did not have an accurate basis in fact, any ulterior motives by management were far more likely related to labor-management strife and a related FLSA lawsuit than to complainant's handicap or her protected activities in connection therewith. A conclusion of discrimination is not mandated by a finding of pretext where the record reflected that management was motivated by somethin other than complainant's protected activity. *St. Mary's Honor Center v. Hicks*, 125 L.Ed. 2d 407, 113 S.Ct. 1742 (1993); *Kovalic v. DEC Intl. Inc.*, 161 Wis. 2d 863, 876-78, 469 N.W. 2d 224 (Ct. App. 1991). *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant requested a route reassignment as an accommodation for her MS, and presented a doctor's note setting forth certain restrictions on the extent of her driving. Because management perceived this note as ambiguous concerning the extent of the restrictions, they placed complainant on leave with pay while they attempted to obtain clarification from her physician. She also was assigned for one day to light duty refurbishing ticket dispensers in the regional office, a normal assignment for employes in complainant's classification who were not actively engaged in running routes. Under the circumstances, both actions by management constituted reasonable accommodations, and respondent did not violate the FEA by not providing complainant with the exact accommodation she desired. *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant's discharge from his employment as a driver's license examiner was in connection with his acting out in the presence of members of the public, certain behavior related to what was diagnosed as an "immature personality disorder in association with a sexual paraphilia," but which was not diagnosed as a psychiatric illness or impairment, but a personality disorder which did not limit his capacity to work. Therefore, he was not a handicapped individual pursuant to §111.32(8), Stats., since his sexual impulses

were not uncontrollable and his behavior did not result from an uncontrollable or irresistible urge or impulse. *Miller v. DOT*, 89-0092-PC-ER, 11/23/93

No discrimination was found where complainant, a non-handicapped individual, presented no evidence to substantiate his claim that respondent hired a handicapped individual instead of him to meet an affirmative action quota. Complainant's interview score was only third highest among five finalists. The successful candidate was rated highest and had a very strong reference. *Sagady v. ECB*, 92-0101-PC-ER, 9/24/93

Respondent's failure to interview complainant for a vacancy was solely because of its keypunch error when entering complainant's application information. Complainant's handicap discrimination claim was dismissed. *Schimmel v. DOD*, 91-0070-PC-ER, 9/24/93

Complainant's dyslexia was held not to "limit the capacity to work" but to impose "a substantial limitation on a particular life activity" and, as a result, to constitute a handicap. It was held that it did not constitute handicap discrimination per se for the appointing authority not to select complainant even though he was the interview panel's top-ranked candidate; but it was appropriate for the appointing authority to consider this as one of several selection factors, including the candidates' level and type of education, level and type of experience with the State Patrol, and the goals of the applicable affirmative action plan. Complainant's argument that, once respondent requested handicapped expanded certification, it was required to hire a handicapped candidate, would lead to an absurd result. *Byrne v. DOT & DMRS*, 92-0672-PC, 92-0152-PC-ER 9/8/93; affirmed by Dane County Circuit Court, *Byrne v. State Pers. Comm.*, 93-CV-3874, 8/15/94

No discrimination was found in hiring three positions where, as to two of the decisions, the decisionmakers were unaware of complainant's handicapping condition and the decisions not to select complainant were based on reasons other than her handicap, including her attitude and friendliness expressed during the interviews and her references' comments. *Smith v. UW-Madison*, 90-0033-PC-ER, 7/30/93

Respondent's request to DMRS to remove complainant's

name from the certification list was consistent with §ER-Pers 11.04(1), Wis. Adm. Code, and did not support a finding of discrimination. The author of the letter was unaware of complainant's handicap. *Smith v. UW-Madison*, 90-0033-PC-ER, 7/30/93

A claim of handicap discrimination was rejected by the Commission where the employe's reinstatement at a lower pay rate than at the time of his prior termination was the consistent practice of the hiring unit. Pretext was not shown by reference to two other employes who were reinstated without pay loss because differences demonstrated they were not similarly situated to complainant. *Hanke v. DHSS*, 91-0041-PC-ER, 6/25/93

Respondent did not fail to accommodate complainant's handicap where complainant waited until after he was given his termination notice to inform respondent he was an alcoholic and the only evidence respondent had that complainant might have a drinking problem was his arrest for operating while intoxicated and, based on that single arrest, respondent was not required to ascertain the existence of a handicap. *Thomas v. DOC*, 91-0161-PC-ER, 4/30/93

Where a substantial portion of complainant's absenteeism could be attributed to her depression, her discharge was substantially attributable to her handicap. Respondent established that complainant was unable to adequately undertake her job responsibilities due to her pervasive absenteeism. *Bell-Merz v. UW-Whitewater*, 90-0138-PC-ER, 3/19/93

Complainant, who had incurred injuries in an auto accident, which involved a whiplash injury resulting in headaches, neck pain, numbness in both arms and hands, slight back pain, and pain between her shoulder blades, did not satisfy the definition of a "handicapped individual," §111.32(8), Stats., since complainant's injuries caused her to make only minor changes in her work and life activities and did not render achievement unusually difficult or limit in any significant way her capacity to work. The record also does not reflect that respondent perceived complainant as handicapped. Assuming *arguendo* the existence of a handicap, complainant failed to establish that the substantial reasons assigned by respondent for her probationary termination were a pretext for handicap discrimination.

***Renz v. DHSS*, 88-0162-PC-ER, 12/17/92**

Complainant failed to establish pretext with regard to respondent's decision as to promotion. Respondent articulated a legitimate, non-discriminatory rationale for its decision--the selected candidates did better on the oral interview, and management had positive opinions about the selected candidates' past performance and concerns about complainant's past performance. These concerns were not shown to be pretextual, particularly in light of examples of complainant's problem areas in the record. While complainant had more education and experience than the selected candidates, respondent had a reasonable basis for its opinion that the selected candidates had demonstrated greater potential for successful performance in the higher level positions based on performance factors and better performance during their interviews. That complainant had more experience and formal education did not result in a conclusion of pretext because, under all the circumstances, including the aforesaid performance factors, respondent had a reasonable basis for believing the selected candidates had better potential to succeed at the higher level. While complainant's contentions about inadequate accommodation of his handicap were considered as potentially probative of respondent's attitude toward handicapped employes, he did not establish that respondent denied him any accommodations. *Orr v. OCI*, 92-0018-PC, 92-0025-PC-ER, 10/29/92

Complainant's problematic personality characteristics did not fall within the parameters of an actual or perceived handicap where his mental status was otherwise considered to be "well within the normal range." Merely because the enokiter contended complainant's condition would satisfy the criteria in §230.37(2), Stats., it does not follow that the condition constituted a perceived handicap. Where the personality characteristics did not fall within the meaning of the term "impairment," there was neither an actual nor a perceived handicap. *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

Respondent did not discriminate against complainant on the basis of handicap or retaliation with respect to conditions of employment. While the record reflected a poor relationship between complainant and his supervisor, there was no

reason to conclude that this was attributable to appellant's handicap or to retaliation as opposed to a number of other possible reasons. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

Respondent did not discriminate against complainant on the basis of handicap in connection with his suspension with pay pending an investigation for a crime that ultimately was attributed to another employe. Respondent had a reasonable basis for having suspected complainant, and this was not shown to have been pretextual. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

No retaliation or handicap discrimination was found as to a termination decision where there were consistently negative evaluations of complainant's work by a number of supervisors and the supervisor who spent the most time directly supervising complainant was then unaware of his earlier complaint. The complainant also grabbed a co-worker's wrist, bruising it enough that a doctor recommended a brace and a week's absence from work. *Bjornson v. UW-Madison*, 91-0172-PC-ER, 8/26/92

Qualifying for Handicapped Expanded Certification does not in and of itself show that complainant is handicapped for purposes of FEA. Complainant's "multiple pulmonary emboli" required only a short hospitalization and a total recovery period of only a few weeks. Complainant did not show that her medical conditions had a tendency to "make achievement unusually difficult or limit capacity to work," or resulted in the relevant work performance problems. The complainant failed to show that those making the subject termination were aware of complainant's depression. *Engel v. UW-Oshkosh*, 89-0103-PC-ER, 8/26/92

Respondent's hiring of complainant as part of a program for "slow learners" and assignment to him of least complex duties to which a lower productivity standard was applied, established that respondent aware of complainant's handicap. In view of expert testimony that complainant's mental impairment would not prevent him from performing duties of Library Services Assistant position once such duties were learned, his performance deficiencies, rather than his handicap, was the basis for his termination. *Fischer v. UW-Madison*, 84-0097-PC-ER, 7/22/92

It would require an employer to engage in intrusion and

guesswork if the employer were required, based on the existence of performance problems alone, to aggressively investigate whether an employe has a handicap. *McClure v. UW-Madison*, 88-0163-PC-ER, 4/21/92

Respondent was not aware nor should it have been aware of complainant's handicap where during his first day on the job, complainant completed a form which indicated that he had no handicapping condition which required accommodation, there was nothing in complainant's behavior or speech which should have alerted respondent that complainant had a handicap and where his supervisor asked the complainant whether there was some problem which was interfering with his ability to do his job, complainant only made some vague reference to a problem at home. *McClure v. UW-Madison*, 88-0163-PC-ER, 4/21/92

Although a written psychological evaluation indicated that complainant's handicap would cause him to have a great deal of trouble understanding any form of written instructions and to have trouble retaining any complex oral instructions, and would require him to obtain employment which would involve extensive repetitious training, close supervision, simple tasks, and no self-direction and self-control, complainant's work history indicated that these limitations did not significantly affect complainant's ability to independently perform janitorial tasks. Complainant failed to show a clear causal relationship between his handicap and his performance deficiencies. No discrimination was found with respect to the respondent's decision to terminate complainant's employment as a Building Maintenance Helper 2. *McClure v. UW-Madison*, 88-0163-PC-ER, 4/21/92

Where complainant failed to show that respondent was or should have been aware of his handicapping condition and failed to show that there was good reason for the employer to suspect a clear causal connection between his handicapping condition and work performance problems, the respondent's termination decision was not discriminatory. Respondent had been informed that the complainant was a slow learner but not that he had a particular handicap, complainant had indicated on one of his application forms that he did not have a handicap which required an accommodation and complainant had indicated in response to questions from respondent that he did not

have a problem which was affecting his work performance. The respondent had no additional obligation to determine whether the complainant was handicapped and whether any handicap could be accommodated. The complainant did not realize he was handicapped until after his termination. *Jacobus v. UW-Madison*, 88-0159-PC-ER, 3/19/92; affirmed by Dane County Circuit Court, *Jacobus v. Wis. Pers. Comm.*, 92CV1677, 1/11/93

Where complainant failed to show a clear causal relationship between his handicap and his performance deficiencies, no discrimination was found with respect to the decision to terminate his employment. *Jacobus v. UW-Madison*, 88-0159-PC-ER, 3/19/92; affirmed by Dane County Circuit Court, *Jacobus v. Wis. Pers. Comm.*, 92CV1677, 1/11/93

Respondent did not discriminate against the complainant, who has uncorrected vision acuity of 20/400, in deciding not to consider him further as a candidate for a State Patrol Trooper I position, where respondent had a standard for uncorrected vision of 20/100. *Wood v. DOT*, 86-0037-PC-ER, 5/5/88; affirmed by Milwaukee County Circuit Court, *Wood v. Wis. Pers. Comm. & DOT*, 88-CV-09-178, 5/10/89; affirmed by Court of Appeals, 009-178, 11/22/89

Respondent did not discriminate when it terminated complainant's employment as a Correctional Officer 2, which involved a special duty of care, due to complainant's inability to adequately perform some of the duties listed on the standard CO 2 position standard. Respondent was entitled to assume that a doctor's opinion stating that complainant "will most likely never return to his old job duties" but that he could "engage in sedentary work" meant that complainant was unable to adequately perform a past assignment which he had received four months earlier even though complainant had been on medical leave during the four month period. *Conley v. DHSS*, 84-0067-PC-ER, 6/29/87

Termination of the complainant, who suffered from vision problems which affected his ability to quickly locate and identify documents but had a very limited effect on his actual reading speed, was upheld where complainant's lack of speed in performing his tasks meant that he was simply not performing some of those duties set out in his position

description. *Rau v. UW-Milwaukee*, 85-0050-PC-ER, 2/5/87

In a complaint arising from a hiring decision, no discrimination was found where complainant was not as well qualified as those sixteen applicants ultimately hired for janitorial positions, where eight of the thirty two certified applicants were handicapped and three of the eight were hired and where complainant held six different positions during the prior 4-year period and had been terminated once for a personality conflict and once for a verbal attack on a nun escorting a group of children who had walked on a floor complainant had just waxed. *Vesperman v. UW-Madison*, 81-232-PC, 81-PC-ER-66, 3/31/83

No handicap discrimination was found with respect to a refusal to allow the employe/complainant to rescind a request for voluntary demotion, where the complainant failed to show that he was handicapped or that the employer perceived him as such, where there was ample evidence that the employer based its decision on the complainant's inadequate job performance, and where another case was factually distinguishable. *Rasmussen v. DHSS*, 81-PC-ER-139, 12/29/82

Although complainant showed he was handicapped, he failed to show that the employer had any obligation under the Employe Assistance Program to refer the complainant to the program. *Green v. UW*, 79-PC-ER-129, 5/13/82

There was no showing of discrimination by respondent when it terminated complainant's employment where the complainant, approximately 2½ weeks after leaving work to enter a hospital, had informed the respondent that he did not want his job back. *Green v. UW*, 79-PC-ER-129, 5/12/82

No unlawful discrimination was found where the complainant, whose hand was in a cast, never clearly communicated to the respondent that he had had difficulty taking a written exam until several months later, and the respondent then offered him the opportunity to retake the exam. *Goldberg v. DP*, 78-PC-ER-66, 74, 10/17/80

Where the complainant was handicapped due to back and neck pains, but declared to his supervisors that he was totally unable to do the duties required, did not provide requested medical information on his condition, and did not

anticipate being able to return to work at any specific time in the foreseeable future, no discrimination was found with respect to his discharge. *Fuller v. UW*, 78-PC-ER-55, 3/13/80

774.04 Prima facie case (also see 702.18)

Respondent's motion to dismiss for failure to state a claim of disability discrimination relating to a non-selection decision was denied, even though respondent denied that anyone on the search committee perceived complainant as having a mental impairment, where complainant pointed to various remarks provided to the committee and argued the committee must have inferred a disability of mental impairment. The Commission was unable to conclude as a matter of law that there was no conceivable way that complainant could establish that element of a disability claim. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

Respondent's motion for summary judgment was denied as to complainant's disability claim arising from two alleged decisions not to recall the complainant even though the person who selected the other two individuals for the positions was not aware of complainant's disability at the time. The record did not indicate who had excluded complainant from the recall process. *Sheskey v. DER*, 98-0063-PC-ER, 8/26/98

Complainant failed to establish a prima facie case of disability discrimination relating to a Program Assistant 1 non-selection decision where the disability status of the successful candidate was not contained in the record. *Ledwidge v. UW-Madison & UWHCB*, 96-0066-PC-ER, 5/20/98

Complainant did not establish that she suffered from a mental impairment due to stresses at work, where she continued to be able to perform her job duties, she did not suggest to respondent that she suffered from a handicap, respondent did not perceive her as handicapped and the claimed handicap was not obvious to a lay person. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

Complainant failed to establish that a two to three inch

shortening of his left leg and fusion of his left ankle which caused him to walk with a noticeable limp constituted handicapping conditions where complainant acknowledged he was able to fully perform his duties as an Aide 2, there was no evidence as to how the conditions made achievement unusually difficult and where the persons involved in the subject hiring decisions who were acquainted with complainant did not perceive him to be handicapped as a result of these conditions, where no one had observed that his noticeable limp had interfered to any extent with the performance of his duties. However, complainant did establish that progressive degenerative arthritis in the left knee constituted a handicap. *Van Zutphen v. DOT*, 90-0141-PC-ER, 12/20/96

Respondent's action of removing the complainant from his supervisory position for failure to meet probationary standards was not discrimination based on handicap where complainant, who had taken two lengthy medical leaves, the second of which ended two months prior to the removal, failed to show that he continued to suffer from his impairment after returning from the second leave. *Rose v. DOC*, 93-0200-PC-ER, 8/4/95

The mere existence of a partial disability, involvement in a subsequent car accident, temporary wearing of a cervical collar/back brace as the result of the car accident, and continuing visits to a physical therapist/chiropractor, without a record tying the partial disability or the car accident injuries to substantial and lasting changes in the way that complainant handled the major day-to-day activities of her life, does not satisfy the element of the analytical framework that requires the complainant to establish that the impairment is such that it actually makes or is perceived as making achievement unusually difficult or limits the capacity to work. Respondent terminated complainant's employment as an Auditor 3, Lead Worker. Although respondent knew that complainant's impairment prevented her from sitting in one place for long periods of time and that complainant wore a cervical collar/back brace and even though complainant may have appeared on occasion to be in discomfort, respondent did not understand her condition to interfere in any significant way with her ability to perform the duties and responsibilities of her position. Complainant never indicated to her supervisors or her co-workers that her conditions were interfering, in a

significant way, with her ability to perform her job duties, even though complainant did submit an accommodation request in which she stated her disability "impairs her from working extended hours at her computer" and makes "it difficult to perform numerous hours on the phone." *Rufener v. DNR*, 93-0074-PC-ER, etc., 8/4/95

A letter extending complainant's opportunity to consider accepting a voluntary demotion could not be characterized as an adverse employment action. *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95

A memo, written pursuant to usual practice in order to summarize the content of a meeting, is not a decision regarding the complainant and could not be characterized as an adverse employment action. *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95

Complainant's claim of handicap discrimination based upon perceived handicap arising from a hiring decision was dismissed where there was no evidence establishing that respondent perceived the complainant to be handicapped. Complainant ranked fourth highest after interviews, and the respondent selected the fifth ranking candidate after obtaining job references. Complainant's reference form stated that complainant had been absent due to "workman's compensation a few times" and had a "not too good" health and safety record. However, complainant stated at the interview that he had no work restrictions. *Johnson v. DHSS*, 89-0080-PC-ER, 10/4/94

Complainant's request for handicap accommodation, which she pursued through several layers of management, constitutes an activity pursuant to §111.322(3), Stats., that is protected against retaliation. Additionally, any discrimination against an employe because of a request for accommodation would be subsumed within the FEA's proscription of handicap discrimination per se in §111.34(1)(b). *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Respondent's action temporarily placing complainant on leave with pay while it sought clarification of her medical restrictions was not an adverse employment action, where she was not required to use any leave time and there was no demonstrable negative impact on her employment. *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant, who had incurred injuries in an auto accident, which involved a whiplash injury resulting in headaches, neck pain, numbness in both arms and hands, slight back pain, and pain between her shoulder blades, did not satisfy the definition of a "handicapped individual," §111.32(8), Stats., since complainant's injuries caused her to make only minor changes in her work and life activities and did not render achievement unusually difficult or limit in any significant way her capacity to work. The record also does not reflect that respondent perceived complainant as handicapped. Assuming *arguendo* the existence of a handicap, complainant failed to establish that the substantial reasons assigned by respondent for her probationary termination were a pretext for handicap discrimination. *Renz v. DHSS*, 88-0162-PC-ER, 12/17/92

In a termination case, discrimination can occur if the discharge was motivated by complainant's handicap or if the discharge was based upon performance reasons that were causally related to the handicap. *Jacobus v. UW-Madison*, 88-0159-PC-ER, 3/19/92; affirmed by Dane County Circuit Court, *Jacobus v. Wis. Pers. Comm.*, 92CV1677, 1/11/93

The complainant established that she had been discriminated against for purposes of the second element of analysis in a handicap discrimination case, where the respondent effectively disqualified the complainant from hiring consideration once the respondent learned of complainant's handicapping condition. *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

The complainant did not establish that he was a handicapped individual or that he was discharged because of his handicap and there was evidence to the effect that complainant acknowledged, at the time of his discharge, that his physical ailments were treatable and under control. *Shevlin v. Office of Public Defender*, 87-0101-PC-ER, 4/17/90

Complainant was handicapped where his responsibilities as a Youth Counselor, requiring him to physically restrain students, aggravated his pre-existing condition of mild to moderate arthritis of the lumbar spine, citing *LaCrosse Police Comm. v. LIRC*, 139 Wis 2d 740, 741 (1987). *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88

Complainant was handicapped where he suffered from an

organic mental disorder which created stress and anxiety which in turn made it difficult for complainant to perform his job as a Building Maintenance Helper 2. *Brummond v. UW-Madison*, 84-0185-PC-ER, 85-0031-PC-ER, 4/1/87

In order to establish handicap discrimination, the complainant had to show that he was handicapped or that his employer perceived him as handicapped, and it was insufficient to show that co-workers and supervisors had doubts about his judgment, that there was concern as to whether complainant was capable of physically threatening or harming others at the workplace, and that some co-workers were aware of the fact that he was seeing a psychiatrist or psychologist. *Buller v. UW*, 80-PC-ER-49, 10/14/82; factual findings modified by order on 12/2/82; appeal dismissed by Dane County Circuit Court, *Buller v. Pers. Comm.*, 83-CV-8, 12/14/89

The complainant failed to establish a prima facie case because of the strong evidence of inadequate job performance. She also failed to request an accommodation for her asthmatic condition or to inform her supervisor that she had a handicap which was exacerbated by working conditions. *Way v. UW*, 78-PC-ER-52, 3/8/82

774.05 Duty of accommodation

Respondent did not reasonably refuse to accommodate complainant's disabling condition when respondent provided him a leave of absence of more than 15 months after his back surgery before terminating his employment. Respondent established that had complainant been allowed to return to work as a youth counselor with a permanent assignment to certain specified 3rd shift posts, it would need to assign a second youth counselor to the same post as complainant, given complainant's work restrictions. It is not a reasonable accommodation to require an employer to hire another employe to work alongside a disabled employe and to duplicate the disabled employe's responsibilities. *Wille v. DOC*, 96-0086-PC-ER, 1/13/99 (appeal pending)

Where there were disputed issues of fact regarding the suitability of positions offered to complainant before her resignation and where complainant claimed that she was forced to resign due to respondent's failure to accommodate

her disability, respondent's motion to dismiss for failure to state a claim was denied. *Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98

Where, throughout complainant's employment, respondent consistently provided and demonstrated a willingness to provide complainant a manageable work schedule, respondent adequately accommodated complainant's disability. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Respondent reasonably accommodated complainant's disability where it followed the advice of its expert in establishing the specifications for the ergonomic chair requested by complainant. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Respondent reasonably accommodated complainant's disability when it responded to complainant's request for an ergonomic class and an E-mail class by conducting an ergonomic evaluation of complainant's workstation, had its safety officer instruct complainant on ergonomic correctness and gave complainant individual instruction on the use of E-mail. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Respondent failed to accommodate complainant's disability within a reasonable period of time where there was no evidence offered by respondent to explain or justify the lapse of time in providing complainant a chair with a headrest. In March of 1994, complainant submitted a Disability Accommodation Report form for such a chair. Respondent's affirmative action compliance officer informed complainant in September of 1994 that respondent would provide him with the chair but then did not follow up until January of 1996. *Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98

Respondent did not violate its duty of accommodation when it denied complainant's request for seven days of leave over two months, where complainant had already been absent from work 611 hours that year, including 416 hours of leave without pay. *Farrar v. DOJ*, 94-0077-PC-ER, 11/7/97

The Fair Employment Act does not require that an employer has to provide any and all leave requested in connection with an employe's treatment program. The questions of what is a reasonable accommodation, and whether a particular accommodation would impose a

hardship, involve factual determinations that will vary from case to case. An employer is not obligated to keep an employe on a leave of absence indefinitely when there is no foreseeable date for the employe to return to work. *Farrar v. DOJ*, 94-0077-PC-ER, 11/7/97

Respondent did not violate the Fair Employment Act by requiring complainant to utilize non-work hours for counseling sessions, if the sessions were available during non-work hours, instead of permitting her to attend therapy sessions in the middle of her shift and allowing her to use flex-time to compensate for the absences. *Farrar v. DOJ*, 94-0077-PC-ER, 11/7/97

Respondent did not discriminate against the complainant based on handicap when it terminated her employment as a Residential Care Technician in a center for the developmentally disabled. Formal standards required RCTs to lift 55 pounds, complainant acknowledged her job required her to lift in excess of that amount and there were various lifting restrictions placed on complainant by medical providers, ranging to a maximum of 45 pounds. Respondent could not have reasonably accommodated complainant because excluding her from all those work activities which required her to lift in excess of her limitations would be to establish a special position for her, would measurably exacerbate problems of cost, staffing, contractual agreements and employe morale and would eliminate an essential function of the RCT position. The 55 pound weight lifting requirement was formally initiated well before the event that precipitated complainant's termination. *Van Blaricom v. DHSS*, 93-0033-PC-ER, 5/2/96

Respondent adequately accommodated complainant, who suffered from motion sickness, during a three month period after respondent required complainant and three coworkers to rotate seats when traveling in a state-owned van. There had been no prior policy and complainant had invariably ridden in the front seat. At the time the new policy was imposed, respondent's supervisor was vaguely aware that complainant suffered from motion sickness but the supervisor was unaware of the specific connection between riding in the back of the van and the illness. When, after three months, complainant made his supervisor aware of the connection between his handicap and the new policy, respondent immediately instituted a temporary accommodation which satisfied the complainant and once

the need for that accommodation was verified by complainant's physician, respondent made it permanent. *Eddy v. DOT*, 93-0009-PC-ER, 9/14/95

Respondent did not fail to accommodate the complainant, a quadriplegic, when, in conjunction with an offer of employment, respondent denied complainant's request to direct another employe to be available to refill complainant's water glass on a continual basis, cook her lunchtime meal, cut the food into pieces, put out utensils, open food containers and set up and remove her lunch. No employes were willing to provide the assistance on a volunteer basis. In analyzing the request, the Commission looked to the Americans with Disabilities Act and related federal regulations and guidelines for interpretive guidance. Respondent had the responsibility to ensure complainant had equal access to the benefits and privileges of lunch and break times, and was not required to ensure she received the same results of those benefits and privileges. Respondent was not required to hire a personal care assistant for complainant. Respondent met its responsibility by providing complainant an opportunity to attempt to make arrangements for her drink and water needs through other sources. *Rogalski v. DHSS*, 93-0125-PC-ER, 6/22/95

Respondent attempted to reasonably accommodate complainant's handicap of depression and an obsessive-compulsive condition when it offered complainant a demotion compatible with a psychologist's report. Respondent had rejected the option of returning the complainant to his former position with various adjustments which respondent reasonably rejected as requiring too much supervisory time and resulting in delayed services to respondent's clients. Respondent had provided complainant an unprecedented medical leave in excess of two years in hope that he could return to his former position. *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95

Respondent satisfied its duty of reasonable accommodation where the only possible accommodation would have been to place complainant in another job, there was no evidence either that there were any positions available within respondent agency that would have satisfied complainant's self-articulated restrictions or that respondent did not make an appropriate effort to canvass the agency for such jobs, and respondent provided information to complainant about how to check generally available information concerning

announced vacancies in other agencies but did not make other efforts to find complainant another position beyond the perimeter of respondent agency. Where respondent secretary had no statutory authority to appoint people to positions outside of the agency, such an appointment could not be considered a reasonable accommodation under the Fair Employment Act, citing *Pellitteri v. DOR*, 90-0112-PC-ER, 10/24/94; affirmed by Dane County Circuit Court, *Pellitteri v. Wis. Pers. Comm.*, 94CV3540, 7/19/95. *Ledvina v. DHSS*, 93-0194-PC-ER, 3/3/95

Respondent met its duty of accommodation where it complied with the civil service code and provided information to complainant about transfer opportunities outside of the agency. Where complainant was a long-term employe in state service and knew, or should have known, where to inquire further about transfers to other agencies, respondent's duty of reasonable accommodation did not require it to search for positions outside of respondent agency or to advocate for complainant's hire in any such suitable positions. The Commission did not address the question of whether respondent's accommodation duties under the FEA were limited to the duties required under the civil service code. *Pellitteri v. DOR*, 90-0112-PC-ER, 10/24/94; affirmed by Dane County Circuit Court, *Pellitteri v. Wis. Pers. Comm.*, 94CV3540, 7/19/95

The employer was not required to hire an assistant for complainant, who suffered weakness in his left leg caused by stroke, in order for complainant to perform his job as a sheet metal worker, where to do so would be unwieldy at best. The record also established that mechanical aids would not be adequate from a safety standpoint. Respondent also made a good faith offer of alternate employment, but complainant only was interested in remaining in the sheet metal job. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 6/21/94

Where the complainant did not establish a relationship between his handicaps and his absences, and his termination was based on his absences, there was no duty of accommodation. In any event, the only accommodation sought by complainant (removal of the requirement for medical verification for sick leave) is not the type of action contemplated by the FEA's accommodation requirement, because it is not related to complainant's performance of his assigned duties and responsibilities. *Miller v. DHSS*,

91-0106-PC-ER, 5/27/94

The employer failed to meet its responsibility for accommodation where it failed to determine whether an appropriate job opening was available within the agency through transfer and to offer any such vacancy to complainant. Instead, respondent left the pursuit of such matters to complainant. Complainant was discharged for medical reasons connected to his handicap which left him unable to perform as a Correctional Officer. *Keul v. DHSS*, 87-0052-PC-ER, 6/23/93

The decision in *McMullen v. LIRC*, 148 Wis. 2d 270, 434 NW2d 830 (Ct. App. 1988), which held that the duty of accommodation may include the transfer of a handicapped employe to another position for which the employe is qualified, depending on the facts of each individual case, operates retroactively. *Keul v. DHSS*, 87-0052-PC-ER, 6/23/93

Respondent satisfied the requirements of §230.37(2), Stats., when it transferred complainant, placed him on part-time service, and granted him several medical leaves. The record evidence showed complainant was unable to work at all during the relevant time period and, as a result, just cause existed for his termination and there was no duty of accommodation because no possible accommodation could be made. *Chavera v. DILHR*, 90-0404-PC, 90-0181-PC-ER, 5/21/93; affirmed by Dane County Circuit Court, *Chavera v. Wis. Pers. Comm.*, 93-CV-2441, 8/25/94; affirmed by Court of Appeals, 94-2674, 6/1/95

Respondent did not fail to accommodate complainant's handicap where complainant waited until after he was given his termination notice to inform respondent he was an alcoholic and the only evidence respondent had that complainant might have a drinking problem was his arrest for operating while intoxicated and, based on that single arrest, respondent was not required to ascertain the existence of a handicap. *Thomas v. DOC*, 91-0161-PC-ER, 4/30/93

Given the pervasiveness and duration of complainant's absenteeism problem, the absence of any expert opinion that a transfer would have been medically indicated, and the fact that complainant failed to suggest a transfer at the time of her discharge, the respondent did not fail in its duty of

accommodation by not having pursued on its own motion the idea of a transfer. *Bell-Merz v. UW-Whitewater*, 90-0138-PC-ER, 3/19/93

Respondent did not deny complainant an accommodation where he was completely unable to work and there was no foreseeable change in his condition. Respondent was not required to keep complainant's job open and extend his leave of absence indefinitely as an accommodation under these circumstances. An accommodation normally is an alteration in the working environment, the provision of some special assistance that will enable the employe to perform the duties of his or her position, or the provision of an alternative work assignment or position with duties the employe can perform. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

Respondent did not violate its duty of accommodation by providing a couch to complainant, a paraplegic, which was too short for its intended purposes, where complainant accepted the couch without indicating it was too short, and his doctor had provided neither specifications for the couch or an explanation for its intended use when it was originally requested. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

Respondent was under no obligation to provide an accommodation where complainant never advised respondent that his performance problems were related to his physical condition. Complainant's handicap did not meaningfully contribute to his performance problems and there wan an independent basis for termination that had no possible relation to handicap. *Bjornson v. UW-Madison*, 91-0172-PC-ER, 8/26/92

Although no duty of accommodation existed, if such duty had existed, respondent would not be required to go beyond the recommendations of the mental health experts selected by complainant's physician to determine the availability/practicality of other accommodations. *Fischer v. UW-Madison*, 84-0097-PC-ER, 7/22/92

The employing agency's responsibility to "accommodate" imposed by §230.37(2) runs throughout the agency, except in cases where there is a subdivision whose head has been given statutory or constitutional authority to make appointments. While the original appointing authority can delegate his or her "power of appointment" under

§230.06(2) to various subordinates, this does not limit the scope of the original appointing authority's responsibility of "accommodation" under §230.37(2). *Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 11/6/91

The burden of proof with respect to the ability to perform in a handicap case rests on the employer, citing *Samens v. LIRC*, 117 Wis. 2d 646, 345 N.W. 2d 432 (1984). *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

A complainant who has been refused employment is not required to show that he or she in fact at least broached the issue of accommodation at the time of the hiring transaction. The duty of accommodation is not contingent on the applicant making a request for accommodation. *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

If an employer reaches the conclusion that a handicapped job applicant who is otherwise in line to be hired faces a problem in performing the job because of that handicap, the employer should know that it has a duty of accommodation. However, depending on the circumstances of the particular case, there may be cases where an applicant would have some obligation to come forward with information about a possible accommodation. *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

In a complaint arising from the decision to reject the complainant, who was visually handicapped, for a vacant position on a hospital's food tray line, the respondent's accommodation expert could properly conduct a case-by-case analysis of the complainant's ability to perform where the expert knew the complainant's visual acuity was 20/200. Respondent was not required to provide the complainant a trial in the position. *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

Where the complainant consistently failed to meet performance standards for her Auditor Specialist 3 position, the respondent was not required to transfer the complainant to another position because there were no positions identified which she could adequately perform or were otherwise viable. The respondent was also not required to lower the performance standards because that would effectively mean the creation of a different position.

Finally, the respondent was not required to permit the complainant to utilize a "job coach" from the Division of Vocational Rehabilitation where the respondent had already unsuccessfully used several experienced auditors to "coach" the appellant and the DVR coach would only focus on minimal aspects of complainant's duties. *Tews v. PSC*, 89-0150-PC, 89-0141-PC-ER, 6/29/90

Respondent was required to offer complainant a reassignment where the employe who had previously performed the work had moved to another assignment, someone had to pick up the duties, the complainant had the ability to do the work and there would be no hardship in giving the job to complainant who was handicapped. The reassignment was not in the nature of a restructuring of existing jobs. Note: The respondent was found to have offered the reassignment to the complainant. *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88

The employer's obligation is limited to the job-related responsibilities of the handicapped individuals' employment vis-a-vis the particular job he or she occupies or for which he or she is applying. The employer is not required to create a new job or transfer an employe to a completely different position as an accommodation but, where the employer normally exercises a degree of flexibility in assigning duties to employes and in a particular case can assign the responsibility to the handicapped employe without hardship, it may be required to do so as an accommodation. *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 2/11/88

Respondent was not required to exempt complainant, a handicapped employe, from forced overtime, as long as it was an essential job duty. *Conley v. DHSS*, 84-0067-PC-ER, 6/29/87

Respondent did not violate its duty to accommodate where respondent had granted complainant extensive leaves of absence, beyond that required by the collective bargaining agreement, and stood ready to allow complainant to work in his old classification with a prosthetic device if his doctor had released him to return to work on that basis. When respondent received a letter from complainant's physician stating complainant "would most likely never return to his old job duties" and did not identify any accommodation that would have permitted complainant to return to work,

respondent was not required to pursue the question of accommodation further in light of the taxing physical demands of the classification. *Conley v. DHSS*, 84-0067-PC-ER, 6/29/87

Respondent, who ultimately terminated the complainant, properly attempted to accommodate his handicap of an organic brain disorder, by agreeing not to rotate his job tasks as done for other employes, creating a job that would minimize changes and be limited in scope and granting him extended medical leaves. *Brummond v. UW-Madison*, 84-0185-PC-ER, 85-0031-PC-ER, 4/1/87

In a discharge case where complainant suffered vision problems, respondent was justified in not accepting complainant's offer to work an additional 4 hours per week without pay where 4 hours was not enough to compensate for complainant's slow work speed. Respondent could not require the complainant to work overtime without pay, so an accommodation sufficient to allow the complainant to generate the quantity of work described in his position description was not available. *Rau v. UW-Milwaukee*, 85-0050-PC-ER, 2/5/87

The duty to accommodate does not include utilizing other employes to actually perform a job duty for a handicapped individual, or creating a new job. *Rau v. UW-Milwaukee*, 85-0050-PC-ER, 2/5/87

The respondent met its duty of accommodation in the context of determining whether there was probable cause to believe discrimination had occurred, where complainant, who suffered from allergic rhinitis and rheumatoid arthritis, declined an opportunity to transfer to a less dusty environment, declined to wear a breathing mask or to be out of doors more frequently on breaks and the option of installing air cleaners/purifiers was of questionable utility and significant expense. *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

There was probable cause to believe the respondent failed to meet its statutory obligation of accommodation of complainant's asthma condition with respect to exposure to chemical weapons, where gas masks were available to certain correctional staff. *Hebert v. DHSS*, 84-0233-PC & 84-0193-PC-ER, 10/1/86

Respondent made satisfactory efforts to accommodate

appellant's handicap of diabetes where respondent granted him sick leave in order for him to have time to gain better control of his diabetes, offered him a straight shift for the same reason and offered him another position. Respondent also had unsuccessfully attempted to find a position for appellant to demote into or work part-time. *Lueders v. DHSS*, 84-0095-PC-ER, 5/29/86

Respondent fulfilled its duty to accommodate where it provided complainant with a less demanding clerical position and also gave him some work that was equivalent to his prior position of Building Construction Superintendent, but on a half-time basis and under close supervision, and where complainant was unable to adequately perform in these positions. *Burnard v. DOA*, 83-0040-PC-ER, 1/30/85

Probable cause existed where respondent failed to even consider the appropriateness of safety equipment as a means of accommodating complainant's handicap of epilepsy, and where respondent acknowledged that special life jackets were available and would be a good safety measure in many instances. *Giese v. DNR*, 83-0100-PC-ER, 1/30/85

Subchapter II, Chapter 111, Stats., provides a duty of reasonable accommodation to handicapped employe. *Kleiner v. DOT*, 80-PC-ER-46, 1/28/82

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 704 through 706.01

[Previous material] [Next material]

---

704 Effect of bargaining agreement (§111.93(3), Stats.) and additional complainant procedures

The fact that complainant grieved the denial of sick leave under the applicable collective bargaining agreement does not deprive the Commission of jurisdiction over a claim filed under the FMLA. The same absence for medical reasons can be both a medical leave under the FMLA and a sick leave under the contract. *Janssen v. DOC*, 93-0072-PC-ER, 10/20/93

The Commission's jurisdiction over a Fair Employment Act complaint of discrimination relating to the denial of family health insurance coverage by DETF would not be precluded by the effect of §340.03(i)(j), Stats., providing for appeals to DETF of adverse eligibility determinations. The agencies (DETF and the Personnel Commission) enforce different statutes and DETF cannot address complainant's Fair Employment Act contentions. *Phillips v. DETF & DHSS*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; affirmed by Dane County Circuit Court, *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92

The 60 day time limit for filing a whistleblower complaint is not tolled by the filing of a grievance of the same transaction. *Cleveland v. DHSS*, 86-0104-PC-ER, 7/8/87

An informal or contractual review procedure need not be exhausted prior to filing a complaint with the Commission and, in fact, a delay in filing a complaint in order to

exhaust such procedures may cause the FEA complaint to be untimely. *Teikari v. UW-Green Bay*, 87-0001-PC-ER, 4/29/87

The 300 day time limit is not tolled by the filing of a grievance of the same transaction. *King v. DHSS*, 86-0085-PC-ER, 8/6/86

A request for reconsideration of an earlier decision normally does not toll the running of the period of limitations. A complaint arising from a tenure denial decision was not timely where it was filed more than 300 days after the decision even though the complainant had requested reconsideration of the decision within the 300 day time limit. The reconsideration request bad been denied. *Dahl v. UW-Milwaukee*, 84-0205-PC-ER, 11/7/85

The 300 day period of limitations for allegations of discrimination is not tolled by the filing of a contractual grievance, citing *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 299, 13FEP Cases 1813 (1976), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58, 7FEP Cases 81 (1974). *Hoepner v. DHSS*, 79-191-PC, 6/30/81

The Commission's jurisdiction under subch. II, ch. 111, Stats., is not superseded by §111.93(3), Stats., unless the provisions in the bargaining agreement that are in question related to wages, hours and conditions of employment. That exception was found not to have been met where agreement provided that employes under the agreement were to be covered by the State Fair Employment Act, and, therefore, exclusive jurisdiction to administer the Act for covered employes was not conferred on an arbitrator acting under the agreement. *Jones v. DNR*, 78-PC-ER-12, 11/8/79

706.01 Generally

Respondent's motion to dismiss the complaint as untimely filed was granted as to claims relating to conditions of employment and the decision to deny tenure to complainant. Complainant's last day of employment was May 24, 1997, which was more than 300 days before she filed her complaint with the Commission. Complainant offered no rationale for concluding that any allegedly discriminatory

term or condition of employment extended beyond the date she was employed by respondent. *Hedrich v. UW (Whitewater)*, 98-0165-PC-ER, 2/10/99, affirmed Waukesha County Circuit Court, 99-CV-0500, 12/17/99

Respondent's motion to dismiss the complaint as untimely filed related to the respondent's decision to deny tenure to complainant. Complainant's last day of employment was May 24, 1997, which was more than 300 days before she filed her complaint with the Commission. A reasonable person similarly situated to complainant would have concluded, on receipt of a memo from the Chancellor on June 28, 1996, that an official and final decision on her application for tenure had been made. Complainant's subsequent efforts to have this decision reviewed were in the nature of requests for reconsideration or for collateral review and did not justify the tolling of the statue of limitations. *Hedrich v. UW (Whitewater)*, 98-0165-PC-ER, 2/10/99, affirmed Waukesha County Circuit Court, 99-CV-0500, 12/17/99

Complainant is charged with receipt of a written notice of his discharge when he actually received it, rather than the later date of when he opened the envelope. *Magel v. UW-Madison*, 98-0167-PC-ER, 1/27/99

Complainant's whistleblower retaliation claim, filed in July of 1998 and arising from personnel actions leading up to her resignation in September of 1997, was untimely. *Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98

Complainant's claims under the whistleblower law were untimely filed because they related to events occurring more than 60 days before she filed her complainant, the three actions were discrete events not susceptible to application of a continuing violation theory and complainant became aware of the events at the time they occurred. The fact that complainant may not have formed a belief until later that they were retaliatory did not operate to toll the 60-day filing period, citing *Vander Zanden v. DILHR*, 87-0063-PC-ER, 1/11/91. *Meyer v. UW-Madison*, 98-0103-PC-ER, 10/21/98

It is complainant's burden of proof to demonstrate that the allegations raised in his complaint were timely filed. When analyzing this question in the context of respondent's motion to dismiss, it was appropriate to construe the

allegations raised in the complaint in a light most favorable to complainant. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Family/medical leave act allegations filed in 1998 arising from complainant's performance evaluation and subsequent lay-off in 1995 were untimely. The question raised was whether a person similarly situated to complainant with a reasonably prudent regard for his or her rights would have made the inquiry necessary to determine whether his or her rights provided by the FMLA were violated. *Sheskey v. DER*, 98-0054-PC-ER, 6/3/98; rehearing denied, 7/22/98; affirmed by Dane County Circuit Court, 98-CV-2196, 4/27/99

Filing a claim with another entity, albeit a state or federal agency, does not constitute filing with the Personnel Commission. The Commission declined to recognize complainant's earlier filing with the Equal Rights Division as timely on either the basis of "good faith" or "share agreements," citing *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/97. *Swenby v. UWHCB*, 98-0012-PC-ER, 5/20/98

Complainant has the burden to show that the allegations in her charge were timely filed and where she provided no dates in regard to certain allegations, and no dates were apparent from the information provided by the parties, those allegations were untimely. *Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98

The 300 day filing requirement is in the nature of a state of limitations and, as a result, is subject to equitable tolling. The burden of establishing facts sufficient to justify tolling of the filing period is on the complainant. *Acoff v. UWHCB*, 97-0159-PC-ER, 1/14/98

Mere unawareness of the legal requirements for filing a complaint is insufficient to toll the filing period. Complainant did not claim that respondent mislead him regarding those requirements. Therefore, the complaint, filed more than 300 days after the final act of alleged discrimination, was untimely. *Acoff v. UWHCB*, 97-0159-PC-ER, 1/14/98

Where complainant merely contended that his health had begun to fail and caused him problems that kept him from filing a complaint, he failed to establish that he was incapacitated and unable to file a complaint. Therefore, the

complaint, filed more than 300 days after the final act of alleged discrimination, was untimely. *Acoff v. UWHCB*, 97-0159-PC-ER, 1/14/98

Complainant's claims were dismissed as untimely filed where she failed to cure a technical defect as directed by the Commission in a previous ruling. In the earlier ruling, complainant was permitted to amend her complaint by filing a properly signed, verified and notarized statement as required under §PC 2.02(2), Wis. Adm. Code. Instead of complainant curing the technical defect by verifying the information herself, her attorney provided the information under his own signature, which was the same defect addressed in the previous ruling. Because complainant had not taken advantage of the opportunity previously granted her to cure the technical defect, there was no allegation of discrimination during the 300 day period prior to the filing of her complaint and her complaint, therefore, was untimely. *Reinhold v. Office of the Columbia County District Attorney*, 95-0086-PC-ER, 11/7/97; rehearing denied, 12/17/97; affirmed by Dane County Circuit Court, *Reinhold v. Office of the Columbia District Attorney & Wis. Pers. Comm.*, 98-CV-0076, 7/8/98

It is complainant's burden of proof to demonstrate that the allegations raised in her complaint were timely filed, citing *Vander Zanden v. DILHR*, 87-0063-PC-ER, 1/11/91. In analyzing this question it is appropriate to construe the allegations raised in the complaint in a light most favorable to complainant, citing *Tafelski v. UW-Superior*, 95-0127-PC-ER, 3/22/96. *Reinhold v. Office of the Columbia County District Attorney*, 95-0086-PC-ER, 9/16/97

The Fair Employment Act's 300 day filing period is to be measured from the date of notice of termination, not the effective date of the termination, citing *Hilmes v. DILHR*, 147 Wis. 2d 48, 433 N.W.2d 251 (Ct. App., 1988). *Haney v. DOT*, 94-0165-PC-ER, 9/24/97

Because the actions of the Personnel Commission, in allegedly giving complainant incorrect information about the operative date for measuring the time period for filing a complaint, were not attributable to the respondent agency, equitable estoppel did not lie as to the respondent and the 300 day filing period was not equitable tolled. *Haney v. DOT*, 94-0165-PC-ER, 9/24/97

The 30 day period for filing a claim of occupational safety and health retaliation commenced when a final decision to terminate complainant's employment had been made and communicated to complainant, rather than when complainant was notified of a meeting for complainant to present information in regard to respondent's expressed intent to terminate his employment for medical reasons. *Leinweber v. DOC*, 97-0104-PC-ER, 8/14/97

Filing of a complaint is based on when the Commission receives a document and filing a complaint with another entity, such as the Equal Rights Division of the Department of Industry, Labor and Human Relations, is insufficient. *Radtke v. DHFS*, 97-0068-PC-ER, 6/19/97

Where complainant provided no evidence that her supervisor continued his vigilance as to her whereabouts past complainant's resignation date which was more than 300 days before she filed her complaint of discrimination, and where complainant provided no evidence that her supervisor used, within the 300 day actionable period, information obtained from his vigilance, complainant failed to show that any discriminatory action occurred within the actionable period. Complainant had merely made a bald assertion that discrimination had continued until her last day of work which was within the actionable period. *Tafelski v. UW (Superior)*, 95-0127-PC-ER, 6/4/97

An employe's lack of knowledge about his/her rights does not generally operate to excuse the late filing of a complaint. *Holmes v. UW-Madison*, 97-0037-PC-ER, 4/24/97

Where complainant was informed in May of 1996 that his employment contract would not be renewed resulting in the termination of his employment the following February, his claim of retaliation due to occupational safety and health activities, filed in March of 1997 was untimely. No tolling of the 30 day filing requirement arose from a failure to comply with the occupational safety posting requirements of §101.055(7)(d), Stats., where complainant had consulted with an attorney in mid-August of 1996 and was informed by the attorney to contact the Personnel Commission. *Holmes v. UW-Madison*, 97-0037-PC-ER, 4/24/97

Complainant's allegation relating to respondent's failure to fill a position into which complainant had sought to transfer

was untimely where complainant knew in April of 1992 that respondent had denied his transfer request and/or that respondent had decided not to fill the position and complainant did not file his complaint until mid-March of 1993. Complainant's contention that he had been subjected to a pattern of discrimination since 1988 was insufficient to toll the limitations period for a claim arising from a discrete event such as the denial of a transfer request. *La Rose v. UW-Milwaukee*, 94-0125-PC-ER, 4/2/97

Complainant's allegation relating to respondent's decision denying his request to be reassigned to another position was untimely where complainant knew in March of 1993 that respondent had denied his request and complainant did not file his complaint until mid-March of 1993. Complainant's contention that he had been subjected to a pattern of discrimination since 1988 was insufficient to toll the limitations period for a claim arising from a discrete event such as the denial of a reassignment request. *La Rose v. UW-Milwaukee*, 94-0125-PC-ER, 4/2/97

The filing date of a complaint is based on the date the Commission received the complaint, rather than the date it was filed with the Equal Rights Division. *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97

A perfected complaint, which included the complainant's notarized signature, related back to the date the complaint was initially filed with the Commission even though the initial complaint was sworn to by complainant's attorney. *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97

Complainant made a cognizable claim when she alleged that respondent failed to adequately discipline another employe who had allegedly harassed the complainant, even though complainant had, more than 300 days before she filed her complaint of discrimination with the Commission, transferred out of the institution employing the alleged harasser. *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97

Complainant's FMLA claim arising from the decision to terminate her employment on December 18 was untimely where she filed her complaint on February 8. However, where complainant had an outstanding leave request at the time her employment was terminated and where she stated she received the written denial of her request on January 10 or 11, her February 8th complaint was timely as to a claim

that the denial of the leave request violated the FMLA. The Commission proceeded to address the question of mootness. *Follett v. DHSS*, 95-0017-PC-ER, 7/5/96

The doctrine of equitable estoppel only comes into play in the statute of limitations tolling context if the respondent takes active steps to prevent the complainant from suing in time. Alleged misinformation provided by the Commission during a telephone conversation was not attributable to respondent. *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96

The burden of establishing facts sufficient to justify tolling the filing period is on the complainant. *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96

Where complainant sent the Commission a copy of a letter she wrote to a State Senator, the Commission followed up with a telephone call and a confirming letter which referenced complainant's intent that the letter be treated as a whistleblower disclosure and provided her a further opportunity to ask questions, the Commission rejected complainant's later contention that the letter should have been considered a claim of age discrimination. *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96

A copy of complainant's charge of age discrimination which complainant had filed with the Equal Rights Division and the Equal Employment Opportunities Commission was not filed with the Commission until it was received at the Commission's office, citing §PC 1.02(10), Wis. Adm. Code. There is no authority for interpreting the filing of a complaint with one of the agencies as a filing with the other. *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96

Complainant did not suffer from a mental incapacity that would toll the statute of limitations for a period of years where she claimed her handicaps included post-traumatic stress disorder and anxiety attacks and was on medical leave for approximately eight months, but she then returned to work, she was able to carry out an investigation of various incidents as they occurred and she contacted a lawyer at that time. In analyzing the timeliness of the complainant's complaint, the standard of "a similarly situated person with a reasonably prudent regard for his or her rights" must be applied. *Masko v. DHSS*, 95-0096-PC-ER, 4/4/96

Lack of knowledge of the law does not toll the running of a statute of limitations, citing *Gillett v. DHSS*,

89-0070-PC-ER, 8/24/89. *Masko v. DHSS*, 95-0096-PC-ER, 4/4/96

Where complainant had failed to provide dates for certain alleged occurrences despite a motion to dismiss the complaint for untimely filing, the failure to provide the dates was fatal to those claims. *Tafelski v. UW (Superior)*, 95-0127-PC-ER, 3/22/96

The Commission recognizes both fraudulent concealment (also referred to as equitable estoppel) and equitable tolling as bases for tolling the statute of limitations, as those doctrines are explained in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 54 FEP Cases 961 (7th Cir. 1990). Equitable estoppel is where respondent takes active steps to prevent complainant from suing in time. Equitable tolling permits a complainant to avoid the bar of a statute of limitations if, despite all due diligence, he is unable to obtain vital information bearing on the existence of his claim. *Tafelski v. UW (Superior)*, 95-0127-PC-ER, 3/22/96

Complainant's claim arising from a notice that her position was at risk of layoff was filed prematurely. The risk notice did not adversely affect complainant's employment status nor had respondent determined that complainant would be laid off. *Gullickson v. DHSS*, 95-0113-PC-ER, 12/20/95

Where an employe of respondent, in a letter stated that complainant's request for waiver of the remainder of her probation was still pending before another employe, and complainant stated she never received a decision from the second employe, complainant's complaint filed within 60 days of the date of the letter was timely under the whistleblower law with respect to the alleged failure to waive the final portion of complainant's probationary period. *Duran v. DOC*, 94-0005-PC-ER, 10/4/94

A complaint filed more than 300 days after the complainant received notice of the end of her employment relationship was untimely as to that decision, citing *Hilmes v. DILHR*, 147 Wis. 2d 48, 433 N.W.2d 251 (Ct. App., 1988), even though the consequence of that decision may not have been fully realized by complainant until a date within the 300 day period. Federal case rulings regarding the timely filing of claims under Title VII of the Civil Rights Act of 1964 did not control. *Womack v. UW-Madison*, 94-0009-PC-ER, 7/25/94

A complaint was found to have been untimely filed where there was no evidence in the Commission's files of ever having received the complaint around the time it was allegedly filed, complainant alleged he had mailed the complaint to the Commission by registered mail and also delivered it by hand several days later when he had heard nothing from the Commission. Complainant was unable to produce any of the registered mail receipts from the postal service, and, although he produced his own handwritten note memorializing his alleged personal delivery of a copy of the complaint to the Commission, it was determined from his work records that he could not have delivered the letter on the date stated in the note. *Paul v. DOC*, 91-0074-PC-ER, 8/23/93

Complainant's claims were untimely where his employment relationship ended more than 300 days prior to the filing of his complaint. Complainant's allegation that his fears of further harassment or attempts on his life continued into the 300 day filing period did not toll the limitations period. The employer is not liable for a former employe's fears of what might, but does not, recur. *Kuri v. UW-Stevens Point*, 91-0141-PC-ER, 4/30/93

The period for filing a Family/Medical Leave Act complaint relating to the alleged failure to reinstate to the former position after taking family leave commences when the employe returns to work, rather than when the employe completes the period of family leave. Prior to returning to work from family leave, the complainant had been placed on administrative leave due to his conduct during the period of his family leave. *Boinski v. UW-Milwaukee*, 92-0233-PC-ER, 4/23/93

Complainant's charge of discrimination was not timely filed where she admitted she was aware of all relevant facts involving the alleged discrimination at the time of her retirement and she retired more than 300 days prior to the date she filed her complaint. Complainant was subsequently reemployed on an LTE basis, but she did not allege that the discrimination continued during this brief period. *Sindorf v. UW-Stevens Pt*, 92-0105-PC-ER, 4/23/93

Fear of retaliation against a co-worker does not toll the filing period for filing a complaint of discrimination. *Sindorf v. UW-Stevens Pt*, 92-0105-PC-ER, 4/23/93

The 300 day filing period under the Fair Employment Act is a statute of limitations rather than a statute concerning subject matter jurisdiction. *Wright v. DOT*, 90-0012-PC-ER, 2/25/93

The burden of establishing facts sufficient to justify tolling of the filing period is on the complainant. *Wright v. DOT*, 90-0012-PC-ER, 2/25/93

Respondent's motion to dismiss complainant's complaint as untimely filed was denied because the statutory time limit for filing was equitably tolled based upon complainant's affidavit that respondent had misrepresented to complainant its intent to remedy an unlawful hiring practice. Complainant averred that respondent informed him there had been irregularities in the hiring process, that it would find him a temporary position until something else opened up and that it would be unnecessary for complainant to file a formal complaint in order to obtain relief. *Wright v. DOT*, 90-0012-PC-ER, 2/25/93

Lack of counsel at the time of termination and concern about potential retaliation are inadequate to toll the time period for filing. *Christensen v. UW-Stevens Point*, 91-0151-PC-ER, 1/24/92

The posting requirement in the Family and Medical Leave Act refers to posting the required notice in "one or more" conspicuous places and does not require the employer to post the notice in every location in which employment-related notices are posted. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

A posting of a Family and Medical Leave Act notice on a bulletin board in the entrance area to the room containing the top administrative staff of the complainant's bureau, in a visible area and on a bulletin board which was used for posting most employment-related notices of general interest and application to bureau employes, constituted a posting in a "conspicuous place" as required by the FMLA. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent's posting of a Family and Medical Leave Act

notice did not meet statutory requirements where the notice document was buried under 3 pages of other documents. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

As a general proposition, discussions with Commission staff do not preserve the rights of a complainant in terms of timely filing an appeal or a complaint. *Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91

Where the complainant alleged that she had suffered emotional breakdowns in 1981 and in 1986 and that she was incompetent but failed to provide details as to the specific nature and duration of the condition and admitted she had contacted the Commission in September of 1986 for a complaint form and inspected her personnel file in August of 1987, the Commission concluded that the filing period should not be tolled. The complaint filed in December of 1987 was dismissed. *Kirk v. DILHR*, 87-0177-PC-ER, 7/11/91

Where the complainant merely contended that he was "repeatedly denied transfers throughout 1988," he failed to sustain his burden of establishing that his amended complaint, which was filed on December 28, 1988, was timely as to that contention. *Vander Zanden v. DILHR*, 87-0063-PC-ER, 1/11/91; rehearing denied, 2/26/91

A complaint arising from the denial of tenure was untimely where it was filed over 300 days from the date that a reasonable person would have been aware that there had been an official and final decision regarding the complainant's status by the respondent. The decision was "official and final" when the time for further proceedings for internal review had expired. *Franz v. UW-Oshkosh*, 86-0110-PC-ER, 8/24/89

In the absence of a specific statutory exception, once the statute has begun to run, it cannot be tolled by a later incompetency. *Franz v. UW-Oshkosh*, 86-0110-PC-ER, 8/24/89

Lack of knowledge of the law does not toll the running of a statute of limitations. *Gillett v. DHSS*, 89-0070-PC-ER, 8/24/89

The Commission's decision in *Latimer v. UW-Oshkosh*, 84-0034-PC-ER, 11/21/84, was effectively overruled by *Hilmes v. DILHR*, 147 Wis. 2d 48, 433 N.W. 2d 251 (Court of Appeals, 1988). In *Hilmes*, the court held that in construing the 300 day time limit, the word "occurred" means the date of notice of the alleged discriminatory act. *Harris v. UW-La Crosse*, 87-0178-PC-ER, 11/23/88

The Commission applied the reasonable person standard to determine the date of notice under the Wisconsin Fair Employment Act. *Harris v. UW-La Crosse*, 87-0178-PC-ER, 11/23/88

In a complaint arising from the nonrenewal of a tenure track probationary faculty member, a reasonable person in complainant's position would not have been put on notice of respondent's official and final position by a letter from the two-member retention committee of the respondent's Department of Marketing, where the administrative code provides for reconsiderations and appeals of nonrenewal decisions and, at §UWS 3.08(3), Wis. Admin. Code, provides that "[t]he decision of the chancellor shall be the final decision." Respondent's motion to dismiss was denied where the complainant had appealed the non-renewal decision internally but the chancellor had never rendered a decision due to the disability of complainant. *Harris v. UW-La Crosse*, 87-0178-PC-ER, 11/23/88

Respondent had not waived its objections to the timeliness of amendments to a complaint where, after the amendment was filed, the respondent objected to the amendment "unless more information is provided which delineates the exact acts of discrimination", where one month later the respondent did not raise any jurisdictional issues and agreed to an issue for hearing which arguably was broad enough to include some claims added by the amendment, and where three months later and once complainant specified the actions included within the scope of his amendment, respondent moved to dismiss the new claims as untimely. *Pugh v. DNR*, 86-0059-PC-ER, 6/10/88

Because the Commission's rules do not require the filing of an answer, the failure to assert an affirmative defense where no answer was filed cannot constitute a waiver as to raising the defense later in the proceedings. *Pugh v. DNR*, 86-0059-PC-ER, 6/10/88

Complainant had been charged with second degree sexual assault and was notified by letter dated May 30, 1985, that he was suspended from his position without pay pending the outcome of the criminal charge; that if convicted, he would be discharged effective May 30th; but that if he was totally cleared he would be restored with back pay for the period of the suspension. Because the suspension without pay was in fact being imposed on the complainant starting May 30th, the 300 day period for filing a complaint regarding the suspension began to run on the same date. However, as to a complaint regarding discharge, the decision to discharge the complainant was not made until on or after October 4, 1985, when complainant plead guilty to a charge of third degree sexual assault. Complainant was notified by letter, dated October 21st, that he was discharged effective May 30th. As it related to discharge, the May 30th letter only notified the complainant that discharge was contingent upon subsequent conviction. Therefore, the 300 day period for filing a complaint regarding the discharge did not commence until the October 21st notification of that decision. *Medina v. DHSS*, 86-0076-PC-ER, 2/11/88

Where there was no evidence that complainant had formed a belief before January 10, 1985, that a position occupied by another employe was the recreation of the position from which complainant had been laid off in 1983, his charge of discrimination filed within 300 days of June 10th was timely. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 12/30/86

The statute of limitations begins to run from the date of the discriminatory transaction, not from the date the complainant decides the transaction was illegal or discriminatory. *Schroeder v. DHSS & DER*, 85-0036-PC-ER, 11/12/86

The 300 day time limit is not tolled by the filing of a grievance of the same transaction. *King v. DHSS*, 86-0085-PC-ER, 8/6/86

As a statute of limitations rather than a jurisdictional requirement, the 300 day time limit in §111.39(l), Stats., is subject to equitable tolling. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 1/24/86

The complaint was dismissed as untimely where it was filed more than 300 days after the end of complainant's

employment, despite complainant's contention that the administrative procedures are unfair because they fail to set a time limit in which the matter must be scheduled for hearing, and that the additional 130 days time period failed to prejudice the respondent. The Commission found that the respondent had not waived the timeliness defense where respondent filed its motion to dismiss prior to the investigation. The Commission also concluded that it lacked the power to rule on complainant's argument that the 300 day limit is unconstitutional because it infringes on due process rights. *Kaufman v. UW (Eau Claire)*, 85-0010-PC-ER, 1/9/86

The complainant was deemed to have received notice of his probationary termination on October 14th where the termination letter was delivered to complainant's wife on Friday, October 11th and complainant was out of town and did not look at it until he returned home on October 14th. *Fliehr v. DOA*, 85-0155-PC-ER, 12/17/85

Complaint was timely where it was filed within 300 days of the date complainant was notified of the decision to select someone else to fill a vacancy even though it was apparently filed more than 300 days after the date the selection decision was made. *Ames v. UW-Milwaukee*, 85-0113-PC-ER, 11/7/85

In a complaint arising from the denial of tenure, the act of discrimination may be said to have occurred when tenure was denied and not when the seven year probationary service period expired. This does not parallel a discharge case, where the decision is made to terminate employment, effective at a later date, citing *Delaware* State *College v. Ricks,* 449 U.S. 250 (1980) *Dahl v. UW-Milwaukee*, 84-0205-PC-ER, 11/7/85

A request for reconsideration of an earlier decision normally does not toll the running of the period of limitations. A complaint arising from a tenure denial decision was not timely where it was filed more than 300 days after the decision even though the complainant had requested reconsideration of the decision within the 300 day time limit. The reconsideration request had been denied. *Dahl v. UW-Milwaukee*, 84-0205-PC-ER, 11/7/85

Where complainant alleged discrimination for failure to restore seniority and classification upon his reinstatement to

state service in 1981 and where in 1985 complainant was re-informed as to the basis for the 1981 decision establishing his seniority and classification, the Commission held that the complaint had to be filed within 300 days of the 1981 decision rather than within 300 days of the 1985 reaffirmation. *Biddle v. DILHR & DHSS*, 85-0118-PC-ER, 9/27/85

Complaint was timely where complainant was a probationary faculty member, employed under successive academic year contracts from 1977 to June 6, 1983, complainant received notice of non-renewal on May 18, 1982 and the complaint was filed within 300 days of the June 6, 1983. The Commission applied *Les Moise, Inc. v. Rossignol Ski Co., Inc.*, 116 Wis 2d 268 (1983) explicitly rejecting *Chardon v. Fernandez*, 454 U.S. 6 (1981) in concluding that period of limitations began to run on the cessation of complainant's employment (June 6th) rather than on the date he was notified he would not be offered employment during the next academic year. *Latimer v. UW-Oshkosh*, 84-0034-PC-ER, 11/21/84

The charge of discrimination alleging constructive discharge on the basis of handicap was timely where the complainant was granted a leave of absence without pay effective January 29, 1979, which was extended yearly until it expired by operation of law on January 29, 1982, the complainant did not return to work, the respondent took no action under §Pers 21.03, Wis. Adm. Code, to terminate or to treat the employe as having resigned, the employe ultimately submitted a resignation (allegedly forced) June 14, 1982, after he was not allowed to return to work, and the charge of discrimination was filed on April 8, 1983, 298 days thereafter, since the complainant's employment status with DOA would not be considered terminated in the context of the timeliness issue until June 14, 1982. *Burnard v. DOA*, 83-0040-PC-ER, 5/25/83

The 300 day period of limitations for allegations of discrimination is not tolled by the filing of a contractual grievance, citing *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 299, 13FEP Cases 1813 (1976), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58, 7FEP Cases 81 (19774). *Hoepner v. DHSS*, 79-191-PC, 6/30/81

Where the complainant had transferred from DILHR to

LIRC on July 3, 1977, her complaint alleging DILHR paid her lower wages than male attorneys, which was filed on September 7, 1978, was untimely, even on a continuing violation theory, because it was filed more than 300 days after her employment relationship with DILHR terminated. *Jacobson v. DILHR & LIRC*, 78-PC-ER-49, 4/23/81

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 776 through 776.01

[Previous material] [Next material]

---

776 Honesty testing device

776.01 Generally

Requiring an applicant to certify that his answers to an exam are true does not constitute the administration of an honesty testing device as defined by the FEA. *McCoic v. Wis. Lottery*, 88-0157-PC-ER, 12/17/92

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 706.03 through 710

[Previous material] [Next material]

706.03 Realization of discriminatory/retaliatory nature of action

The "reasonably prudent" standard is the correct standard to apply in determining the timeliness of a complaint under §103.10(12)(b), Stats. *Sheskey v. Wis. Pers. Comm. & DER*, Dane County Circuit Court, 98-CV-2196, 4/27/99

The "reasonably prudent" standard requires that a complainant file a claim when the facts that would support a charge of discrimination were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff. This language is simply another way of stating that the complainant must file a claim when he or she knows or should have reasonably known of the violation. *Sheskey v. Wis. Pers. Comm. & DER*, Dane County Circuit Court, 98-CV-2196, 4/27/99

Complainant should have inquired about his rights under the FMLA after the following alleged violations occurring in 1994 and 1995: (1) An alleged inappropriate identification on the evaluation of complainant's use of family leave; (2) alleged misinformation supplied by respondent regarding the use of vacation and sick days during his family leave; (3) an alleged change in work assignments; (4) an alleged inappropriate lay off procedure. As a person with a reasonably prudent regard for his rights, complainant should have investigated into his recall rights well before February of 1998. Respondent's alleged retaliation by not recalling him from lay off after August of 1995 was untimely. *Sheskey v. Wis. Pers. Comm. & DER*, Dane County Circuit Court, 98-CV-2196, 4/27/99

Complainant's opinion, held by July 10, 1996, that he was being harassed through misuse of the disciplinary system, triggered his duty to file a complaint, whether complainant knew the harassment was due the Fair Employment Act retaliation or whistleblower retaliation. Those whistleblower claims arising from adverse actions that occurred more than 60 days before he filed his complaint in January of 1997 were, therefore, untimely. *Prochnow v. UW (La Crosse)*, 97-0008-PC-ER, 8/26/98

Family/medical leave act allegations filed in 1998 arising from complainant's performance evaluation and subsequent lay-off in 1995 were untimely. The question raised was whether a person similarly situated to complainant with a reasonably prudent regard for his or her rights would have made the inquiry necessary to determine whether his or her rights provided by the FMLA were violated. *Sheskey v. DER*, 98-0054-PC-ER, 6/3/98; rehearing denied, 7/22/98; affirmed by Dane County Circuit Court, *Sheskey v. Wis. Pers. Comm. & DER*, 98-CV-2196, 4/27/99

Where the entries that gave rise to complainant's charge were all apparent on the face of the performance evaluation when complainant signed it in 1995, complainant's allegation that respondent later crossed out a notation and postdated the changes and that complainant did not discover the changes until he saw his evaluation again in 1998 was not a basis for considering the 1998 complaint to be timely. *Sheskey v. DER*, 98-0054-PC-ER, 6/3/98; rehearing denied, 7/22/98; affirmed by Dane County Circuit Court, *Sheskey v. Wis. Pers. Comm. & DER*, 98-CV-2196, 4/27/99

Normally, when a person is faced with a discrete personnel transaction, he or she has a responsibility to make any necessary inquiry to determine whether the transaction was illegal. *Sheskey v. DER*, 98-0054-PC-ER, 6/3/98; rehearing denied, 7/22/98; affirmed by Dane County Circuit Court, *Sheskey v. Wis. Pers. Comm. & DER*, 98-CV-2196, 4/27/99

Where complainant stated he had formed the opinion he was being subjected to a hostile environment prior to his layoff in 1995, the alleged denial of complainant's recall rights more than 30 days before complainant filed his FMLA claim in 1998 was untimely. A person with a reasonably prudent regard for his or her rights would not, under these circumstances, have waited until February of 1998 to make

an inquiry relative to his recall rights. *Sheskey v. DER*, 98-0054-PC-ER, 6/3/98; rehearing denied, 7/22/98; affirmed by Dane County Circuit Court, *Sheskey v. Wis. Pers. Comm. & DER*, 98-CV-2196, 4/27/99

Even if notes discovered within 300 days of the filing of a complaint fell into the category of the "smoking gun" category of proof, the actual discovery of the notes by complainant did not start the filing period where facts which would support a charge of discrimination would have been apparent earlier to a similarly situated person with a reasonably prudent regard for her rights. *Masko v. DHSS*, 95-0096-PC-ER, 4/4/96

Where complainant was aware from management's disclosure on October 27 that budget cuts could impact on the structure of her position, and where complainant had already formed an opinion that her immediate supervisor had discriminated against her on the basis of sex and handicap, a person with a reasonably prudent regard for her rights in complainant's situation would have made inquiry on or after October 27th to determine if management's explanation was worthy of credence and, if not, whether the decision might be an extension of the discrimination by the supervisor. *Tafelski v. UW (Superior)*, 95-0127-PC-ER, 3/22/96

The Commission recognizes both the fraudulent concealment or equitable estoppel theory as a basis for tolling the statute of limitations, i.e. where respondent takes active steps to prevent complainant from suing in time, as well as the unavailable information or equitable tolling theory, i.e. where a complainant, despite all due diligence, is unable to obtain vital information bearing on the existence of his claim. *Tafelski v. UW (Superior)*, 95-0127-PC-ER, 3/22/96

Where complainant's handicap claims were premised upon allegedly different treatment of complainant in comparison to her co-workers, complainant was aware of this difference in treatment as it was occurring, additional information obtained in 1994 when complainant first saw notes of a meeting held on 1990 between her supervisor and two of her co-workers was insufficient to make her complaint, filed within 300 days of when received the notes in 1994, timely. Events occurring more than 300 days prior to the date she filed her complaint included discipline and other

instances where complainant was able to directly compare respondent's treatment of her to respondent's treatment of her co-workers. *Masko v. DHSS*, 95-0096-PC-ER, 2/15/96; rehearing denied, 4/4/96

A reasonable person would have interpreted supervisor's overtures as sexual in nature and would have been aware of the facts necessary to support complainant's theory of sexual harassment in November of 1989, i.e., more than 300 days prior to filing of complaint. Since complainant had alleged a continuing violation which included actions of his supervisor occurring within the 300-day time period which were arguably acts of sexual harassment, motion to dismiss for untimely filing denied. *Getsinger v. UW-Stevens Point*, 91-0140-PC-ER, 4/30/93

Based upon the availability of the relevant information to complainant in 1989, and upon complainant's evident belief during 1989 that something other than program considerations had prompted the subject non-renewal decision and that this something was cognizable as an equal rights matter, the filing of the complaint in 1991 was untimely. *Christensen v. UW-Stevens Point*, 91-0151-PC-ER, 11/13/92

A complaint filed 20 months after complainant was informed that someone else had been hired to fill a vacancy was not timely where there was no allegation that respondent actively sought to mislead the complainant. A reasonably prudent person who has been denied a job and who has any interest in keeping open the possibility of pursuing his or her right to challenge the selection decision should make inquiry at the time of learning that someone else was appointed. *Zeuner v. DRL*, 91-0088-PC-ER, 12/23/91

Where the complainant believed she was a victim of pervasive discriminatory activity, which included performance evaluations and which culminated in her discharge and where the complainant alleged she contacted the Commission for a complaint form in September of 1986, her complaint filed in December of 1987 was untimely as to all events leading up to and including her discharge in November of 1986 as well as a performance evaluation of which the complainant was not aware until she examined her personnel file in August of 1987. *Kirk v. DILHR*, 87-0177-PC-ER, 7/11/91

Where the earliest possible time that complainant, as a person with a reasonably prudent regard for her rights, would have been aware of the facts that would give rise to a complaint of discrimination was no earlier than when other employes were reclassified, allegedly in contravention of the policy that had been applied to complainant, a complaint filed within 300 days thereafter must be considered timely. *Piotrowski v. DILHR & DER*, 90-0396-PC, 5/1/91

The 60 day limitation period for filing a whistleblower claim begins to run at the point the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory threat, whichever was last, not at the point the employe believes or concludes the action is retaliatory. *Vander Zanden v. DILHR*, 87-0063-PC-ER, 1/11/91; rehearing denied, 2/26/91

A complaint relating to the manner in which equity awards were made and filed more than 300 days after the last equity award was granted, was timely where the gravamen of the discrimination charge was that younger, less senior employes in the same classification were being paid at a higher rate as a result of equity awards designed to deal with specific salary compression problems which affected them and the complainant had no reason to have been aware of the transactions affecting his co-workers' salaries. Therefore, a person in complainant's situation with a reasonably prudent regard for his or her rights could not be expected to make an inquiry about the salary levels of his co-workers. The complaint, filed within 300 days of when complainant learned in a casual conversation with a co-worker that the co-worker's salary was higher than complainant's, was timely. *Rudie v. DHSS & DER*, 87-0131-PC-ER, 9/19/90

A complaint, filed in 1989 alleging respondent DOT discriminated against the complainant by informing a potential employer in July of 1987 that the complainant had filed a discrimination claim against the State after her discharge in 1986, was untimely where in October of 1987 the complainant had filed a notice of claim with the Attorney General charging the respondent with defamation, interference with employment opportunity and interference with contract and where that claim arose from the July conduct. *Bruns v. DOT*, 89-0058-PC-ER, 2/7/90

A complaint was not timely where 1) complainant returned

to work as a security officer in 1984 after recuperating from a heart attack, 2) on several occasions over the next two years complainant requested a change from rotating shifts to permanent shifts for all security officers, 3) those requests were not granted, 4) complainant left the security department in 1986, 5) complainant learned in August of 1987 that other officers with job-related work limitations were given special accommodations by placing them on suitable permanent shifts rather than on shift rotation and 6) complainant filed his complainant in February of 1988. *Ludka v. UW-Stout*, 88-0026-PC-ER, 4/28/89

A complaint, filed in 1988 and arising from a decision in 1986 not to permit the complainant to return to work with light duty restrictions was not timely where a person with a reasonably prudent regard for his or her rights similarly situated to the complainant would have been aware of the facts that would give rise to a charge of discrimination prior to a decision by the respondent in 1987 to permit another employe in a different classification and different vocational group and with a different condition to return to work on light duty. *Welter v. DHSS*, 88-0004-PC-ER, 2/22/89

The 300 day time limit was not avoided under a theory of equitable tolling, equitable estoppel or similar theory where complainant had filed a charge of discrimination against his supervisor in 1985, where the supervisor subsequently told the complainant that there was no money available for raises and that complainant got what everyone else was getting. The Commission concluded that a reasonably prudent person would conduct some kind of inquiry, if that were needed, to confirm or deny whether the salary transactions were proper and could not reasonably rely on the statements of the supervisor as to the basis for the salary decisions. *Kimble v. DILHR*, 87-0061-PC-ER, 2/19/88

Respondent's motion to dismiss was denied with respect to complainant's age discrimination claim arising from a layoff decision and the failure to recall him at a later date. There was no evidence for concluding that complainant had or should have formed the belief that he was discriminated against until he read an entry in the faculty/staff directory listing a person with a position name identical to the classification title of complainant's former position. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 12/30/86

A complaint, alleging discrimination through the use of

expanded certification involving promotions made in 1983 and 1984 was untimely where the complaint was not filed until March of 1986. There was no reason to assume that the complainant was not aware of or could not have become aware of all the *facts* that would have supported charges of discrimination back in 1983 and 1984 even though complainant did not reach a *conclusion* that these facts arguably gave rise to a violation of the Fair Employment Act until 1986 when he learned that a hearing examiner at the Commission had issued a proposed decision finding that certain of the state's expanded certification procedures were improper. *Gozinske v. DHSS*, 86-0038-PC-ER, 6/25/86

Respondent's motion to dismiss the occupational safety and health claim arising from a layoff decision was granted because complainant was aware or should have been aware of facts sufficient to support a claim of retaliation more than 30 days prior to the date he filed the complaint. Early in 1983, complainant had given a deposition that was detrimental to the respondent's position. One month later, respondent met with union representatives concerning eliminating complainant's job in the Theater Technician classification, his impending layoff and creating a new academic staff position that would include complainant's duties as well as other duties. The layoff decision was grieved, but sustained. Two years later, in 1985, immediately after complainant saw a listing in the faculty/staff directory for a person with the title of Theater Technician, he filed his complaint. However, respondent's motion to dismiss complainant's age claim was not granted, where complainant alleged he did not learn that a younger person had been appointed to his "reinstated" position until 1985. *Sprenger v. UW-Green Bay,* 85-0089-PC-ER, 6/18/86

The phrase "any appeal filed under this section may not be heard" in §230.44(3), Stats., applies only to appeals involving the subject matter set forth in §230.44, Stats., and not to appeals or charges of discrimination filed under §§230.45(l)(b) and 111.375(2), Stats. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 1/24/86

The 30 day time period for filing a charge of occupational safety and health retaliation and the 300 day time period for filing charges of age discrimination do not begin to run until the facts that would support a charge of discrimination or retaliation were apparent to the complainant or should have

been apparent to a person with a reasonably prudent regard for his rights similarly situated to the complainant. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 1/24/86

706.05 Continuing violation

A party is not required to file a FEA claim within 300 days of the initial accrual of a claim if the claim involves a continuing violation. *Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98

In a case where complainant was seeking a different position as an accommodation, the alleged violation was, at least arguably, a continuing violation while complainant remained employed by respondent, even though she was on a leave of absence. An employer has a continuous duty of accommodation. *Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98

Granting a motion to dismiss on timeliness grounds is inappropriate where there are facts in dispute as to whether respondent discharged its duty of accommodation during a portion of the 300 day filing period, and whether the circumstances of the case gave rise to a continuing violation. *Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98

Complainant's claims under the whistleblower law were untimely filed because they related to events occurring more than 60 days before she filed her complainant, the three actions were discrete events not susceptible to application of a continuing violation theory and complainant became aware of the events at the time they occurred. The fact that complainant may not have formed a belief until later that they were retaliatory did not operate to toll the 60-day filing period, citing *Vander Zanden v. DILHR*, 87-0063-PC-ER, 1/11/91. *Meyer v. UW-Madison*, 98-0103-PC-ER, 10/21/98

Complainant's opinion, held by July 10, 1996, that he was being harassed through misuse of the disciplinary system, triggered his duty to file a complaint, whether complainant knew the harassment was due the Fair Employment Act retaliation or whistleblower retaliation. Those whistleblower claims arising from adverse actions that occurred more than 60 days before he filed his complaint in January of 1997 were, therefore, untimely. *Prochnow v. UW (La Crosse)*, 97-0008-PC-ER, 8/26/98

A notation on complainant's evaluation that was subsequently crossed out did not give rise to a continuing violation. To the extent the notation could contribute in some way to future discrimination against complainant, this would be a subsequent damage from the notation, not a continuing violation. Similarly, altering the notation was not a continuing violation. *Sheskey v. DER*, 98-0054-PC-ER, 7/22/98; affirmed by Dane County Circuit Court, *Sheskey v. Wis. Pers. Comm. & DER*, 98-CV-2196, 4/27/99

In contending that there was a continuing course of conduct with a link to the 300 day filing period, complainant must allege a particular incident which occurred during this period and cannot rely on a general assertion that discrimination and retaliation continued into the period. *Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98

The particular incident occurring within the 300 day filing period on a continuing violation theory must be an adverse action. Complainant could not rely on respondent's decision to grant her request to work at home, where complainant did not contend that she suffered any injury as a result of this action. The Commission rejected complainant's argument that the basis for her request to work at home was a harassing environment where she was unable to cite a specific incident of discrimination or retaliation that occurred during the actionable time period. *Nelson v. DILHR*, 95-0165-PC-ER, 2/11/98

Respondent’s motion to dismiss was denied where complainant had alleged that sex harassment occurred on an ongoing basis and she had provided specific examples including examples allegedly occurring during the actionable period. However, complainant’s claim of Fair Employment Act retaliation was dismissed as untimely where complainant had failed to provide a date upon which the alleged action, a threat to fire complainant, occurred. The conclusion that the sex discrimination claim was timely did not require that the retaliation claim also be considered timely. *Reinhold v. Office of the Columbia County District Attorney & Bennett*, 95-0086-PC-ER, 9/16/97

Complainant’s allegation relating to respondent’s failure to fill a position into which complainant had sought to transfer was untimely where complainant knew in April of 1992 that respondent had denied his transfer request and/or that respondent had decided not to fill the position and

complainant did not file his complaint until mid-March of 1993. Complainant's contention that he had been subjected to a pattern of discrimination since 1988 was insufficient to toll the limitations period for a claim arising from a discrete event such as the denial of a transfer request. *La Rose v. UW-Milwaukee*, 94-0125-PC-ER, 4/2/97

Complainant's allegation relating to respondent's decision denying his request to be reassigned to another position was untimely where complainant knew in March of 1993 that respondent had denied his request and complainant did not file his complaint until mid-March of 1993. Complainant's contention that he had been subjected to a pattern of discrimination since 1988 was insufficient to toll the limitations period for a claim arising from a discrete event such as the denial of a reassignment request. *La Rose v. UW-Milwaukee*, 94-0125-PC-ER, 4/2/97

Complainant's claim of sexual harassment was untimely where all the facts which complainant advanced to support her claim were known to her more than 300 days prior to the date she filed her complaint with the Commission. *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97

A transfer decision, which occurred outside of the 300 day filing period, was a discrete event and complainant knew, at the time her transfer request was granted, all of the facts which she advanced in support of her claim that the transfer was discriminatory. Therefore, her failure to file her complaint within 300 days of the date of the transfer was fatal to her claim. *Schultz v. DOC*, 96-0122-PC-ER, 4/2/97

Complainant's allegation that respondent discriminated against her when it failed to return her manuscript to her, both while she was employed and afterward, was in the nature of a decision-making process which took place over a period of time, making it difficult to say that the alleged discrimination occurred on any one particular day to the exclusion of other days. *McDonald v. UW-Madison*, 94-0159-PC-ER, 8/5/96

Promotion and termination decisions were discrete, isolated and completed actions which had to be regarded as individual violations. Both had a degree of permanence which should have triggered complainant's awareness of and duty to assert her rights. Likewise, complainant's allegation that her laboratory supervisor became enraged

with her promotion and threatened to delay the paperwork for the promotion was a separate incident that was not susceptible to application of the continuing violation doctrine. *McDonald v. UW-Madison*, 94-0159-PC-ER, 8/5/96

The continuing violation doctrine allows an employe to get relief for an otherwise time-barred act by linking it with an action that occurred within the limitations period, citing *Selan v. Kiley*, 59 FEP Cases 775, 558 (7th Cir., 1992). There are at least three separate theories for applying the doctrine: 1) where it is difficult to pinpoint the exact violation date due to the involved decision-making practices of the employer; 2) where the claim challenges an employer's express, open policy; and 3) where the allegations are of covert discrimination evidenced only by a series of discrete acts. In analyzing the third theory for applying the doctrine, it is appropriate to consider three factors: 1) do the alleged facts involve the same type of discrimination, tending to connect them in a continuing violation; 2) are the alleged acts recurring or more in the nature of an isolated work assignment or employment decision; and 3) does the act have the degree of permanence which should trigger an employe's awareness and duty to assert his or her rights, or which should indicate to the employe that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? In applying these factors, the only act outside the actionable period which fell within the third theory of the continuing violation doctrine was the claim that complainant's supervisor checked on complainant's whereabouts. *Tafelski v. UW (Superior)*, 95-0127-PC-ER, 3/22/96

The acceptance of one discriminatory theory during the actionable period cannot be used under the continuing violation doctrine to "bootstrap" prior claims brought under an unrelated, separate discrimination theory. Allegations of handicap discrimination occurring outside of the 300 day time period could not, on a continuing violation theory, rely on a timely allegation of age discrimination. *Tafelski v. UW (Superior)*, 95-0127-PC-ER, 3/22/96

Respondent's motion to dismiss on timeliness grounds was denied without prejudice where one action identified in complainant's charge of whistleblower retaliation occurred during the relevant 60-day period prior to filing,

complainant alleged a pattern of harassment or a pattern of actions designed to achieve complainant's separation from employment and none of the alleged actions was sufficiently remote in time from its predecessor or successor to break the chain. *Kortman v. UW-Madison*, 94-0038-PC-ER, 11/17/95

A 1988 decision, described by complainant as a "demotion" and by respondent as a "reassignment," had the requisite degree of permanence to trigger complainant's duty to assert his right to file a claim of discrimination and was not appropriate for inclusion under a continuing violation theory in a complaint filed nearly 5 years later, where complainant acknowledged that the 1988 conduct was such as to generate, at the time, a conclusion, in anyone's mind, of discrimination. *LaRose v. UW-Milwaukee*, 94-0125-PC-ER, 3/31/95

Complainant's mere statement that racial harassment continued into the 300 days prior to filing her complainant was insufficient to establish a timely complaint where complainant failed to cite any incident which occurred during this period. *Womack v. UW-Madison*, 94-0009-PC-ER, 7/25/94

A period of time of more than 3 years between acts of alleged harassment "breaks the chain" and, as a result, it was held there was no continuing violation. *Chelcun v. UW-Stevens Point*, 91-0159-PC-ER, 3/9/94

Two comments, separated by two months and standing alone, did not constitute a continuing violation. *Doro v. UW-Parkside*, 92-0157-PC-ER, 12/28/93

A reasonable person would have interpreted supervisor's overtures as sexual in nature and would have been aware of the facts necessary to support complainant's theory of sexual harassment in November of 1989, i.e., more than 300 days prior to filing of complaint. Since complainant had alleged a continuing violation which included actions of his supervisor occurring within the 300-day time period which were arguably acts of sexual harassment, motion to dismiss for untimely filing denied. *Getsinger v. UW-Stevens Point*, 91-0140-PC-ER, 4/30/93

Complainant's charge of discrimination was not timely filed where she admitted she was aware of all relevant facts involving the alleged discrimination at the time of her

retirement and she retired more than 300 days prior to the date she filed her complaint. Complainant was subsequently reemployed on an LTE basis, but she did not allege that the discrimination continued during this brief period. *Sindorf v. UW-Stevens Pt*, 92-0105-PC-ER, 4/23/93

By alleging that respondent engaged in a course of conduct which largely involved stripping away his duties and not giving him any significant work over a period of several years and continuing at least until November 11, 1992, complainant alleged a continuing violation in his complaint filed later in November of 1992. *CaPaul v. UW-Extension*, 92-0225-PC-ER, 1/27/93

A continuing violation was found where the LTE hiring process being challenged was ongoing and did not include notification of nonselection for each vacancy. *Dawsey v. DHSS*, 89-0061-PC-ER, 10/29/92

Where complainant's claim of sex discrimination was based on a comparison of her rate of pay with that of a male co-worker performing identical duties and the discrepancy was based on the fact that the male employe had more seniority in the classification which in turn rested on certain distinct personnel transactions which had occurred over 10 years earlier, there was no continuing violation because in order for the respondent to defend against the complainant's current complaint, it would have to rely on the earlier personnel transactions by arguing that the current salary discrepancy was justified by them. *Herrbold v. DOC*, 91-0003-PC-ER, 5/16/91

Even though the complainant had terminated her health insurance coverage in February of 1989 and did not actually submit a bill to the respondent for reimbursement during the 300 days prior to January 22, 1990, which was when she filed her complaint of discrimination based on creed, her complaint was timely based on a continuing violation theory. Complainant made her February 1989 decision to terminate her insurance coverage when she learned of the decision in December of 1988, rejecting a request to extend group coverage to include reimbursement of Christian Science practitioner expenses. Respondent's policy was clearly established and it was reiterated to the complainant on numerous occasions, including a number of times within the 300 day period prior to the date she filed her complaint with the Commission. *Lazarus v. DETF*, 90-0014-PC-ER,

2/15/91

Where complainant alleged that respondent was paying him less than it should, that this was occurring on an ongoing basis and that respondent failed or refused to rectify the situation, the circumstances constituted a "continuing violation." *Rudie v. DHSS & DER*, 87-0131-PC-ER, 9/19/90

Where the original complaint was apparently drafted *pro se*, was filed in 1987 and alleged that complainant was being prevented from returning to a previous position, and where the proposed amended complaint alleged that in 1988 complainant had been denied transfers into unspecified positions and had been prevented from returning to his previous position, the Commission could not rule out a continuing violation and declined to deny the complainant's request for amendment of his complaint. *Vander Zanden v. DILHR*, 87-0063-PC-ER, 2/28/89

An allegation that an employe has requested and for retaliatory reasons has been denied reinstatement on certain occasions usually will not give rise to a continuing violation theory -- the alleged wrong against the employe occurs on specific occasions and is not of an ongoing nature. On the other hand, an allegation that a laid-off employe was subject to recall for a period of time and that the employer wrongfully refused to recall the employe during that period probably would amount to a continuing violation because of the ongoing nature of the alleged wrong. *Vander Zanden v. DILHR*, 87-0063-PC-ER, 2/28/89

A continuing violation theory applied to a whistleblower claim arising from a policy first announced on May 2, 1984, even though the whistleblower law did not become effective until May 11, 1984, where the policy was in effect on May 11th and was clarified in writing on May 17th. *Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88; affirmed by Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 89-1355, 1/10/90

An employer's decisions on salary increases are discrete transactions which cannot be characterized as continuing violations. *Kimble v. DILHR*, 87-0061-PC-ER, 2/19/88

A complaint relating to the February, 1983 filling of two 50% positions by someone other than the complainant was untimely where the complaint was filed more than 300 days

thereafter. The fact that in December of 1983, the other employe was permitted to take a reduction in hours, thereby permitting him to work every other weekend rather than every weekend, did not provide a basis for applying a continuing violation theory as to the February, 1983 transactions. *Boyle v. DHSS*, 84-0090-PC-ER, 2/11/88

Receipt of monthly retirement checks does not constitute a continuing violation as to complainant's claim that he was forced to retire early because of his age. The complaint, filed in April of 1987, was dismissed because it was filed nearly 17 months after the date of retirement. *Pelikan v. DNR & DETF*, 87-0043-PC-ER, 6/24/87

A continuing violation typically involves an employer's ongoing policy that affects that employe continually. *Pelikan v. DNR & DETF*, 87-0043-PC-ER, 6/24/87

A continuing violation theory was unavailable to the complainant who alleged discrimination through the use of expanded certification involving three promotions made in 1983 and 1984 and did not file his complaint until March of 1986. *Gozinske v. DHSS*, 86-0038-PC-ER, 6/25/86

The relationship between a) investigative interviews and a suspension occurring more that 300 days before the complaint was filed and b) a suspension occurring within the 300 day limit was not such as to support a continuing violation theory. A suspension is a discrete event and the complainant was in a position to file a complaint within 300 days of the first suspension but did not. *Poole v. DILHR*, 83-0064-PC-ER, 12/6/85

Complaint that alleged discrimination based on handicap filed over two years after a memo was issued establishing the procedure to be used by complainant in purchasing materials for her tailoring class was held to be timely on a continuing violation theory. The memo continued to dictate the methods used by the complainant for purchasing materials up to the time the complaint was filed. The Commission also applied the continuing violation theory to complainant's allegation that respondent failed to reasonably accommodate her handicap by assigning her to a second floor classroom and by not providing her with a telephone. *Olson v. DHSS*, 83-0010-PC-ER, 4/27/83

A complaint of discrimination alleging sex discrimination in the assignment of a classification series to salary ranges was

timely because each bi-weekly salary payment (during the period the salary range assignments were in effect) represented a basis for an allegation of sex discrimination due to unequal pay on a continuing violation theory. *WFT v. DP*, 79-306-PC, 4/2/82

An appeal containing an allegation that the appellant was paid less than similarly situated male employes was held to constitute a continuing violation, the Commission noting that this case involved a basic issue of salary level which can be distinguished from a case involving a discrete personnel transaction which over the years had a continuing effect on an employe's salary as a result of the operation of an arguably neutral personnel policy. *Hoepner v. DHSS*, 79-191-PC, 6/30/81

Where the complainant had transferred from DILHR to LIRC on July 3, 1977, her complaint alleging DILHR paid her lower wages than male attorneys, which was filed on September 7, 1978, was untimely, even on a continuing violation theory, because it was filed more than 300 days after her employment relationship with DILHR terminated. *Jacobson v. DILHR & LIRC*, 78-PC-ER-49, 4/23/81

706.07 Of amendment

Complainant's claims were dismissed as untimely filed where she failed to cure a technical defect as directed by the Commission in a previous ruling. In the earlier ruling, complainant was permitted to amend her complaint by filing a properly signed, verified and notarized statement as required under §PC 2.02(2), Wis. Adm. Code. Instead of complainant curing the technical defect by verifying the information herself, her attorney provided the information under his own signature, which was the same defect addressed in the previous ruling. Because complainant had not taken advantage of the opportunity previously granted her to cure the technical defect, there was no allegation of discrimination during the 300 day period prior to the filing of her complaint and her complaint, therefore, was untimely. *Reinhold v. Office of the Columbia County District Attorney*, 95-0086-PC-ER, 11/7/97; rehearing denied, 12/17/97; affirmed by Dane County Circuit Court, *Reinhold v. Office of the Columbia District Attorney & Wis.*

***Pers. Comm.*, 98-CV-0076, 7/8/98**

Complainant's request to change three allegations of unequal treatment based on sex to include them in her claim of sex harassment was granted where it was properly characterized as curing a technical defect, even though the request was not made until more than 2 years after the complaint was filed and about 6 months after the initial determination was issued. *Reinhold v. Office of the Columbia County District Attorney*, 95-0086-PC-ER, 9/16/97

Complainant's request to amend her complaint to include a race discrimination claim was denied where the amendment was filed 24 months after complainant filed her initial complaint of sex discrimination, nothing in the original complaint placed the respondent on notice that its treatment of a co-worker of complainant would be critical to its defense against complainant's allegations, and the new claim was not raised until the investigation of the original complaint had been completed and an initial determination issued. *Payne v. DOC*, 95-0095-PC-ER, 7/31/97

Even though the complainant's amendment sought to raise a claim of handicap discrimination arising from some of the same conduct described in her initial complaint of age discrimination, amendment was not permitted where the amendment was not filed until more than 3 years had passed since complainant's resignation and after an initial determination had been issued on complainant's charge of age discrimination and where complainant had retained legal counsel more than a year before the amendment was filed. *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96

Amendments alleging new acts of discrimination and filed after the issuance of an initial determination held not to relate back to filing of original complaint. *Chelcun v. UW-Stevens Point*, 91-0159-PC-ER, 3/9/94

Alleged FEA retaliation based on the filing of the initial complaint cannot be considered to "relate back" to the initial complaint. It cannot be considered part of the same acts alleged in the initial complaint because it is based upon the subsequent act of filing of the initial complaint. Such new allegations may be treated as a separate charge of discrimination, but only if they are timely filed. *Chelcun v. UW-Stevens Point*, 91-0159-PC-ER, 3/9/94

Complainant's request to amend the issue for hearing to add a claim under the whistleblower law was denied where the request was filed four months after the parties had stipulated to an issue limited to sex discrimination and was also filed three days after closure of discovery. Complainant failed to show any reason for the delay and failed to show that the stipulation as to the issue resulted from inadvertence or mistake, and there was no allegation of whistleblower retaliation in the original complaint. *Florey v. DOT*, 91-0086-PC-ER, 9/16/93

Complainant's amendments, filed before the commencement of an investigation, were permitted, where they did not threaten delay and there was no allegation of potential prejudice. *Butzlaff v. DHSS*, 90-0162-PC-ER, 11/13/92

The complainant could not amend his original complaint to add family/medical leave, occupational safety and health and whistleblower claims and have the amendment relate back where the original complaint had been dismissed for lack of subject matter jurisdiction, complainant was represented by counsel during the earlier proceeding and he had had a full opportunity at that time to seek to amend his complaint to add allegations and to thereby avoid a dismissal order but failed to do so. *Butzlaff v. DHSS*, 90-0162-PC-ER, 4/5/91

The untimeliness of the filing of an amended charge cannot be cured by relating back to a previous untimely charge. Complainant had filed a whistleblower complaint on August 8, 1986 relating to an investigatory meeting on April 28, 1986. That complaint was untimely because it was outside the 60 day time limit for whistleblower complaints. Complainant's June 19, 1987 amendment alleging that his March 31, 1987 discharge constituted retaliation for whistleblower activities was, therefore, also untimely. *Cleveland v. DHSS*, 86-0104-PC-ER, 7/8/87

Technical deficiencies in a letter, considered by the Commission to constitute a complaint of discrimination, were corrected by filing a completed form PC-3. The corrections related back to the date the original letter was filed. *Goodhue v. UW-Stevens Point*, 82-PC-ER-24, 11/9/83

A complainant would be permitted to amend a complaint to

add an allegation that the agency action of which he originally complained constituted discrimination on the basis of race also constituted discrimination on the basis of retaliation, and the amendment would relate back to the date of the original complaint. However an investigation of the amended complaint and an initial determination thereon would be required before matter could proceed to hearing. *Adams v. DNR & DER,* 80-PC-ER-22, 1/8/82

An amendment of a complaint was found to be timely on a relation-back theory where the only new issue raised in the amended complaint was the inclusion of a possible legal conclusion previously omitted, i.e., checking an additional box (handicap) on the complaint form. *Jones v. DNR,* 78-PC-ER-12, 11/8/79

706.08 Relation back to previously filed appeal

Where no hearing had been held and no prejudice established, complainant's filing, on December 7, 1992, of a complaint form referencing both a Family/Medical Leave Act claim and a handicap discrimination claim, was allowed as an amendment of a letter of appeal filed on June 24, 1992, which clearly sought to invoke the Fair Employment Act. Because the FMLA claim was related to the subject matter of the original appeal, the December 7th filing met the requirements of §PC 3.02(2), Wis. Adm. Code, and was held to relate back to the June 24th filing for purposes of timeliness. *Boinski v. UW-Milwaukee,* 92-0233-PC-ER, 4/23/93

Where the complainant's initial correspondence to the Commission was an appeal of a reclassification denial and made no request that the Commission open a file for any other matters, complainant's subsequently filed whistleblower complaint which was received more than 60 days after the alleged retaliatory conduct, was untimely. *Holubowicz v. DHSS,* 88-0097-PC-ER, 9/5/91

Appellants, who had filed an appeal of reallocation decisions and had alleged, in their appeal, that the actions constituted discrimination based on sex, were permitted to perfect a complaint of sex discrimination by filing a notarized complaint as to the matters set forth in the appeal. The complaint would relate back to the date the original

appeal was filed. The Commission ordered that the appeal was to be dismissed (for lack of subject matter jurisdiction) once the complaint had been filed. *Saviano v. DP*, 79-PC-CS-335, 6/28/82

Appellant, who in 1979 had filed an appeal of his termination and bad alleged in his appeal that the termination was "based on religious discrimination," was permitted to perfect a complaint of discrimination based on creed in 1981 relating to his termination. The complaint related back to he date the original appeal was filed. The complainant was not permitted in 1981 to add a claim of handicap discrimination because there was no indication that the basis for the allegation was not known or knowable prior to a hearing held on the appeal in 1980. *Laber v. UW*, 79-293-PC, 8/6/81

706.50 Appeal from initial determination of no probable cause

The 30 day time limit for receiving appeals of an initial determination of no probable cause is directory rather than mandatory and the Commission will accept a late filing if complainant shows good cause as to why the appeal was filed late. Generally, good cause is established when the complainant shows that the filing was late for a reason beyond complainant's control rather than reasons within the complainant's control. *Allen v. DOC*, 95-0034-PC-ER, etc., 11/7/97

Where complainant should have known that it was physical receipt by the Commission in Madison which measured whether his appeal would be filed timely and receipt was due on September 26th, his action of waiting until September 25th to write and mail his appeal in Green Bay was not good cause for a late appeal. *Allen v. DOC*, 95-0034-PC-ER, etc., 11/7/97

The time limit for filing an appeal of an initial determination of no probable cause is a stricter standard than applies to the filing of various other documents with the Commission. *Allen v. DOC*, 95-0034-PC-ER, etc., 11/7/97

Complainant's statement that he was busy trying to find employment did not constitute good cause for his failure to

meet the 30 day time limit for appealing an initial determination of no probable cause. *Allen v. DOC*, 95-0034-PC-ER, etc., 11/7/97

Illness may serve as good cause for a late filing of an appeal from an initial determination of no probable cause. However, where complainant did not indicate whether his illness resulted in days of incapacitation during the appeal period and, if so, which days, complainant did not establish that his illnesses were the reason why his appeal was filed late. *Allen v. DOC, 95-0034-PC-ER, etc.*, 11/7/97

Complainant's appeal from an initial determination was not timely where it was received more than 30 days after the initial determination was mailed to complainant's attorney and complainant. Complainant's copy was returned due to an expired forwarding order but was re-sent 8 days later to an address obtained from his attorney. *Garrette v. DRL & DER*, 90-0092-PC-ER, 91-0184-PC-ER, 8/4/95

An appeal of an initial determination of no probable cause was not timely where it was due at the Commission on Monday, the 21st, it bore a Madison postmark of the 21st, was received on the 23rd and complainant claimed she mailed it in Milwaukee on the 18th. Even if complainant had mailed it on the 18th, there was an insufficient basis to conclude that the receipt on the 23rd was caused by the post office rather than by complainant. *Hill v. DHSS*, 93-0077-PC-ER, 3/29/94

Complainant's appeal of a no probable cause finding was filed on the day after it was due. Good cause for this late filing was found where the cover letter to the initial determination did not reflect a recent change in the Commission's mailing address. *Amaya v. DOC*, 93-0104-PC-ER, 1/11/94

Complainant's appeal from an initial determination of no probable cause was received by the Commission one day after the 30 day appeal period. Good cause existed to consider the appeal timely because on the morning of the 29th day, complainant mailed her appeal letter by Express Mail "Next Day Service" which specified delivery by 3:00 p.m. on the next day, i.e. the last day of the appeal period, yet the letter was not delivered to the Commission until the 31st day. *Jazdzewski v. UW-Madison*, 92-0179-PC-ER, 11/29/93

Good cause was not found for complainant's filing of his appeal of an initial determination of no probable cause one day late, where he merely asserted that he had not allowed enough time to effect delivery of the appeal on the last possible day. *Krueger v. DHSS*, 92-0065-PC-ER, 7/8/92

Complainant's appeal was untimely where it was received on the 31st day following the date the initial determination was mailed to both the complainant and to her attorney. Complainant's letter was postmarked in the p.m. of November 22nd, it had to be filed with the Commission by the 24th and the 23rd was Thanksgiving, a legal holiday. Good cause for the late filing did not exist where it was mailed at the 11th hour and complainant was represented by counsel. *Rogers v. DOA & Ethics Board*, 87-0010-PC-ER, 12/22/89; rehearing denied, 2/12/90

Complainant Joubert's appeal of a no probable cause initial determination was timely where his designated representative clearly indicated by letter received within the 30 day period that complainant wished to appeal the matter. In addition, complainant was away on business when the initial determination arrived at his address and his own letter of appeal took 17 days after it was posted in Africa to arrive at the Commission, 34 days after the initial determination was mailed. *McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/8/88

The 30 day period in §PC 2.07(3), Wis. Adm. Code, is directory rather than mandatory. Where the complainant's mother died on the day before the 30 day period would have ended and the complainant's union representative was absent from the state, there was good cause for failing to file the petition within the 30 day period. *Dugas v. DHSS*, 86-0073-PC-ER, 87-0143-PC-ER, 7/14/88

Pursuant to the Commission's rules, revised in 1987, the 30 day period for filing a request for hearing on the issue of probable cause commences with the mailing of the initial determination. In addition, the request for hearing is not perfected until it has been physically received by the Commission. The complainant's appeal filed outside the 30 day period was untimely even though the complainant's address had changed prior to the issuance of the initial determination. The complainant had failed to notify the Commission of the address change and the initial determination had also been mailed to complainant's

attorney of record. *Shelton v. DNR & WCC*, 85-0123-PC-ER, 7/13/88

The 30 day period provided in §PC 4.03(3), Wis. Adm. Code, (1980) for appealing an initial determination of no probable cause, commences on the date the initial determination was actually received rather than on the date it was mailed to the complainant by the Commission, citing *Vesperman v. UW-Madison*, 81-PC-ER-66, 6/4/82. Note: The Commission's rules relating to this topic were renumbered and revised, effective in August of 1987. *Bender v. DOR*, 87-0032-PC-ER, 3/23/88

The 30 day limit in §PC 4.03(3), Wis. Adm. Code is directory rather than mandatory. The complainant's appeal of an initial determination of no probable cause was timely where the appeal was postmarked July 2, the 30th day was a Sunday so by operation of §801.15, Stats., the due date was July 7th, and the appeal letter was received by the Commission on July 8th. Mailing the appeal letter on July 2 was reasonable and prudent so there was good cause for the failure to comply with the 30 day limit. *Stein v. DHSS*, 85-0152-PC-ER, 8/20/86

With respect to an appeal pursuant to §Pers. 4.03(3) of a determination of no probable cause, the service of the decision is not complete until receipt, and the petition for appeal is timely if posted within the 30 days set forth in the rule. *Vesperman v. UW*, 81-PC-ER-66, 6/4/82

Equitable estoppel lies where the complainant relied to his detriment upon incomplete notice provided by the Commission; the detrimental reliance occurring where complainant failed to timely request a hearing on the finding of no probable cause. *Lott v. DHSS & DER*, 79-PC-ER-72, 5/16/80

The Commission has no statutory obligation, nor any obligation imposed by administrative rule, to notify complainant of the 30-day appeal period commencing upon the issuance of a finding of no probable cause to believe that discrimination practices have occurred. *Lott v. DHSS & DER*, 79-PC-ER-72, 5/16/80

710 Parties

Appointing authorities, or their designees, actually make appointment decisions to the state civil service. The secretary of the Department of Employment Relations and the administrator of the Division of Merit Recruitment and Selection do not control, and are not accountable for, aspects of the appointment process carried out by state agencies acting as appointing authorities. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

The Personnel Commission reasonably interpreted ch. 230, Stats., to mean that the appointing authority is generally responsible for actions in the selection process which occur after the point of certification. The terms of delegation agreements running from the administrator of the Division of Merit Recruitment and Selection to various appointing authorities did not demonstrate that DMRS had ultimate authority over appointments at the various state agencies where the positions were located. The terms of those agreements as well as the State's Personnel Manual cannot supersede the language of the statutes, and ch. 230, Stats., does not give the administrator authority over the appointment process after the point of certification. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

Where complainant was certified as qualified for both positions in question by the administrator of the Division of Merit Recruitment and Selection, any discrimination or retaliation against complainant occurred after the administrator's authority over the appointment process terminated. The administrator and the secretary of the Department of Employment Relations were properly dismissed as parties. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

The Commission lacks jurisdiction under the Fair Employment Act to add the State of Wisconsin as a separate party respondent. *Pellitteri v. Wis. Pers. Comm.*, Dane County Circuit Court, 94CV3540, 7/19/95

It is up to the appointing authority, and not the Department of Employment Relations or the Division of Merit Recruitment and Selection, to decide how to fill a vacancy in the career executive program. Neither DER nor DMRS were appropriate respondents in terms of reviewing the decision to fill the vacancy by transfer. *Oriedo v. DOC et al.*, 98-0124-PC-ER, 11/4/98

Alleged action by the Department of Employment Relations and the Division of Merit Recruitment and Selection of failing to respond to or act on complainant's letter of complaint relating to conduct by his employing agency, could not have any adverse effect on complainant's employment. Complainant was not employed by either DER or DMRS. *Oriedo v. DOC et al.*, 98-0124-PC-ER, 11/4/98

Complainant was not permitted to amend his whistleblower complaint to include the State of Wisconsin as an additional respondent. There is clear evidence of a legislative intent not to permit the State of Wisconsin to be named a respondent in a complaint of whistleblower retaliation filed with the Commission. *Oriedo v. DPI et al.*, 98-0042-PC-ER, 8/12/98

The Department of Employment Relations and the Division of Merit Recruitment and Selection are not proper respondents in a claim of racial discrimination arising from the failure of the Department of Public Instruction to hire complainant for a vacant position, citing *Balele v. DNR et al.*, 95-0029-PC-ER, 6/22/95. The alleged discriminatory action took place after certification, during the selection/appointment process and there is nothing in the statutes which gives either DER or DMRS any control over hiring decisions of the appointing authorities. *Oriedo v. DPI et al.*, 96-0124-PC-ER, 3/12/97

While it is unlawful for a "person" to discriminate, the Commission's jurisdiction under the FEA runs only to the state agency as the employer, and not to individual agents of the agency in their individual capacities. *Goetz v. DOA & Columbia County District Attorney*, 95-0083-PC-ER, 11/14/95

Respondent DOA's motion to dismiss it as a party was denied where the claim involved an allegation of sexual harassment by a district attorney of a member of his staff, DOA provides administrative support to the district attorney's office, DOA arranged for an investigation of the complaint when it was initially filed with DOA, the governor has the authority to remove a district attorney for cause and DOA is a cabinet agency. Even though DOA had no authority to discipline or remove a district attorney, there was at least the possibility that DOA could have had a role in a chain of authority over the district attorney. *Goetz v. DOA & Columbia County District Attorney*,

95-0083-PC-ER, 11/14/95

While it is unlawful for a "person" to discriminate, the Commission's jurisdiction under the Fair Employment Act runs only to the state agency as the employer, pursuant to §111.375(2), Stats., and not to individual agents of the agency in their individual capacities. *Reinhold v. DOA et al.*, 95-0086-PC-ER, 11/14/95

In a claim based on the whistleblower law, a respondent may be a supervisor or appointing authority in his or her individual capacity. *Reinhold v. DOA et al.*, 95-0086-PC-ER, 11/14/95

The Commission's jurisdiction over the employer in Fair Employment Act cases is limited to agencies per se, as opposed to a broader entity such as the State of Wisconsin, citing *Pellitteri v. DOR*, 90-0112-PC-ER, 9/8/93; affirmed, *Pellitteri v. Pers. Comm.*, 94CV3540, Dane County Cir. Court, 7/19/95 *Reinhold v. DOA et al.*, 95-0086-PC-ER, 11/14/95

With respect to a claim which runs to the appointing authority's failure to have appointed complainant after he had been examined and certified as eligible, neither DER nor DMRS are appropriate parties. *Balele v. DNR et al.*, 95-0029-PC-ER, 6/22/95

DER was an appropriate party for remedial purposes because the remedy conceivably could involve an order requiring the employing agency to notify DER of its determination of complainant's protective occupation status pursuant to §40.06(1)(dm), Stats. It cannot be concluded on the basis of an assertion in DER's brief in support of its motion for dismissal as a party that it has been advised by DETF (Department of Employe Trust Funds) that it will not give effect to any order by DER regarding complainant's protective occupation status, that an order directed to DER would have no possible effect on complainant's protective occupation status. *Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER-B, 9/17/93

DER was properly a party to a whistleblower claim where it was alleged that it violated the whistleblower law with respect to the determination of complainant's protective occupation status. *Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER-B, 9/17/93

Complainant's request to add the State of Wisconsin as a party, pursuant to the theory that the FEA's duty of handicap accommodation by transfer runs to all agencies of the state, was denied because pursuant to §111.375(2), Stats., the Commission's jurisdiction is limited to receiving and processing FEA complaints against individual state agencies as employers. The Commission did not reach the issue of whether the duty of accommodation includes inter-agency transfers. *Pellitteri v. DOR*, 90-0112-PC-ER, 9/8/93; affirmed by Dane County Circuit Court, *Pellitteri v. Wis. Pers. Comm.*, 94CV3540, 7/19/95

The employing agency is an appropriate party in claims alleging that complainants, who were employed as parking attendants, were discriminated against by being placed in a classification premised upon sex, resulting in a pay disparity. Because complainants requested back pay, the employing agency was an appropriate party for remedial purposes in the event the complainants were successful. The Commission was unable to find, as a matter of law, that the employing agency could not be required to make contribution in the event of a back pay award, despite its contention that it was not a party to the collective bargaining agreement which allocated the classification to a particular pay range and its contention that it had previously requested the other respondent to move the classification to a higher pay range. *Kosinski, et al. v. UW-Madison & DER*, 92-0243-PC-ER, etc., 4/30/93

The statutes under which the Commission operates preclude the designation of named individuals as parties-respondent. *Balele v. DHSS & DMRS*, 91-0118-PC-ER, 3/19/92

DER was retained as a party in a whistleblower case for remedial purposes where complainants alleged that there had been a threat to terminate their protective occupation status and contended that DER had the authority to approve protective occupational status under §40.06(1)(dm). *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 2/21/92

The Commission's authority under the Whistleblower law does not extend to an individual outside the employing agency who may have played some precipitating role in a disciplinary action but who has no legally-recognized role as an appointing authority or employer. The complainant, a Correctional Officer 3 employed by the Department of

Corrections and assigned to the Security Ward at the UW-Hospital and Clinic alleged that he had been reassigned to another facility and harassed as a result of complaints of sexual harassment made by UW-Hospital and Clinic employes. UW-Madison was dismissed as a party. *Martin v. DOC & UW-Madison*, 90-0080-PC-ER, etc., 1/11/91

A petition for intervention was denied where the petitioner was not involved in or directly affected by the transaction which formed the subject matter of the case and petitioner basically viewed the respondent's actions as part of a pattern of conduct which would be probative evidence in his own proceedings pending with the Commission. *Deppen v. UW-Madison*, 90-0110-PC-ER, 8/8/90

DETF is the proper party respondent in a Fair Employment Act discrimination case involving a DETF decision to deny family health insurance coverage to an employe's homosexual non-spousal partner because even though DETF did not employ the complainant, it was acting in the role of employer with regard to determining complainant's fringe benefits. DHSS would not be retained as a party where it played no operative role in the denial of coverage and it would not be a necessary party for the purpose of granting any relief that might be required. *Phillips v. DETF & DHSS*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; affirmed by Dane County Circuit Court, *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92

The Commission lacks jurisdiction pursuant to §111.375(2), Stats., over a labor union, and therefore, despite the fact that a discrimination complaint under the Fair Employment Act involves a bargainable subject -- i.e., health insurance coverage which falls within the category of fringe benefits -- with respect to which the labor organization has been involved in bargaining, the labor organization cannot be made a party. *Phillips v. DETF & DHSS*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; affirmed by Dane County Circuit Court, *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92

In a complaint arising from a decision with respect to retirement benefits, the complainant's former employing agency (DHSS) was retained as a party in addition to DETF even though the complainant conceded that DHSS had not

discriminated against him where complainant contended that he should be reinstated to his former position as the remedy upon a finding of discrimination. *Prill v. DETF & DHSS*, 85-0001-PC-ER, 1/23/89, reconsideration denied, 1/30/89

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 778 through 778.04

[Previous material] [Next material]

---

778 Marital status discrimination

778.02(2) Finding of *no* probable cause

There was no disparate treatment of a similarly-situated employe where complainant was not allowed to use doctor's excuses signed by her husband because their marital relationship created a facial conflict of interest. While respondent did not have a general policy on the subject of who could sign doctor's excuses, its objection to complainant's husband signing her excuses was not premised on their marital relationship per se, but on the inherent conflict of interest involved. *Earnhart v. DHSS*, 89-0025-PC-ER, 11/19/92

There was no probable cause with respect to respondent's exercise of discretion setting complainant's starting rate of pay where the person who made the decision was not aware of the complainant's identity. *Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92

Where the primary basis utilized by respondent for making hiring decisions pursuant to the contractual transfer process was seniority unless a less senior candidate possessed clearly and substantially different qualifications, and where the complainant failed to show that her relevant qualifications were clearly and substantially different than those of the more senior candidates, no probable cause was found and the decision not to select the complainant was

affirmed. *Molitor v. DHSS*, 89-0086-PC, 89-0105-PC-ER, 5/1/92

No probable cause was found with respect to a selection decision where there was no basis on which to conclude that the selection criteria were unreasonable, were not uniformly applied, or were not as respondent represented them to be or that the interviewing panelists' assessments of the candidates were not reasonable in view of the presentations of the candidates at the interviews and in view of the selection criteria. *Larson v. DILHR*, 86-0019-PC-ER, 86-0013-PC, 1/12/89

778.03(2) Finding of *no* discrimination

The Commission properly dismissed a complaint in which complainant alleged that she had been discriminated against on the basis of marital status by denial of her application for family health insurance coverage for her lesbian companion. Complainant was not similarly situated to married couples in context of discrimination analysis because under current Wisconsin law she had no legal relationship to companion and law imposed no mutual duty of general support and no responsibility for provision of marital care on unmarried couples of any gender as did not married couples, thus, complainant's legal status was not similar to that of married employee. *Phillips v. Wis. Pers. Comm.*, 167 Wis. 2d 205 (Court of Appeals, 1992)

Respondent did not discriminate against complainant, a limited term typist at a correctional institution, based on marital status when respondent terminated her employment after learning her husband was an inmate at another institution, where the termination was based on respondent's belief that complainant lacked good judgment, was untrustworthy and was a high security risk. *Purifoy v. DOC*, 92-0044-PC-ER, 12/22/94

While complainant showed some variances in her interview for a vacant position with the appointing authority, complainant failed to establish that the variances were motivated by an unfavorable bias toward her marital status and that they resulted in her failure to gain the top ranking for the vacancy. *Bell-White v. DHSS*, 89-0009-PC-ER, 4/30/92

Complainant was not discriminated against on the basis of marital status, sex or sexual orientation when she was denied family health insurance coverage for her homosexual non-spousal partner with whom complainant shared finances and maintained many attributes usually associated with the marital relationship. The failure of DETF to have promulgated a rule that would have included complainant's partner within the definition of a dependent for purposes of family insurance coverage is not discriminatory because precedent and legislative history establishes that the legislature did not intend that such coverage be provided, complainant was not similarly situated with respect to married employes whose relationships were legally recognized by Wisconsin family law, and DETF was not obligated by the Fair Employment Act to recognize relationships, for the purpose of defining dependents, that are not legally recognized by family law but which arguably are parallel to legally recognized relationships. *Phillips v. DETF & DHSS*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; affirmed by Dane County Circuit Court, *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92

The respondent's action of not permitting a husband and wife, both of whom are state employes to choose "family" health insurance coverage for one spouse and their children and "single" health insurance coverage for the other spouse, was upheld where the decision was made pursuant to express provisions of the administrative code and statutes and the legislature could not have intended to nullify these provisions when it amended the Fair Employment Act to include marital status discrimination. *Ray v. DHSS & Group Insurance Board*, 83-0129-PC-ER, 10/10/84; affirmed by Dane County Circuit Court, *Ray v. Pers. Comm.*, 84-CV-6165, 5/15/85

778.04 Prima facie case

Complainant failed to state a claim of marital status discrimination with respect to a non-selection decision where there was no allegation that anyone on the search committee knew complainant was divorced. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

Complainant failed to state a claim of marital status discrimination when she contended management in the state agency that previously employed her disapproved of a relationship she had with another employe of that agency who was married, thereby affecting the references provided to her prospective employer, a second agency. If her former employer disapproved of complainant's relationship with a married person, the basis for that disapproval had nothing to do with complainant's marital status. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 712 through 715.9

[Previous material] [Next material]

712.2 What constitutes/sufficiency

A complaint of age discrimination must be filed in written form as provided in §PC 2.02, Wis. Adm. Code. A discussion of age issues in telephone conversations with a Commission staff member did not constitute a filing of a complaint. *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96

A complainant is not required to provide, in the complaint, complete identification of all protected conduct serving as a basis for a claim under the whistleblower law. *Canter-Kihlstrom v. UW-Madison*, 86-0054-PC-ER, 6/8/88

A complaint form that was filled out by a Commission staff member as a consequence of a telephone conversation with the complainant and at the complainant's request constituted, on that date, a complaint of illegal retaliation. The document was complete except for a notarized signature and complainant's filing one week later of a notarized complaint corrected any technical deficiencies and related back to the initial complaint. *Fliehr v. DOA*, 85-0155-PC-ER, 12/17/85

Written complaint filed under the Whistleblower law was found to have met the statutory requirement that it specify the nature of the retaliatory action or threat and request relief. The complaint is not subject to the standards of sufficiency established by the Wisconsin Code of Civil Procedure. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 9/28/84

Respondent's motion to make more definite and certain was

denied where complainant's whistleblower claim generally complied with requirements of §230.85, Stats., because complainant had identified the nature of the alleged retaliation by stating her program director did not talk to complainant and wrote "biting notes" instead, copies of the notes were attached and complainant indicated that during the course of the investigation she would specify the actions taken and amend the original complaint accordingly. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 9/28/84

A letter to the Commission constituted a complaint of discrimination where the letter identified the complainant, alleged different treatment based on sex and, possibly, marital status, identified the conduct complained of and its source, and requested assistance from the Commission. Not all of the information listed in §PC 4.020)(a) through (f), Wis. Adm. Code, (1982) needs to be present for a document to be a complaint of discrimination. *Goodhue v. UW-Stevens Point*, 82-PC-ER-24, 11/9/83

712.4 Failure to state claim on which relief may be granted

In ruling on a motion for failure to state a claim, appellant's memo, which referred to the absence of a maintenance agreement for equipment in two offices, could be said to satisfy the requirements for a written disclosure of "mismanagement." *Duran v. DOC*, 94-0005-PC-ER, 10/4/94

In ruling on a motion to dismiss for failure to state a cause of action, the Commission must analyze the complainant's allegations liberally in favor of the complainant and may grant the motion only if it appears with certainty that no relief could be granted. *Duran v. DOC*, 94-0005-PC-ER, 10/4/94

In deciding a motion to dismiss for failure to state a claim, the Commission was unable to determine on the limited record before it whether a conversation with a co-employe concerning a statement made by the agency head would be considered a verbal disclosure to "any other person" that was not preceded by a disclosure under either §230.81(1)(a), Stats. (in writing to the supervisor) or §230.81(1)(b) (in writing to a governmental unit designated by the Commission), and hence not a disclosure covered by

the whistleblower law, or whether the conversation with the co-employe was part of assisting "in any action or proceeding relating to the lawful disclosure of information under §230.81 by another employe," within the meaning of §230.80(8)(b). *Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER-B, 9/17/93

A complaint of sex discrimination under the FEA fails to state a claim upon which relief can be granted where the complaint consists primarily of allegations of an unsatisfactory work environment involving specific problems complainant experienced with supervisors (most of whom were of the same gender), coworkers, and others. In responding to the motion to dismiss, complainant's attorney did not attempt to explain how these incidents involved sex discrimination, except to the extent that it was alleged that the clerical staff were treated as "emotional punching bags" by their supervisors, who were frustrated and intimidated by treatment they were receiving at the hands of *their* supervisors. Assuming all of complainant's allegations to be true for the purpose of deciding this motion, the chain of causation--complainant's supervisors react to a sexist atmosphere created by their supervisors by using complainant as an "emotional punching bag"--is too extended for a conclusion that respondent discriminated against complainant because of sex in violation of §111.322(1), Stats. Also, management had no obligation to act where the conditions about which complainant was concerned did not involve sex discrimination but rather involved disagreements with her supervisor about her approach to supervision. *Makl v. UW-Stevens Point*, 92-0038-PC-ER, 4/30/93

Complainant's complaint of sex discrimination was dismissed for failure to state a claim upon which relief can be granted because complainant did not allege quid pro quo harassment or that she was subjected to conduct of a sexual nature that amounted to a claim of sexual harassment nor did she identify any specific term and/or condition of her employment that was affected by the allegedly sexist atmosphere of the office in which she worked. Complainant's failure to allege any acts of sex discrimination against her could not be attributed to a generalized pleading because complainant provided ample details regarding her dissatisfaction with her working conditions and relationships with fellow employes. *Weeks v.*

***UW-Stevens Point*, 92-0036-PC-ER, 4/30/93**

Complainant's assignment to open the Chancellor's personal mail which contained two arguably "offensive sexually graphic materials" held not to satisfy the statutory definition of sexual harassment as "deliberate, repeated display" of such materials. The complaint was dismissed for failure to sate a claim. *Erdmann v. UW-Stevens Point*, 92-0104-PC-ER, 4/23/93

That portion of the complaint which alleged that a nonselection decision made on August 28, 1986, was in retaliation for filing a complaint on September 2, 1986, was dismissed for failure to state a claim upon which relief can be granted. *Franz v. UW-Oshkosh*, 86-0110-PC-ER, 10/4/89

Respondent's motion to dismiss was denied where complainants, who were employed at the Marshall Sherrer Correctional Center, alleged that due to the use of BFOQ's, females have a better opportunity to be hired for officer positions at the Women's Correctional Center than do males, that working conditions are better at WCC than at MSCC in view of the higher officer to inmate ratio at WCC and that, as a result, the complainants are being discriminated against based on sex in regard to working conditions. *Duvnjak & Studenec v. DHSS*, 88-0164, 0168-PC-ER, 9/8/89

Respondent's motion to dismiss was denied where it was supported by an affidavit by respondent's counsel that the respondent did not discriminate. The mere existence of the respondent's affidavit did not permit the Commission to ignore the complainant's allegations and to adopt the respondent's version of events. Complainant's allegations were drafted without benefit of counsel. *Acharya v. DOR*, 89-0014, 0015-PC-ER, 7/14/89

Respondent's motion was denied where it asked the Commission to use the information provided by the parties at the conciliation conference to decide that complainant's allegations were not meritorious. While complainant had withdrawn certain of his allegations, many others remained. The Commission is not constrained to consider only those remedies requested by a complainant. *Ingram v. UW-Milwaukee*, 89-0020-PC-ER, 7/14/89

In a whistleblower case, respondent's motion to dismiss was

denied for failure to state a claim was denied where there was no basis on which to conclude 1) that the complainant did not disclose "information" to her attorney as contended by complainant, or 2) that notes to complainant's supervisor, though neutral on their face, acted to inform the supervisor that the writer wished to identify improper governmental activities. *Canter-Kihlstrom v. UW-Madison*, 86-0054-PC-ER, 6/8/88

In ruling on a motion to dismiss for failure to state a claim, the Commission must analyze the complainant's allegations liberally in favor of the complainant and grant the motion only if it appears with certainty that no relief can be granted. *Canter-Kihlstrom v. UW-Madison*, 86-0054-PC-ER, 6/8/88

The Commission denied respondent's motion to dismiss failure to state a claim on which relief can be granted where complainant alleged that his former supervisor made discriminatory comments and sought to get rid of older employes, and while complainant had resigned from his position, he had sought reinstatement to the same office. The Commission held that a cease and desist order would affect respondent's future conduct with respect to employes generally and was unwilling to accept the argument that because he had resigned, complainant gave up his FEA rights. *Bratley v. DILHR*, 83-0036-PC-ER, 7/21/83

Where the complainant transferred from DILHR to LIRC on July 3, 1977, her complaint of discrimination against LIRC did not state a claim upon which relief could be granted where she alleged that LIRC perpetuated DILHR's past discrimination by continuing to pay her lower wages than male attorneys and by assigning her to a regrade point in the attorney's pay plan lower than where she would have been assigned but for DILHR's alleged past discrimination, but did not allege that LIRC assigned her to the regrade point contrary to the provisions of the pay plan, that her assignment was based on sex *per se*, or that the pay plan itself was sex discriminatory, and where she had not filed a timely complaint of sex discrimination against DILHR after her employment with DILHR had terminated, citing *United Air Lines v. Evans*, 431 U.S. 553, 14 FEP Cases 1510, 1512 (1977). *Jacobson v. DILHR & LIRC*, 78-PC-ER-49, 4/23/81

712.5 Amendment

Appellant's tentative reference to the Wisconsin Fair Employment Act in its post-hearing brief to an appeal under §230.44(1)(d), Stats., of a non-selection decision, was insufficient to create an obligation for respondent to object to the consideration of such a claim at the pain of creating an implied waiver. While it is possible to effect a waiver by silence or inaction, the tentative reference in appellant's brief did not indicate that appellant was seeking to amend his appeal. It could not be concluded that respondent reasonably should have foreseen the possibility that complainant's reference, coupled with respondent's failure to object to that reference, would be converted *sua sponte* and without prior notice into an accomplished amendment converting the civil service appeal into a FEA claim and accompanied immediately by the adjudication of the claim and the establishment of liability. There was no effective waiver by respondent to the interjection of the FEA claim. The parties had not had the opportunity to present arguments on a possible amendment or to make a record on that issue. The Commission remanded the matter to the designated hearing examiner to allow complainant to seek to amend his appeal to add a claim under the FEA. *Holley v. DOCom*, 98-0016-PC, 1/13/99

Complainant's request to change three allegations of unequal treatment based on sex to include them in her claim of sex harassment was granted where it was properly characterized as curing a technical defect, even though the request was not made until more than 2 years after the complaint was filed and about 6 months after the initial determination was issued. *Reinhold v. Office of the Columbia County District Attorney & Bennett*, 95-0086-PC-ER, 9/16/97

Complainant was permitted to amend her complaint to add an allegation that provided clarification of an allegation made in the original complaint, where the amendment request was raised about 6 weeks after the initial complaint was filed and the original complaint noted that not all acts of harassment had been specified therein. Complainant was provided 21 calendar days from the date of the ruling to cure the technical defect which arose from the fact that

complainant had not sworn or attested to the added allegation. *Reinhold v. Office of the Columbia County District Attorney & Bennett*, 95-0086-PC-ER, 9/16/97

Complainant was allowed to amend his race discrimination complaint, filed one year earlier, to add a claim of discrimination based on arrest/conviction record, where the claims related to the same hiring decisions and the original charge was still in the investigatory stage. Amendment was permitted even though complainant, who appeared *pro se*, filed his amendment 10 days after the deadline imposed for doing so by the Commission in letter to the complainant, where his failure to meet the imposed deadline was not egregious or part of a pattern of action and there was no showing that the additional ten-day period prejudiced in any significant way the investigation or the respondent's ability to defend. *Staples v. SPD*, 95-0189-PC-ER, 1/30/97

Complainant was not allowed to amend her complaint to add an allegation that was not referenced in her original complaint of discrimination, nor was referenced in the initial determination. *McDonald v. UW-Madison*, 94-0159-PC-ER, 8/5/96

Complainant was permitted to amend her complaint where she raised, in her reply brief to respondent's motion to dismiss the complaint as untimely, an allegation of handicap discrimination arising from the same conduct for which she raised an age discrimination claim in her original complaint. However, the amendment had no bearing on the underlying timeliness question. *Tafelski v. UW (Superior)*, 95-0127-PC-ER, 3/22/96

The Commission generally allows amendments to add an alleged basis of discrimination, but not to add acts complained of which bear no relation to the act complained of in the original complaint. The basic principle is that a respondent must receive notice of the action complained of in a timely manner to enable prompt internal investigation, identification of witnesses and related documents. This basic principle promotes the opportunity for reasonably prompt settlement where appropriate and for preservation of evidence where settlement is not feasible; such goals serving the interests of both parties. While a later amendment adding a suspected basis of discrimination may create some burdens for the parties, the burden is lessened because the parties already have had an opportunity to

identify witnesses and preserve evidence. The burden for both parties is much greater where the amendment attempts to add an act which does not relate to the act complained of in the initial complaint because the opportunities to identify witnesses and preserve evidence is jeopardized. *Chelcun v. UW-Stevens Point*, 91-0159-PC-ER, 3/9/94

Information provided in letter form to an EEOC investigator in a case being investigated by the EEOC and cross-filed with the Commission constituted an amendment to the FEA complaint. *Dawsey v. DHSS*, 89-0061-PC-ER, 10/29/92

Complainant's letter to the EEOC investigator, which, when read with the attachments, identified the complainant, the respondent agency, and the alleged discriminatory conduct, constituted an amendment. Technical omissions could later be cured through the submission of a completed complaint form. *Dawsey v. DHSS*, 89-0061-PC-ER, 10/29/92

Unrepresented complainants are provided substantial leeway in terms of amending their complainants. *Dawsey v. DHSS*, 89-0061-PC-ER, 10/29/92

Appellant's request to amend his original appeal in order to add a claim of whistleblower retaliation was denied because of the 15 month delay in making the request and because upon receipt of the appeal, the Commission had specifically advised the appellant of the procedure for filing a complaint and had provided him a complaint form for doing so. *O'Connor v. DHSS & DER*, 90-0381-PC, 2/21/92

Allegations regarding separate transactions which occurred after the filing of the original complaint should be processed as a separate complaint rather than as an amendment to the original complaint that would relate back. *Nash v. DRL & DER*, 90-0107-PC-ER, 12/23/91

Complainant's request to add a claim of discrimination based on sex was denied where the case had already progressed through a hearing on probable cause with respect to the original claim of sexual harassment, the complainant had been represented by an attorney for nearly two years, the complainant conducted extensive discovery prior to the hearing on probable cause, the complainant had specifically urged the narrowing of the statement of issue from "sex discrimination" to sexual harassment prior to the

probable cause hearing and the complainant failed to offer any basis for the amendment other than an after-the-hearing realization that another theory could apply to the facts of the case. *Kloehn v. DHSS*, 86-0009-PC-ER, 1/10/90

No amendment to add claims of race discrimination and retaliation was permitted after the issuance of an initial determination in light of the potential for delay, the existence of a prior amendment and an extensive opportunity to amend before the issuance of the initial determination. *Ferrill v. DHSS*, 87-0096-PC-ER, 8/24/89

Material set forth in the second count of the proposed amended complaint was processed as a new complaint rather than as an amendment to the original complaint where the second count alleged that the respondent retaliated against the complainant because she filed the first complaint. These allegations did not relate to the subject matter of the original charge, but rather to the filing of the original charge. *Iwanski v. DHSS*, 88-0124-PC, etc., 6/21/89

At the time of establishing the issue for hearing after an initial determination of no probable cause, the Commission declined to grant the complainant an opportunity to amend or clarify his complaint where the complainant had been provided such an opportunity earlier and had failed to exercise it and an opposite conclusion would have generated a potential for a delay of the proceedings in order for an investigation of any new allegations. *Holubowicz v. DHSS*, 88-0097-PC-ER, 4/7/89

Where the original complaint was apparently drafted *pro se*, was filed in 1987 and alleged that complainant was being prevented from returning to a previous position, and where the proposed amended complaint alleged that in 1988 complainant had been denied transfers into unspecified positions and had been prevented from returning to his previous position, the Commission could not rule out a continuing violation and declined to deny the complainant's request for amendment of his complaint. *Vander Zanden v. DILHR*, 87-0063-PC-ER, 2/28/89

Complainant was not permitted to amend his complaint to the extent the claims in the amendment did not relate to the original charge which arose from a termination decision. With one exception, the allegations in the amendment

related to separate personnel actions taken both before and after the termination. Amendment was permitted as to the claim relating to the termination. *Pugh v. DNR*, 86-0059-PC-ER, 6/10/88

Where the original charge alleged that an unsatisfactory performance evaluation in June of 1985 was retaliatory, no amendment was permitted for allegations arising from the denial of pay increases as reflected in pay checks issued on or about August 1 of 1984, 1985 and 1986. *Kimble v. DILHR*, 87-0061-PC-ER, 2/19/88

Complainant was allowed to amend his complaint a second time, after the issuance of an amended initial determination, where complainant was not represented by counsel until after the issuance of the amended initial determination. Complainant was granted 10 days to formally amend his complaint and the Commission denied respondent's request to bifurcate the proceedings to separate the original cause of action from the new cause of action. *Louis v. DOT*, 85-0126-PC-ER, 8/26/87

The Commission declined to grant complainant's motion to amend his complaint to include sex discrimination which was filed two days prior to a scheduled hearing on probable cause as to allegations of race, color and handicap discrimination, where complainant was represented by counsel and where there was no indication that the allegation of both sex discrimination was not known or knowable at the time the original complaint was filed. *Johnson v. DHSS*, 83-0032-PC-ER, 1/30/85

The complainant would be permitted to amend a complaint to add an allegation that the agency action of which he originally complained constituted discrimination on the basis of race also constituted discrimination on the basis of retaliation, and the amendment would relate back to the date of the original complaint. However, an investigation of the amended complaint and an initial determination thereon would be required before the matter could proceed to hearing. *Adams v. DNR & DER*, 80-PC-ER-22, 1/8/82

713.3 Standards

The Commission lacks the authority to issue a preliminary

injunction under the Fair Employment Act, citing *Van Rooy v. DILHR & DER*, 87-0117-PC, 87-0134-PC-ER, 10/1/87, but has such authority under the whistleblower law. Factors which must be considered are the probability of ultimate success on the merits, the degree of threatened irreparable injury, and the balance of relative damages to the parties, citing *Hruska v. DATCP*, 85-0069-PC-ER, 8/13/85. *Balele v. DNR et al.*, 95-0029-PC-ER, 6/22/95

The Commission lacks the authority to issue a preliminary injunction with respect to a complaint filed under the Fair Employment Act. *Van Rooy v. DILHR & DER*, 87-0117-PC, 87-0134-PC-ER, 10/1/87

In exercising its discretion in deciding whether to grant a motion for a preliminary injunction under §230.85(3)(c), Stats., the Commission considered 1) whether the movant had shown a reasonable probability of ultimate success on the merits, 2) whether movant had shown irreparable harm in the absence of an injunction and 3) any irreparable injury that would be suffered by the party opposing the motion if the injunction were entered. *Hruska et al. v. DATCP et al.*, 85-0069, 0070, 0071-PC-ER, 8/13/85

713.8 Relief granted

The Commission issued a preliminary injunction prohibiting the respondents from implementing a proposed reorganization, and from reassigning complainants' work duties and office locations. Complainants demonstrated a reasonable probability of ultimate success on the merits by establishing that they had engaged in a protective activity, that the proposed changes in their work would have the effect of a penalty, that they were entitled to application of the statutory presumption of retaliation and that there was substantial independent evidence (in the form of explicit performance evaluation that were completed subsequent to the protected activity) that the respondents' actions were in fact retaliatory. The complainants established that they would be irreparably injured if the preliminary injunction were denied because there was no way to compensate complainants for a reassignment and the reassignment might permanently decrease the volume of work coming in from outside customers. Finally, in terms of any irreparable

injury to respondent if the injunction were entered, there was no showing of any compelling need to reorganize and reassign now rather than gradually through a process of retirement-induced attrition as had been respondents' plan prior to complainants' protected activity. *Hruska et al. v. DATCP et al.*, 85-0069, 0070, 0071-PC-ER, 8/13/85

713.9 Relief denied

Where there was nothing in either the complaint or complainant's briefs suggesting he had made a disclosure under the whistleblower law, it did not appear he had any chance of succeeding on his claim, and his motion for a preliminary injunction was denied. *Balele v. DNR et al.*, 95-0029-PC-ER, 6/22/95

The Commission's implied powers do not include the authority to issue an order prohibiting respondent or its representatives from making public statements about pending proceedings unless such statements constitute a threat of retaliatory action within the meaning of §230.83(1), Stats. *Getsinger et al. v. UW-Stevens Point*, 91-0140-PC-ER, etc., 6/11/92

Complainant's request for an order temporarily delaying the appointment of another person to a vacant position was denied where 1) there were serious questions about the viability of appellant's asserted disclosures, 2) complainant's subsequent appointment to the position was not completely foreclosed if the appointment of the other person was allowed to proceed, and 3) the balance of convenience was not completely favorable to appellant. *Van Rooy v. DILHR & DER*, 87-0117-PC, 87-0134-PC-ER, 10/1/87

The Commission did not address that portion of complainants' motion for a preliminary injunction to prohibit respondents from removing complainants' educational opportunities, where the testimony at hearing was that there was no intent to change their educational opportunities and where complainants did not press this aspect of their motion in their posthearing brief. The other aspects of the complainants' motion were granted. *Hruska et al. v. DATCP et al.*, 85-0069, 0070, 0071-PC-ER, 8/13/85

714.1 Generally

Where complainant had been unresponsive to prior letters but answered the Commission's final letter requesting information one day late, the Commission imposed an inference at the investigative stage of complainant's public employe safety and health and whistleblower claims that respondent had no knowledge of the events that served as the basis for his retaliation claims. The net effect of the inference was to issue a "no probable cause" initial determination as to those claims. *Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99

A response that was required by the Commission pursuant to §PC 2.04, Wis. Adm. Code, as part of its investigation of an equal rights complaint, would not generally be regarded as the type of pleading presumptively considered part of the factual record for decision purposes. *Enke v. DOT*, 97-0202-PC-ER, 12/16/98

It is appropriate for a respondent to file a motion to dismiss instead of an answer where the motion had the potential of dismissing the entire case. If the motion is unsuccessful, the Commission may issue an order for respondents to file an answer. *Balele v. DOA, et al.*, 93-0144-PC-ER, 3/26/97

No sanctions were appropriate where respondent filed its answer 9 days late, where there was no prejudice either argued or shown by the complainant and no aggravated circumstances were present. *Rupiper v. DOC*, 95-0181-PC-ER, 8/15/96

A letter from the Commission which stated that the complaint would be dismissed if complainant failed to respond within 20 days provided sufficient notice to meet the notice requirements of §PC 2.05(4)(a), Wis. Adm. Code. The Commission imposed sanctions for the failure to have timely provided the information sought in the underlying request for information. *Jackson v. DOC*, 94-0115-PC-ER, 3/7/96

Where, as part of the investigation of a complaint, complainant failed to provide any rebuttal information requested in a letter from the Commission dated March 6th and complainant (via counsel) responded, on the last day, to

a September 21st certified letter by stating he would provide the information within 30 days, the most appropriate sanction was to foreclose complainant's opportunity to present rebuttal information and to issue the initial determination based solely upon the information previously provided by the parties. *Jackson v. DOC*, 94-0115-PC-ER, 3/7/96

Where, after having filed an answer to the complaint, respondent's reply to complainant's response was one or two working days late and no prejudice to complainant was alleged, complainant's motion for an order disregarding or rejecting the reply was denied. *Balele v. DHSS et al.*, 95-0005-PC-ER, 5/15/95; affirmed by Dane County Circuit Court, 97-CV-2724, 5/6/98; affirmed by Court of Appeals, 98-1432, 12/23/98; cert denied, Wisconsin Supreme Court, 4/6/99

Where, in his response to the answer to his complaint, complainant recited certain alleged statements suggesting discriminatory intent by management, but subsequently refused the Commission's requests to provide specifics relating to the statements, the Commission made an inference, for purposes of the investigation only, that such alleged statement were never made. *Wentz v. DOT*, 94-0056-PC-ER, 10/24/94

Even though a request from the Commission to the complainant did not provide notice that his failure to respond could result in the imposition of sanctions identified in §PC 2.05(4)(b), (c), and (d), where respondent's subsequently moved for such sanctions, the Commission then provided complainant a copy of the applicable rules, including al of §PC 2.05, and the complainant reiterated his decision not to provide the requested information, the complainant's refusal was a "failure to answer or produce requested information" within the meaning of §PC 2.05(4)(b). *Wentz v. DOT*, 94-0056-PC-ER, 10/24/94

The entire proceeding which results from the filing of a FEA complaint is a "contested case." The "contested case" is not limited to only so much of the proceeding which occurs after a hearing has been noticed. *Germain v. DHSS*, 91-0083-PC-ER, 5/14/92

714.4 Request for copy of investigation file

The Commission normally has denied access to investigative files during the pendency of the investigation in order to protect the integrity of the investigation. *Keleher v. UW-Madison*, 84-0105-PC-ER, 9/26/85

714.9 Waiver

Since the full Commission had granted the complainant's request to waive the investigation of his complaint, complainant's later request to revoke the waiver also had to be considered by the full Commission. *Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner)

Complainants would not be relieved of their stipulation to waive the investigation of their complaint where they have not alleged that their stipulation was induced by fraud, misunderstanding or mistake, but rather merely indicate they changed their mind, and a hearing date had already been established in reliance on their stipulation. *Martin et al. v. DOC*, 90-0080-PC-ER, etc., 10/16/92

While §230.44(1m), Stats., gives complainant the right to waive an investigation and probable cause determination, it does not give a complainant the right to waive issues such as res judicata, collateral estoppel, untimely filing, etc., that have the capacity to defeat a claim short of a hearing on the merits. *Balele v. UW-Madison*, 91-0002-PC-ER, 2/6/92

715.1 Effect of finding of probable cause

Where the initial determination found probable cause on the issue of handicap, that issue survived the complainant's failure to timely appeal the no probable cause findings as to the race and sex issues. *Jones v. DNR*, 78-PC-ER-12, 11/8/79

715.2 Request for second investigation

The Commission denied complainant's request that the investigation of his complaint be redone where an initial determination of no probable cause had been issued and complainant also indicated that he wished to appeal the initial determination. *Keleher v. UW-Madison*, 84-0105-PC-ER, 9/26/85

715.5 Respondent's objections to the initial determination of probable cause

Where respondents disagreed as to the nature and findings of the investigation that resulted in an initial determination of probable cause, the respondent's objections are best addressed at a de novo hearing on the merits as provided by statute. *Hollinger & Gertsch v. UW-Milwaukee.*, 84-0061, 0063-PC-ER, 8/15/85

715.9 Other issues

The only unilateral action available to a complainant who is appealing a no probable cause finding in an initial determination is the request for a hearing on the issue of probable cause, rather than a hearing on the merits. §PC 2.07(3), Wis. Adm. Code. The complainants did not request waiver of the investigation of their complaints so unilateral waiver of the probable cause determination by complainants was not available. *Kumrah & Pradhan v. DATCP & DER*, 94-0146, 0147-PC-ER, 2/27/97

The hearing on probable cause is a *de novo* proceeding and is not limited to the four corners of the initial determination. *Kumrah & Pradhan v. DATCP & DER*, 94-0146, 0147-PC-ER, 2/27/97

The Commission's usual practice is to adopt, for investigative purposes, the determination of the EEOC. *Vervoort v. UW-Madison*, 93-0059, 0132-PC-ER, 11/22/96

Complainant was permitted to amend his letter of appeal of his discharge, filed within 30 days of the issuance of an initial determination of no probable cause to believe the complainant was discriminated against on the basis of handicap, so that the letter would serve as an appeal of so much of the initial determination as related to the

allegations in the letter, where the only action taken as a consequence of the "appeal letter" was the holding of a prehearing conference and where the respondent had not alleged that any prejudice would result. *Keul v. DHSS*, 87-0052-PC-ER, 6/1/90

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 780 through 780.10

[Previous material] [Next material]

---

780 National origin/ancestry discrimination

780.02(1) Finding of probable cause

Probable cause was found with respect to respondent's decision not to assign the complainant to a three day weekend work pattern where the respondent failed to produce a copy of the posting of the vacancy, complainant's interest in that work pattern was well-known and respondent had contended it hired a non-foreign person from outside the institution because no existing employes had responded to the posting. No probable cause was found as to other reassignment decisions. *Boyle v. DHSS*, 84-0090, 0195-PC-ER, 9/22/87; modified 10/21/87

780.02(2) Finding of *no* probable cause

There was no probable cause to believe respondent discriminated against complainant on the basis of his age, national origin or ancestry and/or race with respect to providing him computer training where complainant, who was born in Mexico, was employed as the sole LTE in the office, there were insufficient computer stations for even the permanent employes and complainant had the lowest priority for training behind the permanent employes. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

There was no probable cause to believe respondent discriminated against complainant on the basis of his age, national origin or ancestry and/or race with respect to the decision to terminate his employment where complainant, who was born in Mexico, was employed as the sole LTE in the office, although respondent criticized complainant's work performance, he actually was terminated because there was a reduction in the workload. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

Respondent's imposition of a post-certification screening criterion to reduce the number of candidates to be interviewed was upheld where the application of the criterion was consistent with applicable requirements and practices and where the respondent ultimately concluded that complainant satisfied the criterion. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

The absence of a racial/ethnic minority on the interview panel was not evidence of pretext where there was a female on the panel and females were underutilized in the job group of which the position was a part. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

The failure to employ written benchmarks or to score responses to interview questions did not demonstrate pretext where the interviewers took notes and after the interviews, the interviewers had a clear idea of who the top candidates were and agreed on the ranking. Respondent's failure to locate one of the interviewer's notes did not demonstrate pretext where the interviewer recalled the impressions she formed as a result of the interviews and another candidate was clearly much better qualified for the subject position. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

No probable cause was found with respect to the decision not to hire the complainant where the successful candidates performed better than complainant on each part of the interview process. *Acharya v. DOR*, 89-0014, 0015-PC-ER, 11/3/89

No probable cause was found with respect to the decision to terminate the complainant from an LTE position where during the entire course of her employment, she failed to meet quantity or quality performance standards, required close and constant supervision and frequent retraining, she made the same errors repeatedly, she changed her work

schedule without prior notice or approval and she took an excessive amount of leave. *Acharya v. DOR*, 89-0014, 0015-PC-ER, 11/3/89

No probable cause was found with respect to the decision to terminate the complainant's employment as a Data Entry Operator 1 where the complainant did not adequately respond to direction from her supervisors and was a disquieting influence on the work place. Certain misunderstandings did occur, likely based in part on complainant's imperfect English language ability, but there was no evidence of discrimination. *Wilczewski v. DOR*, 86-0113-PC-ER, 7/27/88

Where the complainant was denied promotion in 1975 by 9-1 vote of the Psychology Department, with a number of reasons cited for the decision, the department in 1977 changed the promotion review procedure so that an individual could no longer automatically advance his or her name for promotion review, but instead consideration required preliminary nomination by the tenured faculty, the complainant applied for promotion in 1977 and was not reviewed under the new procedure, and there was evidence of some personal differences between the complainant and some of the departmental faculty, no probable cause was found. *Dasgupta v. UW-Eau Claire*, 78-PC-ER-22, 2/19/80

780.03(2) Finding of *no* discrimination

Complainant failed to sustain his burden of establishing that a 10 day suspension constituted discrimination based on national origin or ancestry or retaliation for engaging in FEA activities where respondent believed that a coworker was genuinely upset by complainant's comments and where complainant had a disciplinary history which included a letter of reprimand and a one-day suspension which also involved allegations of harassing or threatening conduct, even though the coworker's reaction to complainant's conduct was unreasonable. *Zeicu v. DHSS [DHFS]*, 96-0043-PC-ER, 1/16/97

Complainant failed to sustain his burden of establishing that the decision not to select him for a temporary position constituted discrimination based on national origin or ancestry or retaliation for engaging in FEA activities where

the successful candidate was better qualified and complainant's work history included a five-day suspension. Even though the successful candidate also had received a five-day suspension, the nature of those offenses were not as serious as complainant's in the context of the vacancy. *Zeicu v. DHSS [DHFS],* 96-0043-PC-ER, 1/16/97

No discrimination based on creed, sex or sexual orientation was found with respect to respondent's actions of removing complainant from his position as program leader and setting the level of his pay in his backup position of associate professor, where concerns about complainant's managerial abilities were heightened by receipt of an affirmative action complaint against complainant from one of complainant's colleagues, and where respondent concluded that complainant's leadership was not meeting program needs. Complainant's comparisons relating to his salary claim involved circumstances that were distinctly different from those of complainant. *Kinzel v. UW (Extension),* 92-0218-PC-ER, 8/21/96

No discrimination was found on the bases of age, national origin/ancestry or sex, nor was FEA retaliation found, relative to the decision not to retain complainant as a faculty member in respondent's Industrial Engineering Department, where complainant did not complete her Ph.D. by the date to which she had contractually agreed and where respondent had concerns about complainant's teaching effectiveness, the evidence of which included routine student evaluations as well as a petition filed by a group of students with a dean. *Nowaczyk-Pioro v. UW-Platteville,* 93-0118-PC-ER, 4/16/96

Where complainant alleged a pattern of verbal harassment on the basis of national origin but frequently initiated and participated in national origin-oriented banter and comments, and never complained of his treatment to higher level supervisors, he failed to establish a violation of the FEA. Complainant's claims that he was discriminated against on the basis of national origin with respect to equipment provided, and having been required to rewrite reports were also not established, because he was unable to demonstrate any pretext with respect to management's explanations for these matters. *Romero v. WSFP,* 90-0075-PC-ER, 6/23/94

Complainant's LTE employment as a security officer was

terminated in connection with an off-duty incident where he was drinking, wearing a partial uniform and carrying a pistol in a tavern after closing hours, and subsequently became unruly in a contact with the Milwaukee Police Department. Complainant claimed his termination was based on national origin, but failed to show that he had been treated differently from any other officers, or that respondent's rationale for its action was in any way pretextual. *Romero v. WSFP,* 90-0075-PC-ER, 6/23/94

Respondent did not discriminate against complainant, a Native American, based on his race, color, and national origin or ancestry when it failed to hire him for one of eleven vacancies where, even though complainant produced statistical evidence that respondent underutilized minorities, there was no evidence of irregularities in the hiring procedure, the same interview questions were asked of all candidates, the exams were designed to measure job-related criteria, all candidates were evaluated against the same rating guidelines and complainant received a score lower than the successful candidates. *Thunder v. DNR*, 93-0035-PC-ER, 5/2/94

Complainant failed to establish that his impressions of certain work-related incidents involving individuals who had input into the subject hiring decision demonstrated racial animus on their part, but instead the record showed that complainant perceived any differences about work-related matters with his white supervisors and other whites with authority as based on racial animus. The complainant also failed to show that his relevant qualifications were superior to those of the successful candidate. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

Even though respondent stipulated that the limitation of recruitment for two positions to only those applicants with Career Executive status had a disparate impact upon minorities including complainant, complainant failed to establish that he would have been hired for either of the positions if he had been allowed to compete for them. *Balele v. DHSS & DMRS*, 91-0118-PC-ER, 4/30/93

No discrimination was found with respect to the decision not to hire the complainant, a native of Afghanistan, where the complainant failed to show that the reason offered by the respondent -- that the successful candidate's

qualifications were comparable to the complainant's but that the successful candidate provided a better response to the key interview question -- was pretextual. *Wali v. PSC*, 87-0081-PC, 87-0080-PC-ER, 4/7/89

780.04 Prima facie case

Typically, statistical evidence is utilized in disparate impact actions to establish a prima facie case of unlawful discrimination. Complainant failed to establish a prima facie case in a disparate impact analysis where the only statistical evidence presented was that the position at issue was in the Executive/Administration/Manager job group, which consisted of 7 positions, that 8.76% of the qualified and available labor pool were minorities, and that none of the positions were filled by minorities. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

Complainant failed to establish a prima facie case of failure to hire because of age, national origin or ancestry and/or race where complainant offered no evidence that a vacant position existed, that he applied for it, that he was certified and considered, that he was rejected, or that there were circumstances which gave rise to an inference of discrimination. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

The respondent's denial of a faculty exchange involving complainants, one of whom is of South African national origin, was not inferential of national origin discrimination where the respondent's objection to the exchange did not run to the complainants' national origin but to the fact that complainant Joubert was a faculty member at a university in South Africa and that complainant McFarland would be teaching in a South African institution. It was clear that respondent's decision was based on political and moral considerations, not on complainant Joubert's national origin. *McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/8/88

Where the parties had tried the case completely, the Commission proceeded on the assumption that complainant had established a prima facie case as to each issue, and, looking at all the evidence presented, analyzed each issue as

to whether there was probable cause to believe discrimination occurred. *Wilczewski v. DOR*, 86-0113-PC-ER, 7/27/88

780.06 Statistical analysis

Respondent did not discriminate against complainant, a Native American, based on his race, color, and national origin or ancestry when it failed to hire him for one of eleven vacancies where, even though complainant produced statistical evidence that respondent underutilized minorities, there was no evidence of irregularities in the hiring procedure, the same interview questions were asked of all candidates, the exams were designed to measure job-related criteria, all candidates were evaluated against the same rating guidelines and complainant received a score lower than the successful candidates. *Thunder v. DNR*, 93-0035-PC-ER, 5/2/94

Simply establishing that a particular job group is underutilized for ethnic/racial minorities is insufficient to show that the hiring process utilized to fill positions within this job group has a disparate impact on these minorities. The use of an all-white, all-male screening panel is not sufficient in and of itself to demonstrate that the screening process had a disparate impact on minority candidates. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

Complainant failed to establish pretext in a nonselection case where the statistics included those minority candidates who were certified for appointment but did not reflect the number of candidates who dropped out of consideration and his analysis of the statistics failed to indicate how many times minorities were competing against each other for a single position. *Wali v. PSC*, 87-0081-PC, 87-0080-PC-ER, 4/7/89

Complainant's statistics showing the various numbers of minorities who applied, were certified, hired, passed probation as well as failed probation had little probative value in the absence of any comparison between hiring and retention rates for minority employes versus nonminority employes and in light of the small sample size. *Boyle v.*

780.10 Disparate impact

Simply establishing that a particular job group is underutilized for ethnic/racial minorities is insufficient to show that the hiring process utilized to fill positions within this job group has a disparate impact on these minorities. The use of an all-white, all-male screening panel is not sufficient in and of itself to demonstrate that the screening process had a disparate impact on minority candidates. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

The Commission rejected the complainant's theory of disparate impact with regard to the application of a post-certification screening criterion where the ultimate result of the application of the criterion was that none of the ethnic/racial minority candidates were screened out. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

Disparate impact analysis may not be extended to an employer's non-personnel oriented business decisions covering such things as where to do business and how to deploy capital, which will have obvious effects, and perhaps even disparate impacts, on its employes. The respondent's decision to deny a faculty exchange proposal which was based on a program decision not to engage in intercourse with a South African institution is not susceptible to analysis under the disparate impact model of discrimination. *McFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/8/88

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 717 through 717.7

[Previous material] [Next material]

---

717 Relationship with other proceedings/matters

The fact that complainant grieved the denial of sick leave under the applicable collective bargaining agreement does not deprive the Commission of jurisdiction over a claim filed under the FMLA. The same absence for medical reasons can be both a medical leave under the FMLA and a sick leave under the contract. *Janssen v. DOC*, 93-0072-PC-ER, 10/20/93

717.1 Consolidation with appeals/other complaints

Complainant's request to hold 8 cases in abeyance while proceeding on a 9th case was denied, where the issues and parties in the cases were not the same and the primary thrust of discovery would be different. *Balele v. WTCSB et al.*, 97-0097-PC-ER, etc., 12/18/98

While there were various distinctions between the reallocation appeal and three discrimination/retaliation claims in terms of parties, issues and burdens of proof, consolidation was appropriate where two of the three personnel transactions that were the subject of the appeal were also the subject of the equal rights proceedings. It made sense in terms of judicial economy to combine the cases for one hearing on all issues rather than holding two hearings. *Thorn v. DHSS*, 81-401-PC, 12/18/81, distinguished. *Harden & Nash v. DRL & DER*,

90-0106-PC-ER, etc., 1/23/96

Complainant's request to consolidate her first and second complaints for hearing was denied where the second complaint was filed approximately six weeks before the scheduled hearing date for the first complaint, the two complaints did not share identity of issues or witnesses, consolidation would reactivate a no probable cause determination that complainant did not appeal, and consolidation would create a hardship for respondent because it would have inadequate time for discovery and to prepare for hearing on the new issues. *Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner)

Respondent's request for consolidation was granted where both cases related to the same subject but alleged different claims, even though complainant was only represented by counsel as to one of the two cases. *Butzlaff v. DHSS*, 90-0162-PC-ER, 11/13/92

The fact that complainant had an appeal pending of the reclassification of his position did not preclude him from raising a charge of sexual orientation discrimination on the basis of an allegation that a similarly situated heterosexual employee was granted a reclassification while he was denied one. *Nash v. DRL & DER*, 90-0107-PC-ER, 12/23/91

It is the Commission's usual practice to keep appeals separate from companion discrimination complaints unless and until a consolidated hearing becomes appropriate, in order to permit proper application of the different statutory standards and to deal with any jurisdictional problems. *Thorn v. DHSS*, 81-401-PC, 12/18/81

The Commission could ascertain no statutory or other basis for a conclusion that the appellant could not simultaneously pursue both an appeal and a complaint of discrimination, both alleging discrimination based on race with respect to a denial of an exceptional performance award. [Note this decision was prior to the statutory preclusion of such appeals.] *Thomas v. DILHR*, 78-143-PC, 1/8/79

717.2 Existence of parallel federal proceeding

Petitioner's two discrimination complaints were held in abeyance in light of her request for a stay while they were processed by the federal Equal Employment Opportunity Commission, even though respondent had filed a motion to dismiss the complaints as untimely filed, moot and for failure to state a claim. Petitioner was directed to inform the Personnel Commission, after approximately 5 months, of the status of her federal claim. However, the Commission refused to hold petitioner's related classification appeal in abeyance. *Tyus v. DER et al.*, 97-0078-PC, etc., 1/27/99

Complainant's motion to hold the matter in abeyance pending resolution of parallel proceedings in federal court was granted where the two proceedings involved the same parties, facts and causes of action and it was undisputed that judgment on the merits of the federal claim would be conclusive as to the matter before the Commission. *Goetz v. DOA & Office of the Columbia County District Attorney*, 95-0083-PC-ER, 1/16/98

Complainant alleged whistleblower retaliation based on his testimony before the state legislature and his request to the Department of Labor to investigate the employer's overtime policies compared to the requirements of the Federal Labor Standards Act (FLSA). Complainant also had been a plaintiff in a federal court case where his claims included an allegation of whistleblower retaliation based on his participation in the federal court case. He claimed the same retaliatory act in the complaint as claimed in the federal court case, i.e. that the employer changed its policies regarding the use of fleet vehicles. The Commission granted the employer's motion to dismiss agreeing the complaint was precluded under res judicata principles. *Hilmes v. Wis. Lottery*, 91-0093-PC-ER, 9/24/93

Petitioner's request for an indefinite stay of proceedings in order to pursue his case in federal court was denied where petitioner had not yet filed a federal action, respondent opposed the request and respondent had the burden of proof as to one of the two cases before the Commission. The Commission modified petitioner's request and granted him a stay until the earlier of September 1 or 30 days from the service of any federal court proceeding, at which time the request for an indefinite stay was to be reconsidered. *Hodorowicz v. WGC*, 91-0078-PC, 91-0177-PC-ER, 4/23/93

The filing of a §1983 action in a court of record deprives the Commission of jurisdiction, by operation of §230.88(2)(c), Stats., over a complaint of whistleblower retaliation based on the same allegedly retaliatory conduct as the §1983 action. *Dahm v. Wis. Lottery*, 92-0053-PC-ER, 8/26/92

Respondent's motion to stay the proceedings before the Commission until complainant's related federal claim had been resolved was denied where the complainant indicated he preferred to proceed with the administrative proceeding before the Commission because it would be simpler and less burdensome and pointed out that he lacked the funds to conduct discovery in the judicial proceedings. There was no indication the complainant was trying to advance in both forums simultaneously. *McClure v. UW-Madison*, 88-0163-PC-ER, 9/19/90

The fact that a copy of the complaint was cross-filed with the U. S. Equal Employment Opportunities Commission does not deprive the Personnel Commission of jurisdiction to proceed. *Acharya v. DOA*, 88-0197-PC-ER, 10/3/89

That portion of complainant's proceedings before the Commission based on a claim of age discrimination was stayed pursuant to 29 U.S.C. 633(a), despite having been fully heard and partially briefed, where complainant had filed an Age Discrimination in Employment Act claim regarding the same personnel action. However, a stay was not granted as to complainant's claims of handicap discrimination and harassment also pending before the Commission, even though much of the evidence was common as to the age, handicap and retaliation claims. *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 8/18/87

Pursuant to the Age Discrimination in Employment Act, 29 U.S.C. 633(a), the Commission will stay proceedings on an age discrimination complaint pending a federal court proceeding involving the same

subject matter. *Schwartz v. UW*, 78-PC-ER-20, 10/2/79

717.3 Collateral estoppel/res judicata (see also 510.50)

The doctrine of claim preclusion holds that a final judgment

is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings. In order for earlier proceedings to act as a claim preclusive bar in relation to the present suit, three criteria must be satisfied: 1) an identity between the parties or their privies in the prior and present suits; 2) an identity between the causes of action in the two suits; 3) a final judgment on the merits in a court of competent jurisdiction. Wisconsin courts apply the transactional rule in determining whether the claims or causes of action in the two cases are sufficiently identical: a basic factual situation generally gives rise to only one cause of action, no matter how many different theories of relief may apply. The cause of action is the fact situation on which the first claim was based. If the present claim arose out of the same transaction as that involved in the former action, the present claim is barred even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the former action, or to seek remedies or forms of relief not demanded in the first action. In sum, the purpose of the claim preclusion doctrine is to prevent multiple litigation of the same claim, and it is based on the assumption that fairness to the defendant requires that at some point litigation involving the particular controversy must come to an end. *Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0257, 8/10/98; affirmed Court of Appeals, 98-2658, 5/20/99

It was inferred that the federal court intended to dismiss claims without prejudice where it entered judgment in favor of the defendants on the merits of complainant's federal civil rights claims, granted summary judgment dismissing his state claims, concluded it lacked jurisdiction over complainant's state law claims and that there was no private cause of action for such claims because the state administrative remedies were exclusive, and noted specific remedies that were available to complainant. The federal court judgment did not preclude complainant from pursuing his Fair Employment Act discrimination complaint before the Commission as a matter of claim preclusion. *Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0257, 8/10/98; affirmed Court of Appeals, 98-2658, 5/20/99

The doctrine of issue preclusion refers to the effect of a

judgment in precluding re-litigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action. The doctrine does not operate to provide a basis for a cause of action, but is, instead, an additional means by which all or part of a cause of action may be dismissed. Issue preclusion, unlike claim preclusion, does not require an identity of the parties. Issue preclusion is a narrower doctrine than claim preclusion and requires courts to conduct a fundamental fairness analysis before applying the doctrine. In order for earlier proceedings to act as an issue preclusive bar in relation to the present suit, there must be an identity between the causes of action in the two suits. *Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0257, 8/10/98; affirmed Court of Appeals, 98-2658, 5/20/99

Issue preclusion applied where complainant's state claim arose out of the same basic events and the same conduct by the defendants as did his previously decided federal action; complainant had the right to obtain, and did obtain, review of the federal district court judgment; the question was one of law involving one claim that was addressed in the ruling of the federal court, and there were no intervening contextual shifts in the law; the federal court was as qualified as the Commission to decide the discrimination and retaliation issues raised by complainant; there was no shift in the burden of persuasion, and there were no matters of public policy or individual circumstances involved that would render the application of issue preclusion fundamentally unfair. Where complainant's Fair Employment Act discrimination and retaliation claims were issues of fact that had been actually litigated and decided in a prior action, and after analyzing the "fundamental fairness" involved, the doctrine of issue preclusion was applied to bar further litigation. *Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0257, 8/10/98; affirmed Court of Appeals, 98-2658, 5/20/99

In a civil action filed in circuit court under §103.10(13), Wis. Stats., defendant’s motion for summary judgment based on issue preclusion, claim preclusion and estoppel of record was denied. The Personnel Commission had previously considered the merits of a FMLA claim by plaintiff relating to the defendant’s decision to terminate his probationary employment. The Commission’s decision had been affirmed on judicial review. Plaintiff’s new action also

alleged a violation of the FMLA with respect to the same personnel decision. The plain language of §103.10(13), Wis. Stats., "an employe . . . may bring an action in circuit court against an employer to recover damages caused by a violation of sub. (11) after the completion of an administrative proceeding, including judicial review, concerning the same violation," and "An action under par. (a) shall be commenced within . . . 60 days from the completion of an administrative proceeding, including judicial review, concerning the same violation," clearly expresses the legislative intent to abrogate the common law doctrines of issue preclusion, claim preclusion and estoppel by record. *Butzlaff v. Wis. DHFS*, Dane County Circuit Court , 97-CV-1319, 2/4/98

Summary judgment dismissing complainant's federal handicap discrimination claim was *res judicata* on complainant's handicap discrimination claim brought before the Commission, since applying transactional analysis to both actions, complainant's state claim arose out of same events and conduct of Army National Guard personnel regarding complainant's dismissal from Wisconsin Army National Guard which events and conduct showed that complainant's dismissal was not based upon handicap discrimination. *Schaeffer v. State Pers. Comm. & DMA*, 150 Wis. 2d 132 (Court of Appeals, 1989)

Summary judgment dismissing complainant's federal handicap discrimination claim was *res judicata* as to complainant's handicap discrimination claim brought before the Commission, since complainant had ample opportunity to have claim fully litigated but failed to offer any facts in response to respondents' dismissal motion in federal court which was accompanied by affidavits and a set of proposed findings of fact from which the federal court concluded that complainant's dismissal from Wisconsin Army National Guard could not have been product of handicap discrimination. *Schaeffer v. State Pers. Comm. & DMA*, 150 Wis. 2d 132 (Court of Appeals, 1989)

The language of §111.39(4)(b), Stats., indicating that when the Commission finds probable cause and is unable to resolve the problem informally, it "shall issue" a notice of hearing, in conjunction with the issuance of an initial determination of probable cause prior to the complainant's pursuit of a federal court action, does not give a complainant a "right" to a hearing which is unaffected by

the federal court decision and which cannot be barred by *res judicata*. *Schaeffer v. State Pers. Comm. & DMA*, 150 Wis. 2d 132 (Court of Appeals, 1989)

Imposing *res judicata* as a bar to the resumption of the Commission proceedings after an adverse federal decision does no violence to the "independent action" principles underlying Title VII where all of the elements of the doctrine are met -- identity of parties and issues, and, most importantly, the opportunity to litigate them in the former proceeding. *Schaeffer v. State Pers. Comm. & DMA*, 150 Wis. 2d 132 (Court of Appeals, 1989)

In a civil action filed in circuit court under §103.10(13), Wis. Stats., defendant's motion for summary judgment based on issue preclusion, claim preclusion and estoppel of record was denied. The Personnel Commission had previously considered the merits of a FMLA claim by plaintiff relating to the defendant's decision to terminate his probationary employment. The Commission's decision had been affirmed on judicial review. Plaintiff's new action also alleged a violation of the FMLA with respect to the same personnel decision. The plain language of §103.10(13), Wis. Stats., "an employe . . . may bring an action in circuit court against an employer to recover damages caused by a violation of sub. (11) after the completion of an administrative proceeding, including judicial review, concerning the same violation," and "An action under par. (a) shall be commenced within . . . 60 days from the completion of an administrative proceeding, including judicial review, concerning the same violation," clearly expresses the legislative intent to abrogate the common law doctrines of issue preclusion, claim preclusion and estoppel by record. *Butzlaff v. Wis. DHFS*, Dane County Circuit Court , 97 CV 1319, 2/4/98

Issue preclusion applies to a complaint of discrimination and whistleblower retaliation relating to two non-selection decisions where the complaint was held in abeyance pending resolution of a virtually identical claim involving the same parties filed in (state) circuit court, the state action was removed to federal court and the federal proceeding was dismissed on a motion for summary judgment in an order that included an extensive discussion of complainant's Title VII claims, rejection of his claims of disparate treatment and retaliation, and a statement by the court that the Wisconsin Fair Employment Act and Ch. 230, Wis.

Stats., do not provide a private right of action. *Balele v. DOA et al.*, 93-0144-PC-ER, 3/26/97; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm et al.*, 97-CV-1389, 10/30/97; affirmed Court of Appeals, 98-2866, 5/20/99

The doctrine of issue preclusion applies even if the result in the federal court proceeding was erroneous. *Balele v. DOA et al.*, 93-0144-PC-ER, 3/26/97; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm et al.*, 97-CV-1389, 10/30/97; affirmed Court of Appeals, 98-2866, 5/20/99

A summary judgment is subject to the doctrine of issue preclusion, citing *Schaeffer v. State Personnel Comm.*, 150 Wis. 2d 132, 441 N.W.2d 292 (Ct. App. 1989). *Balele v. DOA et al.*, 93-0144-PC-ER, 3/26/97; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm et al.*, 97-CV-1389, 10/30/97; affirmed Court of Appeals, 98-2866, 5/20/99

Where previously filed cases involved the same parties as in the present case and resulted in the issuance of a decision on the merits of complainant's discrimination claims and a companion appeal, which included resolution of disputed acts and resolution of the ultimate legal issues raised, and where complainant had a full and fair opportunity to litigate all his factual and legal disputes and took advantage of that opportunity, both the findings of fact and the legal determinations were binding on the parties. In 1992, the Commission issued a decision on the merits of the complainant's allegations of discrimination and "just cause" appeal regarding his indefinite suspension from work in 1991. Pursuant to the decision which found no discrimination but also concluded there was no just cause for the suspension, complainant was restored to employment with respondent and the matter was dismissed pursuant to a subsequent settlement agreement. After transferring to another agency and then resigning, complainant asked to be restored to a position with respondent but was not selected. Complainant filed a new complaint in which he included a detailed narrative of the events which led up to the indefinite suspension. Respondent's motion *in limine* was granted as to those allegations. *Jacobsen v. DHFS*, 96-0089-PC-ER, 2/6/97

A federal court's decision to dismiss, on a motion for

summary judgment, various claims of adverse conduct involving the same parties was res judicata with respect to separately cognizable claims raised in a subsequent proceeding before the Commission. *Balele v. DOA*, 94-0090-PC-ER, 2/20/95

Taking an appeal from a federal court decision does not preclude the application of res judicata and collateral estoppel arising from that decision, citing *Smith v. Schreiner*, 86 Wis. 19, 56 N.W. 160 (1893); *Luebke v. Marine Natl. Bank of Neenah*, 567 F. Supp. 1460 (E.D. Wis. 1983). *Balele v. DOA*, 94-0090-PC-ER, 2/20/95

While issues which may be foreclosed under the doctrine of collateral estoppel include issues of ultimate fact, evidentiary fact or of law, it its necessary that there be an identity of issues. Collateral estoppel did not apply to factual material alleged as evidentiary support for claims of sex and handicap discrimination relative to the classification of the complainant's position where, such claims were not present in complainant's federal case. However, collateral estoppel did apply to complainant's claims of race and national origin discrimination which were also made in his prior federal case. *Balele v. DOA*, 94-0090-PC-ER, 2/20/95

Res judicata barred complainant's attempt to proceed with his Commission case where complainant filed a charge of discrimination with the Commission which was later pursued in federal court and dismissed with prejudice, and complainant had a full and fair opportunity to litigate his federal court case and even though the federal court applied federal law and the Commission applies state law. *Thomas v. DILHR*, 92-0066-PC-ER, 6/23/94

Res judicata applies whether a case is dismissed with prejudice after a jury trial or, as in complainant's case, upon agreement of the parties. *Thomas v. DILHR*, 92-0066-PC-ER, 6/23/94

Complainant's claims before the Commission were barred on res judicata grounds where they had previously filed related claims in circuit court proceedings which had been dismissed. Complainants had filed 5 discrimination cases with the Commission between 1985 and 1986, which were held in abeyance while they pursued the complaint they filed in 1988, in Winnebago County circuit court. That court dismissed the case with prejudice based on statute of

limitation concerns and such dismissal was upheld by the Court of Appeals in March 1990. The complainant commenced an action in Dane County circuit court in the fall of 1991 which the court dismissed with prejudice in July 1992, based on res judicata principles. The complainants then returned to pursue their pending cases before the Commission. The Commission dismissed all the cases on res judicata principles. *Krebs & Crawley v. DILHR*, 85-0131-PC-ER, etc., 3/11/94

A sufficient identity of parties exists for purposes of the application of the doctrine of res judicata to actions before the Commission when a state agency is identified as the party respondent/defendant in one action and an office of that state agency is identified as the party in the other action, citing *Weatherall v. DHSS*, 84-0047-PC-ER, 10/7/87, affirmed by Ozaukee County Circuit Court, *Weatherall v. Personnel Commission*, 87-CV-481-B1, 9/15/88. *Krebs & Crawley v. DILHR*, 85-0131-PC-ER, etc., 3/11/94

Dismissal of a case with prejudice based on a failure to file the case within the applicable statute of limitations has a preclusive effect on a parallel action brought in another forum. *Krebs & Crawley v. DILHR*, 85-0131-PC-ER, etc., 3/11/94

The Commission lacks authority to assert jurisdiction over a complaint filed six months after the dismissal of another complaint arising from the same transaction. *DePagter v. UW-Madison*, 93-0003-PC-ER, 7/22/93

Where the arbitration award concerning the contractual grievance of complainant's discharge did not address the issue of race or arrest record discrimination and there was nothing to suggest that this would have even been possible under the contract in question, the matter raised in the complaint of discrimination was not identical in all respects with that decided in the first proceeding. Therefore, the doctrine of collateral estoppel did not apply. *Whitley v. DOC*, 92-0080-PC-ER, 7/9/93

Respondent's motion to give preclusive effect to a recent arbitration award determining the contractual grievance of complainant's discharge was denied. The arbitration decision did not address complainant's claims of race or arrest record discrimination. It was not possible, at the

motion stage, to disentangle the more general findings by the arbitrator, i.e., that there was just cause for the discharge, that there was a nexus between complainant's actions and the demands of his job, and that the discipline was not excessive, from the issues of race and arrest record discrimination which were not involved in the arbitration. However, the arbitration award and record could be used in evidence at the discrimination hearing, citing *Dohve v. DOT*, 84-0100-PC-ER, 11/3/88. *Whitley v. DOC*, 92-0080-PC-ER, 7/9/93

An arbitrator's conclusion that there was just cause for discharging the complainant did not collaterally estop the complainant from pursuing his claim of handicap discrimination. There was no way to determine, from the arbitrator's award, the degree of correlation, if any, between the legal principles controlling the arbitrator's conclusion that there was just cause for the discharge, and hence no violation of the contract, and the legal principles that control with respect to the Fair Employment Act. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 3/19/93

An internal agency investigative report finding probable cause to believe that complainant had been discriminated against as she alleged does not have res judicata or collateral estoppel effect against the employing agency in a subsequent Commission FEA proceeding. There is no identity of issues because the issue before the Commission is whether discrimination occurred, not whether there is probable cause to believe discrimination occurred. There is no identity or comparability of process because the investigation had few of the attributes of a due process administrative hearing. *Miller v. DOT*, 91-0117, 0142-PC-ER, 3/10/93

The Commission declined to apply collateral estoppel arising from findings made with respect to essentially the same claims in Circuit Court, where 1) the Court's findings were tentative and subject to possible change or addition and 2) where the Court retained jurisdiction over part of the case so that there apparently was no appealable order. *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92

Res judicata was not applicable where a prior appeal proceeding concerned the issue of whether the action of DMRS in removing complainant from a register violated standards established by the civil service code, and the

pending complaint raised issues of whether an agent of DOT pursued an allegation that complainant had cheated on the exam and subsequently conspired with a DMRS agent to have her removed from the register, because of her handicap. However, collateral estoppel could be applied with respect to the findings made in the decision of the appeal. Those findings would be given preclusive or binding effect with respect to the pending complaint but they did not dictate the dismissal of the complaint. *Dugan v. DOT & DMRS*, 88-0169-PC-ER, 4/17/92

Where complainant had asserted the same basic facts in his complaint of discrimination based on race and color before the Commission as he did in a federal complaint involving the same parties, and where the U.S. District Court ruled against complainant on the merits of his race discrimination claim on the ground that he did not make out a prima facie case, res judicata acted to bar complainant from proceeding with respect to his charge before the Commission. *Oriedo v. DER & DOT*, 90-0067-PC-ER, 9/5/91

The Commission rejected respondent's argument that the worker's compensation act served as complainant's exclusive remedy where complainant had been on leave from work for reasons other than a work-related injury, where respondent refused to return complainant to her former post but offered her a different post and where complainant rejected the offer based on medical advice that such duties might aggravate her colitis and irritable bowel. The exclusivity provision of the Worker's Compensation Law only comes into play when the employer has refused to allow the employe to return to work after an absence due to a work-related injury. *Theiler v. DHSS*, 87-0031-PC-ER, 10/18/90

In deciding a motion to dismiss on the ground of *res judicata* in a whistleblower case, the language in §230.88(2)(b), Stats., requires the Commission to give an arbitrator's award preclusive effect as to those specific matters determined in the arbitration that turn out to be material to the complaint. The Commission held that it could not conclude the arbitrator's award "necessarily depended" on the arbitrator implicitly rejecting complainant's retaliation theory. *Sorge v. DNR*, 85-0159-PC-ER, 11/23/88

In a whistleblower case in which the complainant alleged he

made a protected disclosure relating to the use of tools and materials by other employes for private purposes, a conclusion by an arbitrator as to the truth of whether there was widespread misconduct by other employes similar to that relied upon in discharging the complainant cannot serve as the basis for dismissing the whistleblower claim. The whistleblower law only requires that the employe reasonably believes the information disclosed, not that that information be true. Respondent's motion to dismiss was denied. *Sorge v. DNR*, 85-0159-PC-ER, 11/23/88

The Commission declined to give preclusive effect to an arbitrator's decision. The arbitrator concluded that the complainant had been discharged for just cause because of poor work performance and violation of work rules but also stated that neither party to the grievance had litigated, in any manner, issues relating to sex discrimination. The Commission quoted with approval *Becton v. Detroit Terminal of Consol. Freightways*, 687 F. 2d 140, 142 (6th Cir. 1982) as establishing the appropriate role of an arbitration award in a discrimination proceeding: 1) as persuasive evidence that the grounds found to be just cause for discharge are sufficient to amount to just cause, 2) to be deferred to in issues of contract construction and 3) where the award favors the employer, as meeting the burden of articulating a legitimate, nondiscriminatory reason. *Dohve v. DOT*, 84-0200-PC-ER, 11/3/88

Further proceedings before the Commission relating to the subject charge of discrimination were barred where complainant had filed a federal court proceeding based on 42 U.S.C. §§1981 and 1983 and on Title VlI, the federal court had entered judgment in favor of the defendants and dismissed the case, the cases before the federal court and the Commission involved the same parties (even though there were three individual defendants named in the federal proceeding) and arose from the same transactions. *Weatherall v. DHSS*, 84-0047-PC-ER, 10/7/87, affirmed by Ozaukee County Circuit Court, *Weatherall v. Personnel Commission*, 87-CV-481-B1, 9/15/88

The fact the complainant's federal case was based on different laws than the claim before the Commission does not prevent the Commission from applying res judicata where the cases involved the same parties and arose from the same transaction. *Weatherall v. DHSS*, 84-0047-PC-ER, 10/7/87, affirmed by Ozaukee County Circuit Court,

***Weatherall v. Personnel Commission*, 87-CV-481-B1, 9/15/88**

Respondent's failure to object at the time the complainant requested a stay in the Commission proceedings in order to pursue claims in federal court do not foreclose respondent from pleading res judicata as to the claim before the Commission after a final judgement in favor of the defendants was entered in the federal action. *Weatherall v. DHSS*, 84-0047-PC-ER, 10/7/87, affirmed by Ozaukee County Circuit Court, *Weatherall v. Personnel Commission*, 87-CV-481-B1, 9/15/88

There were no policy reasons to avoid the application of res judicata where the federal court had simply utilized a different substantive approach to causation in finding for defendants than the Commission has utilized because such a result is always a possibility when a party elects to procede under federal rather than state law. *Weatherall v. DHSS*, 84-0047-PC-ER, 10/7/87, affirmed by Ozaukee County Circuit Court, *Weatherall v. Personnel Commission*, 87-CV-481-B1, 9/15/88

The doctrine of res judicata applies where complainant had a full opportunity in a federal court proceeding to have litigated essentially the same claim embodied in his charge of discrimination and the federal claim was dismissed on a motion for summary judgment. The complainant had the opportunity in the federal proceeding to have presented any evidence of handicap discrimination and/or retaliation he may have had in addition to the evidence he actually presented and he either had no additional evidence or he failed to present it, and there was an identity between the parties and the issues in the two proceedings. The pendency of an appeal of the federal court judgment did not deprive the judgment of its preclusive effect. However, the Commission retained jurisdiction during the pendency of the appellate proceedings. *Schaeffer v. DMA*, 82-PC-ER-30, 6/24/87; affirmed by Dane County Circuit Court, *Schaeffer v. State Pers. Comm. & DMA*, 87-CV-7413, 6/22/88; affirmed by Court of Appeals, 150 Wis.2d 132 (1989)

Respondent's motion to dismiss was denied where the complainant alleged his discharge constituted handicap discrimination, the complainant had also pursued a contractual grievance contesting the discharge and related reprimands resulting in an arbitration proceeding where the

arbitrator found just cause for the reprimands and the termination and during the arbitration proceeding the complainant's representative explicitly withdrew any claim of discrimination. The arbitrator's award addressed complainant's arguments that the respondent applied a singular, unreasonable production standard to complainant and that respondent failed to follow a reasonable course of progressive discipline and corrective action in the context of complainant's mental condition but the award did not necessarily resolve issues of handicap discrimination and accommodation. *Fischer v. UW-Madison*, 84-0097-PC-ER, 12/18/86

Respondent's motion to dismiss was granted where the complainant's Title VII action resulted in a finding of no discrimination which was affirmed by the Court of Appeals, the parties were identical, the complaint before the Commission was a copy of the charge of discrimination filed with the EEOC and the basis for the Title VII action and the legal framework is essentially the same under the Wisconsin Fair Employment Act and Title VII. The matter before the Commission had been held in abeyance pending completion of the federal proceedings under Title VII. *Namenwirth v. UW-Madison*, 79-PC-ER-93, 2/13/86

The Commission dismissed a charge of discrimination due to a settlement agreement entered into by the same parties where the settlement agreement was designated as a settlement of "any and all claims… that Appellant has or may have, whether known or unknown," and where the current claim was necessarily based on or arose out of events preceding the execution of the settlement agreement. *Bartell v. DHSS*, 84-0038-PC-ER, 9/13/85

The elements of res judicata were not present where the final decisions of the arbitrator (contractual grievance) and the Labor Industry Review Commission (unemployment compensation proceeding) neither explicitly nor necessarily addressed and decided the issues before the Commission on complainant's discrimination complaint and where complainant litigated neither some nor all of the alleged bases of discrimination in the other proceedings. The commission found that complainant was not precluded from relitigating the matter of his discharge under the Fair Employment Act before the Commission. *Massenberg v. UW-Madison*, 81-PC-ER-44, 7/21/83

The union's failure to file and pursue a contractual grievance on behalf of the complainant in regard to her layoff was held to not be dispositive of the issue of whether respondent complied with the requirements of the applicable bargaining agreement. Res judicata did not apply. *Cowie v. DHSS*, 80-PC-ER-115, 4/15/83

The doctrine of res judicata was applied to a final award made by an arbitrator. The arbitrator had determined there was just cause for the discharge and that "all the reprimands issued to the grievant were neither harassment nor did they constitute a singling out of the grievant for ununiform. treatment." In the matter before the Commission, complainant had charged race discrimination with respect to her discharge from employment with the respondent and alleged her supervisor had subjected her to continuous harassment. Complainant had a full opportunity in the arbitration proceeding to have litigated essentially the same claim embodied in her complaint. She had an opportunity in the arbitration to present any evidence of racial discrimination she may have had in addition to the evidence she actually presented, but she either had no evidence or failed to present it. *Kotten v. DILHR*, 81-PC-ER-23, 1/31/83

Where an employe filed both a civil service appeal and a complaint of discrimination regarding the same transaction, and the proceedings involved the same parties and presented the same issue, a final decision on the merits in the appeal acted to bar the complaint of discrimination pursuant to the doctrine of issue preclusion or collateral estoppel. *Jacobson v. DILHR*, 79-PC-ER-11, 6/3/81

717.5 Effect of prior settlement agreement reached in another proceeding (see also 738.02)

Where previously filed cases involved the same parties as in the present case and resulted in the issuance of a decision on the merits of complainant's discrimination claims and a companion appeal, which included resolution of disputed acts and resolution of the ultimate legal issues raised, and where complainant had a full and fair opportunity to litigate all his factual and legal disputes and took advantage of that opportunity, both the findings of fact and the legal

determinations were binding on the parties. In 1992, the Commission issued a decision on the merits of the complainant's allegations of discrimination and "just cause" appeal regarding his indefinite suspension from work in 1991. Pursuant to the decision which found no discrimination but also concluded there was no just cause for the suspension, complainant was restored to employment with respondent and the matter was dismissed pursuant to a subsequent settlement agreement. After transferring to another agency and then resigning, complainant asked to be restored to a position with respondent but was not selected. Complainant filed a new complaint in which he included a detailed narrative of the events which led up to the indefinite suspension. Respondent's motion *in limine* was granted as to those allegations. *Jacobsen v. DHFS*, 96-0089-PC-ER, 2/6/97

Where after a hearing on the merits, the Commission issued a decision finding no just cause for the imposition of a suspension and ordered complainant restored to employment with respondent, and the parties then reached a settlement agreement, the agreement could not be read so broadly as to waive claims of discrimination that might arise during complainant's restored employment. Such a broad reading would be contrary to good public policy as opening the door for employers to settle claims of discrimination by returning a complaining employe to work but only to make conditions so intolerable as to force a later resignation. *Jacobsen v. DHFS*, 96-0089-PC-ER, 2/6/97

The Commission dismissed a charge of discrimination (alleging that complainant was being paid less for performing the same work as men who had less seniority) due to a settlement agreement entered into by the same parties where the settlement agreement was designated as a settlement of "any and all claims … that Appellant has or may have, whether known or unknown," and where the current claim was necessarily based on or arose out of events preceding the execution of the settlement agreement. *Bartell v. DHSS*, 84-0038-PC-ER, 9/13/85

Where complaints of sex discrimination were filed with DILHR and federal agencies regarding a BFOQ at MMHI (Mendota Mental Health Institute), and were settled by stipulations approved by those agencies, and shift changes engendered by the settlement agreement led an affected employe, who was not a party to or represented in the first

complaints, and who had no notice of the settlement agreement, to file a complaint of sex discrimination with the Commission, that complaint was not barred by the first settlement agreement. *Chadwick v. DHSS*, 81-PC-ER-14, 4/2/82

717.7 Exclusivity of or preemption by other laws/proceedings

Federal law preempts the Wisconsin Fair Employment Act with respect to a claim raised by national guard member who tested positive for human immunodeficiency virus and who challenged options available under federal national guard policy as being discriminatory toward members of Wisconsin Army National Guard. *Hazelton v. State Pers. Comm.*, 178 Wis. 2d 776, 505 N.W.2d 793 (Court of Appeals, 1993)

The Commission's prior order dismissing a portion of complainant's claim based on the exclusivity provision of the Worker's Compensation Act was rescinded in light of the decision by the Wisconsin Supreme Court in *Byers v. LIRC*, 208 Wis. 2d 388 (1997), which held that the exclusivity provision of the Worker's Compensation Act does not prohibit a claim under the Wisconsin Fair Employment Act. *Lehman v. DNR*, 95-0033-PC-ER, 7/16/97

Where there was an insufficient basis on which to conclude that complainant's handicap discrimination claim was based upon conduct arising from his work-related injuries and the medical treatment arising therefrom, rather than upon a handicap arising from one or more surgeries that did not result from his work-related injuries, respondent's motion to dismiss under the Workers' Compensation Act exclusivity provision was denied. *Ledwidge v. UW-Madison*, 96-0066-PC-ER, 1/16/96

Worker's Compensation Act exclusivity was not a bar to complainant's allegations of an extensive litany of acts of sexual harassment and discrimination throughout a six year period of employment, because the alleged intentional sexual harassment was not an "accident" within the meaning of the WCA, applying *Lentz v. Young*, 195 Wis. 2d 457 (Ct. App., 1995). *Reinhold v. Office of Columbia County District Attorney & Bennett*, 95-0086-PC-ER, 1/3/96

The question of Worker's Compensation Act exclusivity is an issue of subject matter jurisdiction that can be raised at any time and cannot be waived, citing *Powers v. UW-System*, 92-0746-PC, 6/25/93. *Longdin v. DOC*, 93-0026-PC-ER, 7/27/95

Only complainant's handicap discrimination claim was subject to dismissal as a consequence of the exclusivity provision. Complainant was permitted to proceed regarding her claim of sex discrimination arising from the alleged failure to provide her with a light-duty position because it alleged an injury that was unrelated to the work injury she suffered to her left shoulder. *Longdin v. DOC*, 93-0026-PC-ER, 7/27/95

Complainant's request for a stay of her whistleblower complaint due to having filed a claim in circuit court which included a cause of action alleging violation of her rights under §230.80, et. seq., was denied. Instead, the complaint was dismissed as required by §230.88(2), Stats. *Tolley v. Office of the Commissioner of Transportation*, 93-0086-PC-ER, 2/22/95

The exclusivity provision of the Worker's Compensation statute barred consideration of complainant's claim that he was terminated in 1992 because of his handicap where respondent's reason for termination was continuing medical problems which resulted solely from a work injury in 1986 that was the subject of a Worker's Compensation claim. *Kafar v. DHSS*, 92-0076-PC-ER, 7/22/93; affirmed by Racine County Circuit Court, *Kafar v. Pers. Comm.*, 93 CV 1985, 6/10/94

Petitioner's handicap discrimination charge and discharge appeal were barred by exclusivity provision of Worker's Compensation Act (WCA), where he had pursued a WCA claim for work-place injuries which prevented him from returning to work subsequent to the injuries and which resulted in his discharge. *Powers v. UW*, 92-0746-PC, 92-0183-PC-ER, 6/25/93

Worker's Compensation Act exclusivity runs to the Commission's subject matter jurisdiction and can be raised at any time. *Powers v. UW*, 92-0746-PC, 92-0183-PC-ER, 6/25/93

Complainant's claim of handicap discrimination was not

barred by the exclusivity provision of the Worker's Compensation statute where the action complained of, the denial of a transfer request, was an independent decision by respondent with a connection that was too remote to complainant's work-related injuries. The transfer denial occurred 7 months after complainant returned to work after his last work-related injury. Complainant alleged he was denied the transfer because respondent perceived him as handicapped. The only relationship between the subject of the complaint and the work-related injuries was the complainant's allegation that respondent's perception of those injuries was causal with respect to respondent's perception of him as handicapped. The denial of transfer was not an "injury" compensable under the Worker's Compensation Act. *Johnson v. DHSS*, 89-0080-PC-ER, 4/30/93

The worker's compensation act did not prevent complainant from filing a claim of handicap discrimination regarding a refusal to rehire where the complainant alleged that the refusal to rehire was based entirely upon injuries incurred prior to commencing employment with respondent rather than upon work-related injuries. *Van Zutphen v. DOT*, 90-0141-PC-ER, 5/1/92

The Commission has the authority to decide whether its legislatively-granted authority under the FEA was preempted by federal law. *Aries v. DMA*, 90-0149-PC-ER, 11/6/91

Where complainant alleged discrimination on the basis of sexual orientation with respect to the refusal to permit him to enlist in the Wisconsin national guard (WIARNG), where, based on statute, at the time complainant was denied enlistment in WIARNG he in effect was also denied enlistment in the National Guard of the Unites States (NGUS), and where federal regulations provided that homosexual behavior was cause for rejection of enlistment, federal law preempted the Fair Employment Act on the subject. *Aries v. DMA*, 90-0149-PC-ER, 11/6/91

Complainant's charge of discrimination based on handicap and sexual orientation arising from his involuntary separation from the Wisconsin National Guard after having been diagnosed HIV positive as a result of a blood test was dismissed where there was a conflict between the state and federal law applicable to the case. *Hazelton v. DMA*,

88-0179-PC-ER, 11/6/91; reversed by Dane County Circuit Court, *Hazelton v. Wis. Pers. Comm.*, 91-CV-4770, 7/13/92; reversed by Court of Appeals, *Hazelton v. State Pers. Comm.*, 178 Wis. 2d 776, 505 N.W.2d 793

Where the respondent's refusal to employ the complainant resulted solely from complainant's pain in his right wrist, complainant was awarded worker's compensation benefits for this pain and complainant's pain in his wrist was the sole basis for his complaint of handicap discrimination, the complainant's exclusive remedy was under the Worker's Compensation Act and his complaint was dismissed. *Olson v. UW-Stout*, 87-0176-PC-ER, 5/1/91

As a general matter, where an employe is injured on the job and the employer then refuses to rehire that employe because of that injury, the Worker's Compensation Act provides the sole remedy regardless of whether the employe alleges that the injury caused a handicap or a perceived handicap that motivated the employer. *Meinholz v. DOT*, 90-0147-PC-ER, 1/11/91

Where the complainant suffered an on-the-job injury, was unable to work for a short period of time and was then laid off, he would have been able to have pursued a claim under the Worker's Compensation Act so the exclusivity provision of that act usurped the Commission's jurisdiction over his charge of handicap discrimination. *Meinholz v. DOT*, 90-0147-PC-ER, 1/11/91

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 782 through 782.04

[Previous material] [Next material]

---

782 Occupational safety and health retaliation

782.01 Generally

Complainant's occupational safety and health retaliation claim was not defeated by his failure to report unsafe conditions to the Department of Commerce, citing *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89. Complainant had filed an incident report with management and his union of unsafe working conditions. *Leinweber v. DOC*, 97-0104-PC-ER, 8/14/97

Workplace violence is regulated under the general duty clause of the federal Occupational Safety and Health Act and, because Wisconsin's public employe safety and health provisions were intended to give covered state employes the same protections as employes in the private sector, complainant's incident report to management and his union relating to threatening telephone calls and the absence of any staff member, other than complainant, a social worker, on a floor at a hall in the Drug Abuse Correctional Center, related to dangers protected under state law. *Leinweber v. DOC*, 97-0104-PC-ER, 8/14/97

782.02(2) Finding of *no* probable cause

No probable cause was found as to complainant's FEA retaliation, occupational safety and whistleblower claims arising from the decision not to reclassify his position where respondent contended that the request was denied because complainant's position did not meet the requirements of the higher classification and complainant did not show respondent's decision was unreasonable or that respondent applied the specification's requirements more stringently for him than for employes who had not engaged in protected activities. *Holubowicz v. DOC*, 96-0136-PC-ER, 4/24/97

No probable cause was found as to complainant's occupational safety and whistleblower claims arising from the decision to require him to undergo an interview for a vacant position along with other names on the certification list rather than to transfer into the position without an interview where the record did not indicate that the alleged retaliator knew the position's classification had been lowered prior to the date the certification list was generated, respondent had posted the position for transfer prior to accepting applications for competition and the record did not indicate that respondent would have had an obligation to post the position for transfer a second time, and complainant waited until minutes before his interview started before requesting an opportunity to transfer without an interview. *Holubowicz v. DOC*, 96-0136-PC-ER, 4/24/97

Complainant failed to sustain his burden at the probable cause stage with respect to his allegation of constructive denial of his reclass request in retaliation for occupational safety and health activities where complainant did not submit the documents necessarily included in a formal request for reclassification or follow the published procedures which apply in the event an employe's supervisor does not respond to such a request. No probable cause was also found with respect to respondent's directive that supervisors notify subordinates orally of the denial of a reclass request when management has initiated the request. *Holubowicz v. DOC & DER*, 94-0030-PC-ER, 11/14/96

No probable cause was found with respect to the respondent's scheduling the complainant for a pre-disciplinary hearing where respondent's practice was to schedule such hearings whenever an investigation had identified a work rule violation and the person who had

conducted the investigation was unaware that complainant had engaged in a protected activity. *Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91

No probable cause was found with respect to the decision to terminate complainant's probationary employment where respondent's approach toward complainant was consistent throughout her probationary period and where it was not clear that complainant had engaged in any protected activity. *Bender v. DOR*, 87-0032-PC-ER, 8/24/89

No probable cause was found with respect to various disciplinary actions where the complainant admitted most of the charges against him, complainant's disciplinary problems started substantially before he filed his first discrimination complaint and respondent could have discharged him earlier when it found he had falsified a medical excuse but instead allowed him to continue working. *Sheridan v. UW-Madison*, 86-0103-PC-ER, 87-0141-PC-ER, 2/22/89

782.03(2) Finding of *no* retaliation

Complainant failed to show pretext with respect to various disciplinary actions where there was no evidence to rebut the testimony of his immediate supervisor 1) that he was unaware of complainant's protected activities and 2) that he had not been directed by anyone else in management to impose the discipline, and where complainant had not demonstrated that there were other employes who were actually similarly situated to him who did not receive similar discipline because 1) those employes were under a different supervisor and 2) complainant failed to establish the reasons for the other employe's absences in light of respondent's attendance policy which called for consideration of mitigating circumstances before the imposition of discipline. *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97

No retaliation was shown in regard to complainant's performance evaluation where complainant had reported safety and health problems over a considerable period of years, had not suffered any adverse employment consequences but had been complimented, recognized and rewarded for her efforts. Complainant, a Building

Maintenance Helper, had more recently failed to notify her supervisors of health and safety violations in her building, had failed to communicate effectively with her supervisors on various occasions, had failed to carry out a work assignment and had failed to wear proper safety equipment. *McKibbins v. UW-Milwaukee*, 94-0099-PC-ER, 4/4/95

Respondent's decision not to allow inclusion of the union steward or attorney requested by the complainant to represent the complainant at an investigative meeting was not retaliatory where there was nothing in the department-wide policy which indicated that the represented employe had the choice to select either a personal attorney or a local union grievance representative who was unavailable at the time of the hearing and there was no evidence that on other occasions, delays in the hearings had been permitted to allow for representation by either a personal attorney or by a union representative who was unavailable at that time. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

Respondent's decision to suspend the complainant for ten days for unauthorized distribution of literature on the grounds of a correctional institution was upheld where management had previously indicated a strong opposition to the practice of distribution union newsletters in the institution, antagonism between the complainant and management preceded the complainant's protected activities, those protected activities were not significant departures from complainant's previous conduct, the person who made the final decision to suspend the complainant was unaware that complainant had engaged in any of the specific protected activities and within the previous 10 months, the complainant had received a written reprimand, and two three-day suspensions. Respondent's decision not to modify the suspension after another employe admitted to distributing some of the literature was upheld where the policy violated by the complainant did not differentiate the degree of malfeasance based on the amount of information found to have been distributed. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

The following actions by the respondent were not found to be retaliatory: 1) the refusal to provide assistance when the complainant called for help where testimony indicated assistance was not required, 2) the decision to investigate a report which raised serious questions about complainant's

conduct, 3) the decision to substitute a day of suspension for a previously scheduled day of vacation where the person who made the change was unaware that the change was not desired by the complainant, 4) the decision to deny complainant admittance to the correctional institution grounds during the period of his suspension where respondent's action was consistent with existing policy. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

Complainant reasonably refused to assist in the delivery of a drum of sulfuric acid because of a reasonable and good faith belief that the task involved a danger of serious injury or death. The complainant also engaged in protected activity when he sent DILHR a copy of a memo to his supervisor specifically questioning the safety of moving the acid. Complainant's subsequent termination was based in part on these activities but these factors were not a substantial reason for the termination and the termination would have occurred in the absence of these factors. Complainant's attitude toward management throughout the course of his four months of employment was contentious and in some respects contumacious, including one statement that the supervisor's memo would make good toilet paper. *Strupp v. UW-Whitewater*, 85-0110-PC-ER 7/24/86; affirmed by Milwaukee Circuit Court, *Strupp v. Pers. Comm.*, 715-622, 1/28/87

Complainant was found not to have engaged in a protected activity where the only evidence of safety-related activity was that the complainant discussed health and safety matters with a co-worker and where complainant failed to establish that respondent believed that he had "filed" an oral safety complaint. Even if complainant had shown he had engaged in a protected activity, he failed to establish a causal connection with his subsequent discharge. *Branski v. UW-Milwaukee*, 82-PC-ER-98, 2/29/84

782.04 Prima facie case

Complainant failed to establish a prima facie case of public employe safety and health retaliation where he failed to present any evidence of having participated in a protected disclosure of health or safety hazards. *Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98

A wage claim, two grievances concerning safety issues and an application for FMLA leave constitute protected activities under at least one statute among the FEA, occupational safety and health provisions and the FMLA. *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97

Filing Abnormally Hazardous Task Reports and making other disclosures to the Department of Industry, Labor and Human Relations were protected public employe health and safety activities. *McKibbins v. UW-Milwaukee*, 94-0099-PC-ER, 4/4/95

Comments and ratings on a performance evaluation are reviewable under the public employe health and safety provisions. *McKibbins v. UW-Milwaukee*, 94-0099-PC-ER, 4/4/95

Complainant failed to establish a prima face case of retaliation where the person who decided not to rescind the complainant's resignation was not aware of the complainant's protected activity. *Radtke v. UW-Madison*, 92-0214-PC-ER, 11/22/94

Nothing in the statute suggests that a grievance directed to management and relating to a health or safety concern cannot constitute the exercise of a right under the law, entitling the grievant to protection from retaliation. Comments to the media were also protected conduct. However, a grievance referring only to a single instance of prior conduct by management with no indication that the conduct represented a policy did not relate to an ongoing safety concern. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

All claims meeting the standard of "discipline" under the whistleblower law constitute adverse actions under the public employe safety and health law. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 719 through 722

[Previous material] [Next material]

---

719 Mootness

Respondent had the burden to show that the controversy was moot. *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98

An issue is moot when a determination is sought which can have no practical effect on a controversy. The focus, generally, is on the available relief in relation to the individual complainant but may shift to a consideration of others in the workplace when an overt policy of discrimination is alleged to impact on a category of employes. *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98

A complaint arising from various conditions of employment was moot where complainant had voluntarily resigned from employment with respondent and was employed by another state agency over which respondent had no supervisory authority, and could not act to affect the terms or conditions of complainant's employment in any practical manner. The fact that complainant could apply for employment with respondent at some time in the future was too speculative to defeat the motion to dismiss. Nothing had occurred from which it could have been concluded that complainant would be considered a prevailing party. The complainant's litigation effort was not a causal factor in achieving the complainant's objectives or improving her situation. *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98

Where complainant resigned after her complaint was filed,

the question of whether the controversy was moot involved reviewing complainant's claims and the available related remedies to determine if the resignation precluded granting effective relief to complainant. *Burns v. UW-Madison*, 96-0038-PC-ER, 4/8/98

Where complainant's prospective remedies, other than attorneys' fees and costs, would be limited to an order to respondent to provide requested accommodation and to cease and desist from discriminating or retaliating against complainant in regard to any future accommodation request, the controversy was moot because complainant was no longer employed by respondent. *Burns v. UW-Madison*, 96-0038-PC-ER, 4/8/98

Where complainant remained an employe of respondent and it was possible that a controversy could arise in the future between the parties relating to the impact of an alleged whistleblower disclosure on complainant's requests for overtime pay, the fact that respondent had, in 1997 made payments to complainant in 1997 for overtime hours he had accrued in 1995, did not cause complainant's allegation of retaliation, arising from respondent's denial of overtime pay in 1995, to be moot, citing *Watkins v. DILHR*, 69 Wis. 2d 782, 12 FEP Cases 816 (1975). Respondent failed to show that there was no reasonable expectation that the alleged violation would recur and that the 1997 overtime payment made to complainant had completely and irrevocably eradicated the effects of the alleged violation. Respondent's motion to dismiss the claim was denied. *Nolen v. DILHR [DOCom]*, 95-0163-PC-ER, 12/17/97

An issue is moot when a determination is sought which can have no practical effect on a controversy. Therefore, the focus, generally, is on the available relief in relation to the individual complainant but may shift to a consideration of others in the workplace when an overt policy of discrimination is alleged to have an impact on a category of employes. *La Rose v. UW-Milwaukee*, 94-0125-PC-ER, 4/2/97

Where each of the potential remedies to various claims could be considered effective only if complainant were still employed by respondent and complainant had retired subsequent to filing his complaint, his claims were dismissed as moot. *La Rose v. UW-Milwaukee*, 94-0125-PC-ER, 4/2/97

A claim arising from respondent's decision denying complainant's request for 8 hours of unpaid FMLA leave for her absence on December 3rd was moot where complainant's employment was terminated on December 18th, complainant had refused respondent's offer to grant her 7.75 hours of FMLA leave and 0.25 hours of unapproved absence, so respondent's records simply reflected complainant's absence as 8 hours of unpaid leave. There would be no potential for a retroactive salary adjustment for the disputed 15 minutes because complainant's underlying FMLA request was for leave without pay, and complainant's personnel file would still reflect that she was terminated for her prior attendance record and her failure to provide proper notice on December 3rd. *Follett v. DHSS*, 95-0017-PC-ER, 7/5/96

Where the Commission could not award the only remedy which complainant was seeking (attorney's fees and costs), the case was moot and the matter was dismissed. *Duello v. UW-Madison*, 87-0044-PC-ER, 3/9/90

A complaint of discrimination alleging sex discrimination in the assignment of a classification series to salary ranges was not moot even though the series had been abolished at some time after the complaint was filed. *WFT v. DP*, 79-306-PC, 4/2/82

720 Standing

The complainant was found to have standing to pursue a complaint of discrimination based on creed where respondent's policy caused the complainant an "injury in fact" during the 300 day period before she filed her complaint by effectively denying group coverage to her which would have provided Christian Science practitioner reimbursement. The complainant's past conduct indicated that but for the policy in question, the complainant would have held group health insurance from the respondent during the 300 day period preceding the filing of her complaint. *Lazarus v. DETF*, 90-0014-PC-ER, 2/15/91

The Department of Employment Relations was a "person aggrieved" under §227.49(1), Stats., for the purpose of filing a petition for rehearing of the Commission's legal

conclusions regarding the family leave/medical leave law where those legal conclusions directly caused injury to DER's interests in the bargaining and administration of the state's leave benefit provisions and where DER's interests were recognized by the family leave and medical leave act. *Lawless v. UW-Madison*, 90-0023-PC-ER, 6/1/90; precedential value qualified, 1/11/91

Because they had never applied for appointment to a position at the Women's Correctional Center, the complainants lacked standing to allege that the WCC's hiring practices were discriminatory. However, because the complainants were employed at the Marshall Sherrer Correctional Center, they had standing to allege a disparity in working conditions between MSCC and WCC. *Duvnjak & Studenec v. DHSS*, 88-0164, 0168-PC-ER, 9/8/89

further for certain positions because his exam scores were not high enough but certain individuals who scored lower than complainant were allowed to proceed further in the selection process because of their handicapped status, thus allegedly constituting an injury to the complainant's interest. *Oestreich v. DHSS*, 87-0038-PC-ER, 6/29/88

Where complainant was found to have been considered for the subject position by the hiring authority, he was the subject of an adverse personnel action when he was not selected and suffered an "injury in fact", even though his name was not on the "official" certification list. *Pfeifer v. DILHR*, 86-0149-PC-ER, 86-0201-PC, 12/17/87

Where complainant had not scored high enough on the written exam to have been certified on a competitive basis and was denied expanded certification because respondent determined his vision was not such as to qualify him as visually handicapped, complainant lacked standing to contest respondent's allegedly illegal vision acuity standards. The only way he could be in a position to be injured by the acuity standards would be to successfully litigate his exclusion from the handicapped expanded certification and then successfully pass the other parts of the screening. *Wood v. DNR*, 85-0002-PC-ER, 4/15/87; affirmed by Waushara County Circuit Court, *Wood v. State Pers. Comm.*, 87-CV-80, 5/3/88

A professor at a UW campus has standing to file a claim arising out of alleged discrimination based on the national

origin of his prospective faculty exchange colleague. *MrFarland & Joubert v. UW-Whitewater*, 85-0167-PC-ER, 86-0026-PC-ER, 9/4/86

Complainant lacked standing to challenge use of a visual acuity standard for the conservation warden position where only those persons whose names were on the certification list could be considered for appointment, and complainant was not certified as an eligible for the position. The only way the visual acuity standard could adversely affect the complainant was if the test prevented him from being hired, and that did not occur. *Wood v. DER & DNR*, 85-0008-PC-ER, 7/11/86

The union has standing with respect to an appeal objecting to the assignment of a classification to a pay range as discriminatory, but not with respect to individual claims of back pay. *WFT v. DP*, 79-306-PC, 4/2/82

721.01 Generally

The Commission is entitled to review the credibility of witnesses and the weight of the evidence in determining probable cause. The Commission is not limited at the probable cause hearing to merely examining whether the petitioner has presented evidence which, if believed, would be sufficient to support his claim. Rather, the test is whether the Commission believes, upon its examination of the evidence and its view of the credibility of the witnesses, that discrimination has probably occurred. *McLester v. Personnel Commission*, Court of Appeals District III, 84-1715, 3/12/85

Where the parties disagreed about whether complainant was qualified for the position in question but complainant had clearly established the other elements of a prima facie case of race discrimination, the Commission proceeded directly to the issue of pretext. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

In an adverse impact case, complainant has the burden of proving that the policy or practice complained of had a significantly exclusionary impact of his protective class. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

In the context of a hiring decision, the elements of a prima facie case are that the complainant 1) is a member of a class protected by the Fair Employment Act, 2) applied for and was qualified for an available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination. *Ruport v. UW (Superior)*, 96-0137-PC-ER, 9/23/98

Since the case had been fully heard on the merits, the Commission proceeded directly to the question of whether respondent's explanation for its action was actually a pretext for age discrimination rather than performing a prima facie case analysis, citing *U.S. Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 715, 75 L. Ed 2d 403, 410, 103 S.Ct. 1478 (1983). *Lorscheter v. DILHR*, 94-0110-PC-ER, 4/24/97

Simply asking an employe to verify their leave status rather than having a supervisor research such status does not rise to the level of an "adverse employment action" within the context of a retaliation charge. *Bower v. UW-Madison*, 95-0052-PC-ER, 8/15/96

Where an entire case has been tried on the merits, and the parties have fully tried the question of whether the employer's rationale for the adverse employment action was pretextual, whether a prima facie case was established is no longer relevant and the question of whether the employer intentionally discriminated against the complainant should be directly addressed, citing *U.S. Postal Service Bd. Of Govs. v. Aikens*, 460 U.S. 711, 715, 75 L.Ed. 2d 402, 410, 103 S. Ct. 1478 (1983). *Mitchell v. DOC*, 95-0048-PC-ER, 8/5/96

The Wisconsin approach to mixed motive questions in Fair Employment Act cases is set forth in *Hoell v. LIRC*, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App., 1994). *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

In a complaint of discrimination relating to the academic-related decisions that bore on complainant's employment as a faculty member, the Commission must give appropriate weight to the academic and pedagogical judgments of the academics who are in the best position to make these kinds of evaluations and who have followed a process the university has developed to provide a careful

method of evaluation of these factors. *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

In analyzing any hostile environment allegation, the employer is not liable unless it is established that the employer acted intentionally because of the employe's protected status. *Stark v. DILHR*, 90-0143-PC-ER, 9/9/94

Although the burden on the complainant to show probable cause is not as rigorous as the burden to prove discrimination or retaliation, it involves more than simply setting forth a prima facie case of discrimination. *Cozzens-Ellis v. UW-Madison*, 87-0070-PC-ER, 2/26/91

The Commission rejected the argument that in order to establish the fourth prong of a prima facie case for a nonselection decision, a complainant who cannot prove the vacancy remained open after s/he was rejected must present some other evidence of improper motivation. *Winters v. DOT*, 84-0003-PC-ER, 7/8/88

The determination of probable cause properly includes the resolution of factual disputes and credibility conflicts. *Boyle v. DHSS*, 84-0090, 0195-PC-ER, 9/22/87, modified, 10/27/87

The probable cause standard requires a degree of proof that is less demanding than the preponderance standard applicable on the merits but more demanding than the substantial evidence test. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

For non-selection cases, the fourth element of a prima facie case under *McDonnell-Douglas* requires that the employer continue to seek applicants having training or experience in the same occupational area as the complainant rather than applicants who are "no better qualified than the complainant." *Welch v. UW-Oshkosh*, 82-PC-ER-44, 10/3/84

As an alternative basis for a finding of illegal discrimination, the Commission applied special rules of analysis where the appellant established the existence of discriminatory intent by direct evidence and found that respondent failed to overcome the presumption of discrimination. *Conklin v. DNR*, 82-PC-ER-29, 7/21/83

721.12 Arrest/conviction record

Respondent has the burden of proof to establish the §111.335(1)(c), Stats., exception to arrest/conviction discrimination. *Staples v. SPD*, 95-0189-PC-ER, 8/11/98 (ruling by examiner)

Even in a job where the circumstances are not particularly conducive to committing the particular crime of which the employe has been convicted, the employer can consider the incompatibility between the personal traits important for a particular job and the personal traits exhibited in connection with the criminal activity in question. The personal qualities associated with the crime of arson, for which appellant had been convicted and was still serving his sentence, are incompatible with the qualities needed for a job that has responsibilities for the safety, direction and discipline of juvenile offenders. *Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93

Respondent's consideration of the elements of the crime, the requirements and responsibilities of the position in question, and factors related to the likelihood of recidivism, like length of time that the applicant remained crime free following the most recent conviction, were all acceptable factors to consider in the hiring decision. *Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93

Only an understanding of the statutory elements of the conviction is required in an "elements only" analysis. Those facts found in a criminal indictment or information would usually be required only when the conviction is for an unspecific offense such as that of disorderly conduct. Retail theft falls within the category of convictions where the type of offensive circumstances is explicit and consideration of the criminal information is not required. *Perry v. UW-Madison*, 87-0036-PC-ER, 5/18/89

721.16 Creed

It is the complainant's burden of proof to establish there is an arguable conflict between an employe's religious practices and the employer's personnel and management procedures. The burden then shifts to the employer to

establish hardship, an issue it is far better situated to address than the employe. *Lazarus v. DETF*, 90-0014-PC-ER, 9/21/92; affirmed by Dane County Circuit Court, *Lazarus v. State Pers. Comm.*, 92 CV 4252, 6/7/93

721.17 Family leave/medical leave

Section 103.10(4)(c), Stats., sets forth the burden of proof placed upon the employe at the hearing on the employe's claim that the employer refused to allow the employe medical leave in violation of the FMLA. The provision does not address the employe's responsibilities under the FMLA when requesting medical leave. The legislative intent was to place the burden upon the employers to determine, at the time an employe requests sick leave, whether the employe (1) has a serious health condition (2) that renders the employe unable to perform the employe's work duties and (3) that a leave is medically necessary. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

The request for FMLA leave need only be reasonably calculated to advise the employer that the employe is requesting leave under the FMLA and the reason for the request. The employe is not required to give the employer detailed information about the employe's medical condition. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

To successfully assert that an employer wrongfully denied the employe medical leave, the employe must prove that (1) the employe had a serious health condition (2) which rendered the employe unable to perform the employe's work duties during the requested leave, (3) the leave was medically necessary and (4) the employe requested the planned medical leave in a reasonable manner. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

No medical expert testimony was necessary where there were outward or overt manifestations, easily recognizable by lay persons, that the employe's serious health condition interfered with her ability to perform her work duties. However, where the employe's serious health condition did not manifest symptoms that lay people would recognize as

necessitating a leave, medical expert testimony was necessary to establish that the employe's requested leave was medically necessary. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

The opinion of a treating physician is not necessarily dispositive of the question of whether leave was medically necessary under the FMLA. An opinion to the contrary from a different medical expert; the treating physician's failure to particularize the basis for her opinion, failure to prescribe leave during a period of time when she regarded the complainant's symptoms as more severe than during the leave period, and failure to document her prescription for leave and its purpose in her treatment notes; and the complainant's participation in college classes and an exam during the leave period, supported a conclusion that the leave was not medically necessary under the FMLA. *Sieger v. DHSS*, 90-0085-PC-ER, 5/14/96; affirmed by Lincoln County Circuit Court, *Sieger v. Wis. DHSS & Wis. Pers. Comm.*, 96-CV-120, 4/4/97; affirmed by Court of Appeals, *Sieger v. Wis. Pers. Comm. & DHSS*, 97-1538, 12/2/97

721.18 Disability [Handicap]

Employment as a Youth Counselor at Ethan Allen School, a type 1, maximum-security institution, involves a special duty of care for the safety of the general public. Youth counselors carry out security responsibilities and their roles are comparable to those of correctional officers employed at a prison. *Wille v. DOC*, 96-0086-PC-ER, 1/13/99 (appeal pending)

At the second step of a handicap discrimination claim, complainant can establish handicap discrimination by showing either that respondent's decision to terminate his probationary employment actually was motivated by handicap or, if the decision to terminate his probationary employment was motivated solely by a performance or conduct deficiency, that the deficiency was caused by his handicap, citing *Jacobus v. UW-Madison*, 88-0159-PC-ER, 3/19/92, affirmed by Dane County Circuit Court, *Jacobus v. Wis. Pers. Comm.* 92CV1677, 1/11/93. *Thomas v. DOC*, 91-0161-PC-ER, 4/30/93

An objective standard is used to determine if the employer

was correct in concluding that a handicapped employe is unable to effectively perform and that no accommodation is feasible. That the employer may have acted in good faith in assessing the handicapped employe's abilities is not a defense. Accordingly, evidence which postdates the personnel transaction which may have no relevance to the employer's intent when the employer made its assessment, may be admissible as relevant to the employe's capacity to perform and accommodation. Respondent's motion in limine was denied. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 3/19/93

Petitioner's problematic personality characteristics did not fall within the parameters of an actual or perceived handicap where his mental status was otherwise considered to be "well within the normal range." Merely because the respondent contended that petitioner's condition would satisfy the criteria in §230.37(2), Stats., it does not follow that the condition constituted a perceived handicap. Where the personality characteristics did not fall within the meaning of the term "impairment," there was neither an actual nor a perceived handicap. *Jacobsen v. DHSS*, 91-0220-PC, 92-0001-PC-ER, 10/16/92; affirmed by Dane County Circuit Court, *Jacobsen v. State Pers. Comm.* 92-CV-4574, 93-CV-0097, 9/9/94

An employer cannot prevent a complainant from establishing the second element to a case simply by stating that its motivation for discharging a complaint was his inability to perform his duties where any such inability has resulted directly from the handicapping conditions. The Commission found the termination was "based on" the handicap. Concluding otherwise would allow the respondent to shift the burden of proof on the issue of ability to perform (element 3 in the Brown County analysis) to the complainant (as element 2 in that analysis). *Conley v. DHSS*, 84-0067-PC-ER, 6/29/87

721.26 Occupational safety and health

In order to establish that a discharge was in violation of §101.055(8)(a), Stats., it would have to be established that the complainant's protected activity was a substantial reason for the discharge or that the discharge would not have taken

place "but for" engagement in the protected activity. *Strupp v, UW-Whitewater*, 85-0110-PC-ER, 7/24/86; affirmed by Milwaukee County Circuit Court, *Strupp v. Pers. Comm.*, 715-622, 1/28/87

The protection against retaliation for public employes who have reasonably refused to perform a task which represents a danger of serious injury or death" is consistent with a test of whether there was a reasonable and good faith belief that the conditions were dangerous. *Strupp v, UW-Whitewater*, 85-0110-PC-ER, 7/24/86; affirmed by Milwaukee County Circuit Court, *Strupp v. Pers. Comm.*, 715-622, 1/28/87

In analyzing a complaint of discrimination pertaining to occupational safety and health, the Commission applied the type of analysis set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), and described the elements necessary for establishing a prima facie case as: 1) statutorily protected participation by the employe; 2) adverse employment action; and 3) a causal connection. *Branski v. UW-Milwaukee*, 82-PC-ER-98, 2/29/84

721.28 Race

In order to be liable for racial harassment by co-employes of the complainant, there must have been more than a few isolated incidents of harassment and the employer must have failed to have taken reasonable steps to prevent the harassment, citing *EEOC v. Murphy Motor Freight Lines*, 22 FEP Cases 892 (D. Minn. 1980). The respondent is not responsible for responding to alleged incidents of which it is unaware. *Sheridan v. UW-Madison*, 86-0103-PC-ER, 87-0141-PC-ER, 2/22/89

721.30 Retaliation

In an appeal pursuant to §230.44(l)(d), Stats., of a non-appointment with respect to which the appellant alleged sex discrimination and retaliation, the Commission applied the type of analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and found no such discrimination following a discussion of the material

circumstances, including the relative qualifications of the applicants. *Jacobson v. DILHR*, 79-28-PC, 4/10/81

721.32 Sex

In *dicta*, the Commission noted that when no tangible employment action was taken, the employer is vicariously liable for the supervisor's harassing conduct unless it can prove by a preponderance of the evidence that: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the employe unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise, citing *Burlington Industries, Inc., v. Ellerth*, 188 S.Ct. 2257 (1998); and *Faragher v. City of Boca Raton*, 188 S.Ct. 2275 (1998). Promulgating an anti-harassment policy with a complaint procedure, and enforcing it may satisfy the first element of the affirmative defense. Failure on the part of an employe to use an existing complaint procedure may suffice to satisfy the employer's burden as to the second element. The Commission proceeded to address complainant's allegations that the respondent unreasonably delayed its investigation and that its remedial action after concluding the investigation was inadequate. The Commission also addressed facts relating to the second element. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

Under §111.36(3), Stats., a presumption of liability attaches if the complainant informs her employer of the harassment and if the employer fails to take appropriate action within a reasonable time. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

In *dicta*, the Commission concluded that complainant did not effectively provide notice of the harassment to her employer until she disclosed the name of the alleged harasser. Respondent took appropriate action within a reasonable time after that date, so complainant failed to show that the presumption of liability under §111.36(3), Stats., should apply. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

Sexual harassment includes 1) conduct falling under §111.36(1)(b), Stats., i.e. either a) "quid pro quo" conduct

or b) unwelcome conduct of a sexual nature, as defined in §111.32(13), Stats.; 2) disparate treatment on the basis of sex with respect to terms, conditions or privileges of employment, i.e. conduct under §111.36(1)(a), Stats.; or 3) harassment on the basis of gender of a nonsexual nature in violation of §111.36(1)(br). *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

Despite the failure to fill the disputed position for some years after the hiring decision in question, and attempts to raise the position's salary level, the position remained "open" for purposes of the Fair Employment Act where the duties did not change and where the agency continued to look for someone other than the complainant to do a job for which the complainant was qualified. *Anderson v. DILHR*, 79-320-PC, 79-PC-ER-173, 7/2/81; affirmed and remanded for additional findings on issue of mitigation of damages by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm.*, 81-CV-4078, 6/7/82

In an appeal pursuant to §230.44(l)(d), Stats., of a non-appointment with respect to which the appellant alleged sex discrimination and retaliation, the Commission applied the type of analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and found no such discrimination following a discussion of the material circumstances, including the relative qualifications of the applicants. *Jacobson v. DILHR*, 79-28-PC, 4/10/81

A complainant charging sex discrimination with respect to the non-renewal of her contract must establish, for a prima facie case, that she is a member of a protected class, that she was qualified to hold her position, that she was not continued in her position, and that the employer decided not to renew her contract while the contract of a male professor was renewed. While the complainant established a prima facie case, the Commission found that the respondent's articulated reasons were not pretextual in the context of a showing of a legitimate business reason for non-renewal. *Boyce v. UW*, 79-PC-ER-33, 2/17/81

721.50 Whistleblower

Where complainant's disclosure was investigated and respondent ultimately disciplined an employe because of it,

the Commission concluded that the employer determined the protected disclosure merited further investigation. Therefore, the complainant was entitled to the presumption of retaliation with respect to respondent's decision to discharge her, where the discharge was within two years of when she made her protected disclosure. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

The presumption of retaliation does not apply to all discipline occurring within certain time periods. It only applies to that discipline specifically listed in §230.80(2)(a), (b), (c) and (d), Stats., rather than disciplinary actions falling within §230.80(2)(intro), Stats. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

The complainant was entitled to the presumption of retaliation even though the respondent did not investigate the disclosure before issuing the complainant a letter stating that the information "merits further investigation." The Commission is only to look at whether the agency found the information merited further investigation rather than to carry out a substantive review of the adequacy of that finding. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

While the issue of just cause can be an appropriate consideration at the analytical stage of determining pretext in a claim arising from the imposition of discipline, the ultimate issue in whistleblower cases is whether retaliation occurred, not whether there was just cause for the imposition of discipline. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

722 Burden of proof

Section 103.10(4)(c), Stats., sets forth the burden of proof placed upon the employe at the hearing on the employe's claim that the employer refused to allow the employe medical leave in violation of the FMLA. The provision does not address the employe's responsibilities under the FMLA when requesting medical leave. The legislative intent was to place the burden upon the employers to determine, at the time an employe requests sick leave, whether the employe (1) has a serious health condition (2) that renders the employe unable to perform the employe's work duties and (3) that a leave is medically necessary. *Sieger v. Wis. Pers.*

***Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)**

The employe in a FMLA case must establish they have met the employe's responsibilities under the FMLA in requesting a planned medical leave and then has the burden of proving the employer violated the FMLA by refusing to grant the requested medical leave. In order to successfully assert that the employer has wrongfully denied the employe medical leave, the employe must prove that the employe was entitled to medical leave under the FMLA. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

To successfully assert that an employer wrongfully denied the employe medical leave, the employe must prove that (1) the employe had a serious health condition (2) which rendered the employe unable to perform the employe's work duties during the requested leave, (3) the leave was medically necessary and (4) the employe requested the planned medical leave in a reasonable manner. *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

In terms of the Fair Employment Act's prohibition against discrimination in compensation on the basis of sex for equal or substantially equal work,the employe bears the burden of showing that the jobs being compared have equal skill, effort and responsibility, and that men and women were paid differently. *Meredith v. Wis. Pers. Comm.*, Dane County Circuit Court., 93CV3986, 8/29/94

Complainant had the burden of proof in his age discrimination case arising from the decision not to appoint him to a faculty position. The Commission has no authority to prosecute the case on complainant's behalf. *Huff v. UW (Superior)*, 97-0105-PC-ER, 3/10/99

Respondent had the burden to show that the controversy was moot. *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98

The employer has the burden of proof on the issue of accommodation. *Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98

Complainant had the burden to prove that he was entitled to receive reimbursement for lost overtime pay as the

appropriate remedy to illegal discrimination/retaliation. *Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98

In a case involving an allegation of age discrimination with regard to the filling of positions as LTE Security Officer, where the interviewer testified that she obtained the ages of the candidates in order to be able to conduct a criminal record inquiry, it was complainant's burden of proof to produce evidence that background checks were never carried out. Complainant had argued that respondent did not produce evidence that background checks were actually done. *Ruport v. UW (Superior)*, 96-0137-PC-ER, 9/23/98

It is complainant's burden of proof to demonstrate that the allegations raised in his complaint were timely filed. When analyzing this question in the context of respondent's motion to dismiss, it was appropriate to construe the allegations raised in the complaint in a light most favorable to complainant. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent has the burden of proof to establish the §111.335(1)(c), Stats., exception to arrest/conviction discrimination. *Staples v. SPD*, 95-0189-PC-ER, 8/11/98 (ruling by examiner)

The question of whether complainant could have returned to work earlier from a medical leave which commenced when he was hospitalized for chest pains two days after he was informed that he was not selected for a vacant position (a decision subsequently found to have been discriminatory) and lasted approximately one year, ran to mitigation of damages, and the burden of proof with respect thereto was on respondent. It was a matter of mitigation because during this period, complainant was neither working nor attempting to work in the position he had previously held, so his remuneration was less than it otherwise would have been and he arguably failed to have done what he could have done to mitigate his damages. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

The burden of persuasion remains continuously with the complainant in a claim under the Fair Employment Act, rather than shifting to the employer if the complainant establishes a prima facie case. *Krenzke-Morack v. DOC*, 91-0020-PC-ER, 3/22/96

Complainant has the burden of persuasion with respect to establishing that which is necessary to recover the remedy he is seeking. *Paul v. DHSS & DMRS*, 82-PC-ER-69, 1/25/95; reversed by Dane County Circuit Court, *Paul v. Wis. Pers. Comm.*, 95-CV-0478, 10/11/95; reversed by Court of Appeals, *Paul v. Wis. Pers. Comm. & DHSS*, 95-3308, 12/12/96 (Note: the effect of the decision of the Court of Appeals was to affirm the Commission's decision in all respects)

The party alleging violation of previous protective orders has the burden of establishing the existence of such violations *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 3/1/94 (ruling by examiner)

The burden of proof with respect to the ability to perform in a handicap case rests on the employer, citing *Samens v. LIRC*, 117 Wis. 2d 646, 345 N.W. 2d 432 (1984). *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

The statutory requirement that the whistleblower act be liberally construed has no relation to the burdens of proof of parties to litigation under the law and does not entitle the complainant to the benefit of the doubt in resolving questions of credibility. *Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88; rehearing denied, 12/29/88; affirmed by Dane County Circuit Court, *Morkin v. Wis. Pers. Comm.*, 89-CV-0423, 9/27/89

The complainant has the burden of establishing probable cause except that the respondent has the burden of establishing no probable cause as to questions of whether the handicap is reasonably related to the complainant's ability to undertake the job-related responsibilities of the complainant's employment and whether respondent has satisfied its duty of accommodation. Citing *Samens v. LIRC*, 117 Wis. 2d 646, 664, (1984) and Giese v. DNR, 83-0100-PC-ER, 1/30/84. *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

As a general matter, the burden of proving inability to accommodate rests with the employer. *Giese v. DNR*, 83-0100-PC-ER, 1/30/85

While this digest has been prepared by Personnel Commission staff for the convenience of interested persons, it should be remembered that the decisions themselves are the ultimate source of Commission precedent.

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 784 through 784.25

[Previous material] [Next material]

---

784 Race discrimination

784.01 Generally

Complainant's attempts to attribute management's complaints against her to racism were undermined by the fact that the person who did the bulk of the investigation as well as the person who fired her were the same race as complainant. *Mitchell v. DOC*, 95-0048-PC-ER, 8/5/96

The fact that the appointee for the subject position was Asian is a factor weighing against finding pretext with respect to a complaint filed by an unsuccessful black applicant, but it is not *ipso facto* inconsistent with discrimination against a black applicant. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

784.02(1) Finding of probable cause

Probable cause was found where the overall qualifications of the complainant, who is black, were, at least on paper, far better than those of the ultimate appointee, an Asian, and the respondent's only enunciated reason for the appointment, the successful candidate's background in connection with a particular aspect of the job, was completely undercut by the complainant's strong showing of

at least a comparable background in that area. No probable cause was found as to a second selection decision. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

There was probable cause to believe that respondent discriminated against the complainant, who was white, in utilizing expanded certification pursuant to an affirmative action plan which was not legitimate because it was based on statewide minority population and did not meet statistical standards developed for proving disparate impact and because it was inconsistent with applicable statutory requirements. *Paul v. DHSS & DMRS*, 82-156-PC & 82-PC-ER-69, 6/19/86

Probable cause was found where appellant who is black, was discharged for receiving and possessing marijuana during work time, where appellant was arrested but no charges were pursued and where respondent took no disciplinary action against a white male coworker despite having no doubts that the co-worker had been smoking marijuana on the job. Massenberg *v. UW-Madison*, 81-PC-ER-44, 9/14/84

Probable cause was found where respondent deviated from its stated position selection process by incorporating an unsolicited and negative assessment of complainant, who is black, and by initially screening out the complainant because he was "overqualified" but not screening out a white male with a comparable background. *Welch v. UW-Oshkosh*, 82-PC-ER-44 and 82-122-PC, 4/5/84

784.02(2) Finding of *no* probable cause

There was no probable cause to believe respondent discriminated against complainant on the basis of his age, national origin or ancestry and/or race with respect to providing him computer training where complainant, who was born in Mexico, was employed as the sole LTE in the office, there were insufficient computer stations for even the permanent employes and complainant had the lowest priority for training behind the permanent employes. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

There was no probable cause to believe respondent discriminated against complainant on the basis of his age,

national origin or ancestry and/or race with respect to the decision to terminate his employment where complainant, who was born in Mexico, was employed as the sole LTE in the office, although respondent criticized complainant's work performance, he actually was terminated because there was a reduction in the workload. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

Respondent's imposition of a post-certification screening criterion to reduce the number of candidates to be interviewed was upheld where the application of the criterion was consistent with applicable requirements and practices and where the respondent ultimately concluded that complainant satisfied the criterion. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

The absence of a racial/ethnic minority on the interview panel was not evidence of pretext where there was a female on the panel and females were underutilized in the job group of which the position was a part. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

The failure to employ written benchmarks or to score responses to interview questions did not demonstrate pretext where the interviewers took notes and after the interviews, the interviewers had a clear idea of who the top candidates were and agreed on the ranking. Respondent's failure to locate one of the interviewer's notes did not demonstrate pretext where the interviewer recalled the impressions she formed as a result of the interviews and another candidate was clearly much better qualified for the subject position. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

No probable cause was found with respect to the decisions not to select the complainant for either of two vacancies where the successful candidates were better qualified for the positions and one of the two persons hired was of the same race as the complainant. *Cozzens-Ellis v. UW-Madison*, 87-0070-PC-ER, 2/26/91

No probable cause was found with respect to the decision not to create a new position for which the complainant would likely have been a candidate where, even though there were some anomalies, the respondent's staffing pattern did not provide for such a position. *Harris v. DILHR*, 86-0021, 0022-PC-ER, 2/22/90

No probable cause was found with respect to the decision

not to promote the complainant, an Unemployment Benefit Specialist 2, for a vacant UBS 4 position where the appointing authority had, without exception since 1985, only promoted persons to the UBS 4 level who were already UBS 3s. Reclassification from UBS 2 to 3 was premised on passing a review of the quality of work performed while employed as a UBS 2. Others who were not in the same protected category as the complainant were similarly treated. There was insufficient evidence to conclude the the quality review process was itself discriminatory where the record contained no information as to the passing rate for minorities and non-minorities. *Harris v. DILHR*, 86-0021, 0022-PC-ER, 2/22/90

No probable cause was found with respect to an allegation of an abusive work environment allegedly resulting in the complainant's constructive discharge in 1988 where the allegation rested on two incidents, one occurring in 1979 and the other in 1986. The Commission found that the 1986 incident was arguably related to complainant's race and, although offensive, was isolated in time and the respondent took reasonable steps in responding to the incident. Complainant failed to show that the incidents were pervasive, sustained or numerous. *Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90

No probable cause was found with respect to the issuance of a written reprimand which was later withdrawn where the complainant failed to introduce any evidence relating to whether the actions for which he was reprimanded merited a reprimand. *Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90

No probable cause was found with respect to a memo instructing the complainant to complete a certain assignment by a certain date where the assignment was equivalent to those given other employes with similar responsibilities and where the deadline was reasonable. *Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90

No probable cause was found with respect to terms and conditions of employment where there was no evidence to suggest that charges against the complainant were pretextual or that complainant was harassed into resigning where the respondent could easily have discharged the complainant earlier in his employment and the discharge would have been consistent with the normal disciplinary process. *Sheridan v. UW-Madison*, 86-0103-PC-ER,

87-0141-PC-ER, 2/22/89

No probable cause was found with respect to a decision to terminate the complainant's employment as an LTE where the respondent had concluded, based on a reasonable though not foolproof procedure for checking on the complainant's presence at various times during the work day, that the complainant had been falsifying his hours. *Pugh v. DNR*, 86-0059-PC-ER, 9/26/88

No probable cause was found with respect to the decisions to issue complainant a written reprimand, suspend him and discharge him, as well as to certain conditions of employment where complainant repeatedly called in sick, left work and ultimately failed to appear at work. *Rose v. DOA*, 85-0169-PC-ER, 7/27/88

No probable cause was found as to the decision not to select the complainant for a vacant permanent position of English teacher, where the successful candidate had a higher score on the questionnaire and complainant, who had been filling the position as a limited term employe, had an inferior job reference based on respondent's first-hand knowledge of complainant's work performance. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

No probable cause was found as to claims relating to discharge and providing negative job references where complainant's employment as a limited term employe ended when complainant used compensatory time to finish the 1044 hour maximum of his LTE appointment and respondent's references were based on complainant's poor work record. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

No probable cause was found as to the decision not to select the complainant, who was black, where the person appointed was also black and had been listed as the number two, or back-up candidate when the position had been filled just two months earlier. However, probable cause was found as to the original selection decision. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

The Commission found no probable cause as to complainant's claim of discrimination based upon respondent's decision not to reclassify his position from Engineering Technician 3 to Engineering Technician 4, where appellant, who is black, failed to meet the requirements for reclassification and presented little

evidence on disparate treatment. *Ellis v. DOT*, 83-0137-PC-ER, 4/30/86

The complainant failed to establish a prima facie case regarding her claim that respondent discriminated against her by not recalling her after layoff where none of the laid off employes was recalled and no vacancy occurred for which complainant was entitled to recall. *Mitchell v. UW-Milwaukee*, 84-0170-PC-ER, 4/4/86

No probable cause was found with respect to a selection decision for an investigator position in the Wausau area where the successful candidate, who did not have a conviction record, had a wider range of and a great deal more relevant experience than complainant who had a conviction record. No pretext was demonstrated where during the complainant's interview, one interviewer stated that complainant's experiences due to his status as an ex-offender were less useful in the Wausau area where most crimes were committed by "white farm boys" and the other interviewer stated he was not generally impressed with the work of "jailhouse lawyers", and where the interviewers were acquainted with the successful candidates prior to the interview and prior to the certification. *Brownlee v. State Public Defender*, 83-0107-PC-ER, 12/6/85

No probable cause was found as to the decision to terminate the complainant's employment while on probation where the complainant was chronically late for work even after having been warned and where the evidence showed that the respondent treated the various employes alike, regardless of their race. *Gray v. DHSS*, 83-0132-PC-ER, 10/23/85

No probable cause was found as to allegations of discrimination based on color, handicap and race, where complainant's employment was terminated based on his unsatisfactory work performance due to consistent failures to meet deadlines for the completion of assignments. *Johnson v. DHSS*, 83-0032-PC-ER, 1/30/85

No probable cause was found as to decision not to reappoint complainant to the position of Coordinator of Black Student Services. Complainant failed to establish a prima facie case where evidence showed he did not satisfy the normal performance requirements for the position, where approximately 80% of the unclassified academic staff employes were rated above the complainant even though

complainant's performance was rated "well within" the acceptable range and where complainant's replacement was also a black person. *Davis v. UW-Stout,* 82-PC-ER-129, 1/17/85

No probable cause was found where complainant introduced no evidence of discrimination. *Berryman v. DHSS*, 81-PC-ER-53, 8/1/84

For a complaint arising out of a hiring decision, no probable cause was found where the successful candidate and the complainant had generally equivalent work experience and the content of their respective answers during the oral interview were approximately equal but where the successful candidate's manner of presentation was more "dynamic" and indicative of the supervisory traits necessary for the position. A prior designation of the successful candidate to fill the position on an acting basis did not indicate pretext. *Meyett & Rabideaux v. DILHR*, 80-PC-ER-140, 81-PC-ER-2, 4/15/83

No probable cause was found with respect to the probationary termination of a white female Institution Aide by a black male supervisor, where the record clearly supported the finding that the complainant's work was unsatisfactory, the record included the testimony of many of her white, female co-workers, and this testimony overshadowed the fact that her Performance Planning and Development Report reflected that she had met certain objectives. *Shilts v. DHSS*, 81-PC-ER-16, 2/9/83

No probable cause was found where the complainant was not appointed to fill a vacant Offset Press Operator 2 position, and although the complainant had not had recent experience with the press used for the performance test, it was the only press on which all 3 applicants had had some experience, and the complainant scored significantly lower on the performance test. *McCrae v. UW-Milwaukee*, 81-PC-ER-99, 2/7/83

No probable cause was found where the complainant was terminated by the UGLRC, and the only substantial evidence of discriminatory animus attributable to the Governor's alternate to the UGLRC was based on the testimony of two long-time political opponents of the alternate whom the examiner believed were lacking in credibility. *McLester v. UGLRC,* 79-PC-ER-38, 10/14/82

No probable cause was found on the issue of race discrimination with respect to respondent's failure to hire the complainant in the misdemeanor unit of respondent's adult criminal division due to the absence of evidence to show a pattern of racial discrimination, the relevant labor market, or general policies and practices of racial discrimination. *Taylor v. State Public Defender*, 79-PC-ER-136, 8/5/82

784.03(1) Finding of discrimination

Complainant, a non-minority, was certified for a position. The person who ultimately was appointed was a minority who became eligible on the basis of an expanded certification that concededly was illegal because a valid workforce analysis had not been conducted in accordance with §230.03(4m), Stats. The illegal use of expanded certification in this manner violated complainant's right, under the FEA, to have been considered for this position without consideration of race except in the context of valid affirmative action considerations, and the latter were not present here. That respondents may have been acting in good faith reliance on existing policies and did not have a specific intent to discriminate against complainant on the basis of his race is not a recognized defense in cases involving selection decisions made pursuant to illegal affirmative action plans. *Paul v. DHSS & DMRS*, 82-PC-ER-69, 3/30/93

Respondent's action of discharging the complainant, a black female, from her position as a correctional officer for engaging in disorderly or illegal conduct and failing to provide accurate or complete information when requested constituted discrimination where complainant worked in a sexually and racially hostile environment, respondent decided to discharge the complainant before it had conducted its fact-finding investigation and white male employes, disciplined under the same personnel policy, were treated less harshly than complainant. *Bridges v. DHSS*, 85-0170-PC-ER, 3/30/89

Respondent discriminated against the complainant by placing him third rather than second on the final hiring list where respondent relied on an affirmative action plan which

was inconsistent with the statutory definition of "balanced work force" when it moved a minority candidate from third to first on the hiring list. *Holmes v. DILHR*, 85-0049-PC-ER, 4/15/87

A race-conscious promotion under an affirmative action plan which was part of an effort to reach a balanced work force was not in compliance with §230.03(rm), Stats., because the plan did not determine the rate of representation of minorities in "that part of the state labor force qualified and available for employment in such classification" but rather based the finding of underutilization on a comparison to the minority percentage of the total state population. Because race was the determinative factor in the decision to appoint a candidate certified via expanded certification rather than the complainant, respondent discriminated against the complainant based on race. The Commission did not accept respondent's arguments of harmless error, i.e., that if the proper labor force analysis had been performed, the same result would have occurred. *Kesterson v. DILHR & DER*, 85-0081-PC, 85-0105-PC-ER, 12/29/86

Where the complainant, who had been discharged, was guilty of some misconduct but established that he had been more harshly treated than similarly-situated white employes, and the respondent's stated reason for having failed to discipline a white employe with a comparable record of missed call-ins was that that employe was handicapped due to Agent Orange exposure, and the employe denied a handicap or that he had suggested such a handicap, the stated reason was found to be pretextual and it was determined that discrimination had occurred. *McGhie v. DHSS*, 80-PC-ER-67, 3/19/82

784.03(2) Finding of *no* discrimination

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to assign complainant additional job duties where complainant was the logical staff member to assume the duties and complainant indicated she would "be happy" to do so. *King v. DOC*, 94-0057-PC-ER, 11/18/98

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to move

complainant to another work station where complainant was the lowest classified/least senior employe in the work unit and the other options would not have accomplished the same goals. *King v. DOC*, 94-0057-PC-ER, 11/18/98

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to deny complainant's request for leave on a specific date where complainant was already scheduled to participate in a meeting on the day in question. Respondent's subsequent decision not to permit complainant to use accrued leave after she walked out of the meeting was also justified and not discriminatory where it is respondent's practice not to approve leave when an employe walks off the job without authorization. *King v. DOC*, 94-0057-PC-ER, 11/18/98

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to reprimand complainant for walking off the job without authorization. Complainant had been warned at the time that walking off the job would have a consequence, and complainant had violated several earlier directives. *King v. DOC*, 94-0057-PC-ER, 11/18/98

There was no basis for concluding there was anything questionable about the rating panel's evaluation of complainant's Achievement History Questionnaire materials where the complainant had been instructed to submit a two page AHQ addressing four factors, complainant, alone among the applicants, submitted four pages, and the specialist administering the selection process removed two pages after deciding it would be inappropriate and unfair to evaluate complainant on the basis of all four pages. The rating panel evaluated the two pages of complainant's materials and appropriately assigned him a score below the passing level. Complainant's race discrimination and retaliation claims failed. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

It was in keeping with the civil service code and other evidence of record that existing career executives would be certified for consideration in filling a vacant career executive position, without having to go through an examination process. The selection process for the position was conducted on an "Option IV" basis under the career executive program. Applicants who were not career executives were evaluated on the basis of an Achievement

History Questionnaire. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

An employer's failure to follow its own policies can be probative of pretext. Where the staffing manual called for the use of "blind" scoring procedures whenever possible, and there was no apparent reason why applicants' names were not deleted from the resumes they submitted as part of their Achievement History Questionnaire, this could constitute some evidence of pretext. However, in light of the other evidence of record, complainant failed to show that respondent's explanation for rejecting complainant for the position in question was a pretext for race discrimination or retaliation. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Where the record established that a balanced panel was desirable under relevant civil service policies but was not mandatory, and where respondents did not provide an explicit explanation as to why they did not have a balanced panel, the absence of a balanced panel could be considered to be probative of pretext. However, in light of the other evidence of record, complainant failed to show that respondent's explanation for rejecting complainant for the position in question was a pretext for race discrimination or retaliation. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Where the only bases for a factual conclusion that the employing agency had pre-selected a white candidate were that the successful candidate was white and was known to the appointing authority, complainant failed to establish his theory of pre-selection. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Where the persons making the hiring decision in question were unaware that the selected candidate was a racial minority member until after the recommendation had been made to hire him, the prima facie case of race discrimination with respect to complainant, an unsuccessful White candidate, was rebutted. *Lundquist v. UW*, 95-0081-PC-ER, 9/23/98

Where there was no showing that the use of expanded certification had been improper, its use was insufficient to show that race discrimination occurred. *Lundquist v. UW*, 95-0081-PC-ER, 9/23/98

Petitioner failed to establish race or sex discrimination

regarding a selection decision where the person selected possessed a greater amount of non-technical skills, such skills were related to the supervisory position and respondent determined to seek a candidate with these non-technical skills prior to knowing who the candidates were. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm. et al*, 95-CV-003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

No discrimination based on sex, sexual orientation or race, violation of FMLA, nor retaliation based on FEA activities was found with respect to respondent's decision to discharge the complainant where respondent concluded that complainant had violated various work rules when she gave a suggestive note to a coworker, telephoned the same coworker at home, admitted to using profanity towards various other coworkers and about a client. *Mitchell v. DOC*, 95-0048-PC-ER, 8/5/96

Petitioner failed to establish race or sex discrimination regarding a selection decision where the person selected possessed a greater amount of non-technical skills, such skills were related to the supervisory position and respondent determined to seek a candidate with these non-technical skills prior to knowing who the candidates were. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al*, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

Complainant failed to establish sex discrimination relative to the failure to provide her with a light-duty position because of a work injury, where, among other reasons, most of the potential light duty assignments did not meet complainant's work restrictions, respondent reasonably believed the remaining potential assignment would have been inconsistent with her restrictions, respondent initially did find a light duty assignment in another facility and two of the three decision makers were women. *Longdin v. DOC*, 93-0026-PC-ER, 7/27/95

No discrimination based on race or sex was shown in regard to complainant's performance evaluation where complainant, a Building Maintenance Helper, had failed to

notify her supervisors of health and safety violations in her building, had failed to communicate effectively with her supervisors on various occasions, had failed to carry out a work assignment and had failed to wear proper safety equipment. *McKibbins v. UW-Milwaukee*, 94-0099-PC-ER, 4/4/95

No discrimination occurred when respondent did not hire complainant, who is black and had previously filed a race discrimination claim against respondent, for a limited term carpenter job where no authorization to hire had been received as of the date the complainant reported for work. A second applicant, who was white, was also not hired on that date, although the second applicant did get hired on a later dated. *Weaver v. UW-Madison*, 93-0022-PC-ER, 11/3/94

No race discrimination was found regarding the respondent's decision to discharge the complainant, where the decision was made by someone of complainant's ethnic heritage and the decision was made after considering the internal investigatory report which showed complainant had been involved in an altercation with a female neighbor, had threatened the neighbor when she was in her car, had blocked her car and had kicked her car, and after discussing the matter with subordinates and legal counsel. *Whitley v. DOC*, 92-0080-PC-ER, 9/9/94

Respondent did not discriminate against complainant, a Native American, based on his race, color, and national origin or ancestry when it failed to hire him for one of eleven vacancies where, even though complainant produced statistical evidence that respondent underutilized minorities, there was no evidence of irregularities in the hiring procedure, the same interview questions were asked of all candidates, the exams were designed to measure job-related criteria, all candidates were evaluated against the same rating guidelines and complainant received a score lower than the successful candidates. *Thunder v. DNR*, 93-0035-PC-ER, 5/2/94

Complainant failed to establish that his impressions of certain work-related incidents involving individuals who had input into the subject hiring decision demonstrated racial animus on their part, but instead the record showed that complainant perceived any differences about work-related matters with his white supervisors and other whites with

authority as based on racial animus. The complainant also failed to show that his relevant qualifications were superior to those of the successful candidate. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

Complainant failed to establish prima facie case where he did not show that different wage-eligibility factors were used for him than were used for all other employes regardless of their race and/or sex and he did not show that the uniform wage-eligibility factors impacted less favorably on the group of employes with the same sex and/or race as complainant. *Christensen v. DOC & DER*, 90-0144-PC-ER, 2/3/94

Respondent's decision to place complainant on a concentrated review program was not discriminatory where respondent verified that complainant was backlogged in her work and performance standards were established for all staff, not just for complainant. *Iheukumere v. UW-Madison*, 90-0185-PC-ER, 2/3/94

While the only two black members of complainant's training class were terminated during their probationary periods, complainant's termination was upheld where the record contained numerous specific observations by numerous individuals of unsatisfactory performance by complainant and complainant failed to address any but a few of the observations other than by generally testifying that he was a good employe who worked hard. The Commission rejected complainant's suggestion that because his work performance did not include any illegal activities, it should have been regarded as satisfactory. *Green v. DHSS*, 92-0237-PC, 12/13/93

In differentiating among well-qualified candidates for a position, it is not evidence of discrimination to consider the goals of a proper affirmative action plan as a selection criterion. *Byrne v. DOT & DMRS*, 92-0672-PC, 92-0152-PC-ER 9/8/93; affirmed by Dane County Circuit Court, *Byrne v. State Pers. Comm.*, 93-CV-3874, 8/15/94

Complainant, who is black, was terminated from the State Patrol Academy on the basis of failing to obtain a passing grade on his notebooks. This rationale was not shown to have been pretextual. While the black training officer gave him a passing grade on his first notebook and the two white

training officers gave him much lower, failing grades, all three of their scores were relatively consistent in failing complainant on the next two notebooks. There was no evidence that the black training officer was influenced to lower her grades for the last two notebooks, and there was no evidence that the two white training officers used any different approach to grading complainant's notebooks than they did to grading the other cadets, and they also failed some of the white cadets. Complainant's contention that he was terminated prior to the computation of his final grades, in violation of Academy policy, carried no weight because once it was clear he could not obtain a passing grade on his notebooks he was subject to dismissal without waiting for his final grades. Complainant also argued he was not permitted to submit a typewritten corrected notebook, while no white cadets were similarly restricted. However, this action was taken because complainant admitted he had not done the typing himself, and Academy policy required that cadets do all their own work. There was no basis for a conclusion that this policy was not also applied to white cadets. Complainant also cited as evidence of pretext the fact that he had been reported for playing basketball when some of the other cadets were working on academics, but there was no mention of the fact he also played tennis. However, complainant had been counseled specifically concerning his academic problems, and subsequently was observed doing something else (playing basketball) when he could have been working on his academics. This observation was made by all three training officers when they were playing tennis. *Owens v. DOT*, 91-0163-PC-ER, 8/23/93

Even though the respondent stipulated that the limitation of recruitment for two positions to only those applicants with Career Executive status had a disparate impact upon minorities including complainant, complainant failed to establish that he would have been hired for either of the positions if he had been allowed to compete for them. *Balele v. DHSS & DMRS*, 91-0118-PC-ER, 4/30/93

No discrimination was found even though race played a part in the hiring decision where respondent established that the decision would have been the same even if race had not played such a role. The successful candidate was substantially better qualified for the Institution Aide 4 position, which required supervision of staff providing

direct care to medically fragile, multiply-handicapped patients. The successful candidate had extensive supervisory experience and background as an LPN while the complainant's sole experience was one year as an Aide 1. *Jenkins v. DHSS*, 86-0056-PC-ER, 6/14/89

No discrimination was found with respect to a nonselection decision where the hiring authority's rationale, that the successful candidate's ability to interact successfully and persuasively with a wide range of individuals was superior to the other candidates, was not pretextual. The hiring authority found complainant's interview responses to be rote and relatively shallow and did not indicate an ability in the area of interpersonal relations. Complainant's paper credentials in certain areas were not determinative given the hiring authority's reasonable reliance on subjective characteristics that were apparent in an interview. A member of one racial minority (Asian) was the successful candidate and a member of a different racial minority (black) was ranked second and was eventually hired when the successful candidate left. Because the complainant, also black, had superior paper credentials to the second ranked candidate, some factor other than race was at work. *Winters v. DOT*, 84-0003-PC-ER, 7/8/88

The analysis of candidates on the basis of subjective criteria was upheld for use in filling a higher level vacancy (i.e., Affirmative Action/Equal Employment Opportunity Officer). *Winters v. DOT*, 84-0003-PC-ER, 7/8/88

The lack of a formal rating system or rating forms, benchmarks or interview notes did not demonstrate pretext in the decision not to the select the complainant for a higher level vacancy. *Winters v. DOT*, 84-0003-PC-ER, 7/8/88

No discrimination was found where complainant, who was black, had been discharged for receiving and possessing a quantity of marijuana on the job. A second, white, employe was not disciplined for being suspected of smoking marijuana on the job due to a lack of physical evidence. However, the second employe was verbally warned that, if caught with marijuana, he would be disciplined up to and including termination. *Massenberg v. UW System*, 81-PC-ER-44, 2/6/86

No discrimination was found where respondent constructively discharged the complainant, who is white and

was employed at a correctional institution, where respondent reasonably concluded that complainant was involved in a romantic relationship with an inmate at the institution and where there were no comparisons establishing that respondent imposed a different level of discipline against similarly situated employes of a different race. *Winterback v. DHSS*, 82-PC-ER-89, 8/31/84

No discrimination was found where complainant failed to introduce evidence sufficient for the Commission to make any significant or relevant findings of fact or to conclude that complainant had proven any of the elements of a prima facie case. *Harris v. DILHR*, 81-PC-ER-52, 6/21/83

While the complainant established a prima facie case, no discrimination as to an appointment was found where there were strong reasons for the appointment that was made, the complainant's statistical showing of work force composition was inconclusive, and there was no evidence of discrimination with respect to three acting appointments of whites followed by their permanent appointments which allegedly constituted a pattern and practice of discrimination. *Long v. DILHR*, 81-PC-ER-1, 11/24/82

Respondent's decision to lay off complainants (five black LTE's) from a work force of five white and seven black LTE's was held not to be motivated by racial considerations where complainants were not as qualified as the employes who were retained, whether because of attendance, nature of jobs performed, length of time since they were hired, or length of time otherwise left in the term of employment. *McKee et al. v. DILHR*, 80-PC-ER-92, etc., 7/26/82

Respondent did not engage in discrimination by discharging appellant for excessive absenteeism where appellant had previously been disciplined on numerous occasions for his extensive absenteeism during the prior 7 years and was unable to satisfactorily explain his unexcused absence to his supervisor. *Norwood v. UW-Parkside*, 78-PC-ER-62, 5/13/82

The Commission held that the denial of a reclassification request, even though it was overturned in a companion §230.44(l)(b), Stats., personnel appeal, did not constitute racial discrimination, where the reclassification denial was based on an interpretation of the position standards with which the Commission disagreed but did not feel was

unreasonable per se, the complainant testified that his supervisor made remarks that he considered discriminatory and stereotypical, but he did not offer any evidence that the supervisor ever discriminated against him, the supervisor had given the complainant good performance evaluations and merit wage increase recommendations, and the supervisor had no role in the reclassification denial decision, and the allegation that the personnel analyst involved did not maintain eye contact with the complainant was of little if any probative value. *Moy v. DPI & DP*, 79-PC-ER-167, 8/21/81

The Commission found no race discrimination in the discharge of the complainant food service worker where she was absent on the average about one shift per week and where a non-discharged white employe did not have a similar or worse attendance record. *Bowers v. UW-M*, 78-PC-ER-1, 7/28/80

Complainant failed to show she was discriminated against when she was discharged where she had been advised that a state car should never be kept out overnight without management approval and one week later, without management approval, she parked a state car overnight in front of her home and it was damaged in an accident. Complainant had filed a charge of discrimination with the Commission approximately one month prior to the state car incident but there was no showing that respondent was aware of the existence of the complaint. *Stonewall v. DILHR*, 79-PC-ER-19, 5/30/80

784.04 Prima facie case

Where the parties disagreed about whether complainant was qualified for the position in question but complainant had clearly established the other elements of a prima facie case of race discrimination, the Commission proceeded directly to the issue of pretext. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Complainant failed to establish a prima facie case of race discrimination regarding the termination of his probationary employment where complainant acknowledged engaging in behavior which clearly violated applicable work rules, and failed to show that he was treated in a different manner than

any other employe under similar circumstances. *Amaya v. DOC*, 93-0104-PC-ER, 7/7/94

Typically, statistical evidence is utilized in disparate impact actions to establish a prima facie case of unlawful discrimination. Complainant failed to establish a prima facie case in a disparate impact analysis where the only statistical evidence presented was that the position at issue was in the Executive/Administration/Manager job group, which consisted of 7 positions, that 8.76% of the qualified and available labor pool were minorities, and that none of the positions were filled by minorities. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

Complainant failed to establish a prima facie case of failure to hire because of age, national origin or ancestry and/or race where complainant offered no evidence that a vacant position existed, that he applied for it, that he was certified and considered, that he was rejected, or that there were circumstances which gave rise to an inference of discrimination. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

Complainant failed to establish a prima facie case with respect to the decision to terminate her employment where her performance did not, at any point during her employment, come close to meeting the performance standards for the position. In addition, respondent had extended complainant's probationary period, located two other positions and encouraged complainant to compete for them and, when she declined to do so, located a LTE position for her. *Watkins v. DHSS*, 89-0073-PC-ER, 4/17/92

The Commission rejected the argument that in order to establish the fourth prong of a prima facie case for a nonselection decision, a complainant who cannot prove the vacancy remained open after s/he was rejected must present some other evidence of improper motivation. *Winters v. DOT*, 84-0003-PC-ER, 7/8/88

Respondent's decision not to reinstate complainant was held not to be motivated by racial considerations where complainant failed to introduce specific evidence concerning her qualifications or concerning the identity and actions of decision makers whom she held accountable, and therefore

failed to make out a prima facie case. *McKee et al. v. DILHR*, 80-PC-ER-92, etc., 7/26/82

784.06 Statistical analysis

Respondent did not discriminate against complainant, a Native American, based on his race, color, and national origin or ancestry when it failed to hire him for one of eleven vacancies where, even though complainant produced statistical evidence that respondent underutilized minorities, there was no evidence of irregularities in the hiring procedure, the same interview questions were asked of all candidates, the exams were designed to measure job-related criteria, all candidates were evaluated against the same rating guidelines and complainant received a score lower than the successful candidates. *Thunder v. DNR*, 93-0035-PC-ER, 5/2/94

Simply establishing that a particular job group is underutilized for ethnic/racial minorities is insufficient to show that the hiring process utilized to fill positions within this job group has a disparate impact on these minorities. The use of an all-white, all-male screening panel is not sufficient in and of itself to demonstrate that the screening process had a disparate impact on minority candidates. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

Statistics showing employment of "racial/ethnic minorities" according to job categories in each of two state agencies and the percentage of "racial/ethnic minorities" in the state population as a whole had very limited probative value where there was no way on the record to determine the degree of correlation between the state population figures and the qualified and available labor force and there was no information as to he nature and geographic disposition of jobs in each category ("professionals," "officials/administrators," etc.) *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

784.10 Disparate impact

In an adverse impact case, complainant has the burden of proving that the policy or practice complained of had a significantly exclusionary impact of his protective class. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Complainant failed to establish that an Option IV, or open competitive selection process for career executive positions, had an adverse impact on racial minorities. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Simply establishing that a particular job group is underutilized for ethnic/racial minorities is insufficient to show that the hiring process utilized to fill positions within this job group has a disparate impact on these minorities. The use of an all-white, all-male screening panel is not sufficient in and of itself to demonstrate that the screening process had a disparate impact on minority candidates. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

The Commission rejected the complainant's theory of disparate impact with regard to the application of a post-certification screening criterion where the ultimate result of the application of the criterion was that none of the ethnic/racial minority candidates were screened out. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

A non-selection case was not susceptible to analysis on a disparate impact theory where the complainant did not show that a practice, procedure or test had a disparate impact on blacks and complainant merely contended that, since the respondent's work force contained unrepresentation, respondent needed to demonstrate that the underrepresentation was due to some kind of business necessity. In addition, there was no showing, that the respondent's work force was underrepresented with respect to the qualified, available labor force. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

784.25 Racial harassment

Where respondent responded to alleged incidents of racial harassment wherever it had a basis on which to respond, there was no basis for a conclusion that there was probable

cause to believe management failed to take reasonable steps to prevent workplace harassment by complainant's co-workers. *Sheridan v. UW-Madison*, 86-0103-PC-ER, 87-0141-PC-ER, 2/22/89

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Section 724

[Previous material] [Next material]

---

724 Discovery (also see 506)

The Commission lacks authority to order a state agency to pay costs and attorney fees for discovery motions filed by a complainant in a proceeding under the Wisconsin Fair Employment Act. *Dept. of Transportation (Beaverson) v. Wis. Pers. Comm.*, 176 Wis. 2d 731, 500 N.W.2d 545 (1993)

Dismissal, though an extreme sanction, was appropriate where complainant failed to attend his scheduled deposition and the failure was intentional and in bad faith. Complainant refused to attend the deposition that had been scheduled with relatively short notice although it had been scheduled to take advantage of complainant's presence in Wisconsin to attend another Personnel Commission proceeding. The deposition had been discussed during two separate telephone conferences with the designated hearing examiner and the parties. Complainant also refused to respond to specific questions posed by the designated hearing examiner in a letter to the parties establishing a briefing schedule on respondent's motion to dismiss. *Huff v. UW (Stevens Point)*, 97-0092-PC-ER, 11/18/98

Language in §804.02(1), Stats., relating to the perpetuation of testimony by deposition before an action in court has been filed, is inapplicable to a case that was already pending before the Commission. *Huff v. UW (Stevens Point)*, 97-0092-PC-ER, 11/18/98

Pursuant to §227.46(1), Stats., and §PC 4.03, Wis. Adm.

Code, a designated hearing examiner has the authority to act on discovery disputes between the parties to cases pending before the Commission. An examiner's oral ruling is a ruling made with the authority of the Commission. *Huff v. UW (Stevens Point),* 97-0092-PC-ER, 11/18/98

Information a party provides in response to an interrogatory is not controlling as to that information. While the party propounding the interrogatory is free to rely on the information by offering the answer in evidence, or by not objecting to the answering party's offer, he also can dispute the information contained in the interrogatory answer. *Balele v. DOC et al.,* 97-0012-PC-ER, 10/9/98

In a complaint arising from the decision not to select the complainant for a vacant Administrative Officer 3 position, where complainant had not asked a preliminary question relating to whether the materials he submitted for the job were received by the employing agency and reviewed by the rating panel, and, therefore, had not established that the raters did not see all of his materials, he was not entitled to discover information about the clerical handling of the application materials. To rule otherwise would create an undue burden for the employing agency. *Balele v. DOR et al.,* 98-0002-PC-ER, 7/7/98

Respondent's answer that "no statistics are available," was an inadequate response to a request for the number of times the agency had used a two-page executive summary for screening candidates for positions in 1997. That information is not available already in summary form does not meet the duty to respond. *Balele v. DOR et al.,* 98-0002-PC-ER, 7/7/98

The responding party is not required to gather and create a document of the requested information at the responding party's own expense. However, the responding party has an obligation to produce what exists and if a requested compilation does not exist, the responding party must make available to the requesting party the documents from which the requested compilation could be derived. *Balele v. DOR et al.,* 98-0002-PC-ER, 7/7/98

Complainant was not entitled to discover the minority hiring record for one of the persons involved in the subject hiring decision, where the record related to hires made while the person was employed by a different agency, citing *Awe v.*

***DATCP*, 89-0040-PC-ER, 11/6/91. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98**

Complainant was not entitled to discover the salary paid to one of the persons involved in the subject hiring decision, either by his current or previous employer, because the inquiry was not reasonably calculated to the discovery of admissible evidence. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

In a complaint arising from a decision not to select the complainant for a vacant position, information as to how the successful candidate came to apply for the job is a topic that could lead to the discovery of admissible evidence. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

In a complaint arising from a decision not to select the complainant for a vacant position, information about connections between the successful candidate and someone who played a part in the hiring decision could lead to the discovery of admissible evidence. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

In a complaint arising from a decision not to select the complainant for a vacant position, a request for all correspondence between two offices, with no limits as to either subject matter or time, was too broad. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

The closed record protections of §230.13, Stats., pertain to keeping personnel matters closed to the public, not to a complainant in the context of litigation where the information is relevant to the complainant's claims. *Balele v. DOR et al.*, 98-0002-PC-ER, 7/7/98

Complainant's attempt to identify a pattern of discrimination in faculty hires and promotions, regardless of which individuals made the hiring decision, was an area of inquiry that could lead to the discovery of admissible evidence relevant to a claim arising from a decision not to select the complainant for a vacant position in the College of Business. Complainant's motion to compel discovery of the names of persons hired or promoted in the College of Business for a ten year period was granted. However, where the issue for hearing only referred to a claim of sex discrimination, complainant's motion to compel was denied with respect to her request to discover the age of the persons hired/promoted. *Ready v. UW (La Crosse)*,

95-0123-PC-ER, 7/1/98

Discovery inquiries relating to the names of persons hired or promoted by respondent must be of a reasonable period of time but are not limited solely to the time complainant was not hired. Rather, the period of time may precede and/or follow the date when complainant was not hired. Complainant's motion to compel discovery of the names of persons hired or promoted in the College of Business for a ten year period was granted. *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

Where it appeared reasonable to presume that respondent's personnel office would have access to hiring and promotion information without much difficulty and where respondent presented insufficient information about its record-keeping system to conclude that answering complainant's interrogatory would create an undue burden, complainant's motion to compel discovery of the names of persons hired or promoted in the College of Business for a ten year period was granted. *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

The responding party is not required to gather and create a document of the requested information at the responding party's own expense. Rather, the responding party has an obligation to produce what exists and if a requested compilation does not exist, the responding party must make available to the requesting party the documents from which the requested compilation can be derived. *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

Complainant, in a case arising from a decision not to select her for a faculty position in the College of Business, was entitled to information in the personnel files of persons hired into faculty positions where that information preceded or was associated with each of the individual hires. However, complainant was not entitled to information in the personnel files which post-dated each individual hire, as those post-dated documents could not have played any part in the hiring or promotional decision made. *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

Sanctions under §804.12(2), Stats., were premature where the Commission granted, in part, complainant's motion to compel, and there had been no opportunity to fail to comply with that ruling. In addition, the Commission lacks

authority to order a state agency to pay costs and attorney fees for discovery motions filed by a complainant in a proceeding under the Wisconsin Fair Employment Act, citing *Dept. of Transportation v. Wis. Pers. Comm.*, 176 Wis. 2d 731, 500 N.W.2d 545 (1993). *Ready v. UW (La Crosse)*, 95-0123-PC-ER, 7/1/98

It is not possible, within the context of discovery, to order the production of something that does not exist. Complainant's motion for discovery sanctions was denied. *Nelson v. UW-Madison*, 97-0020-PC-ER, 5/20/98

A mental status report regarding complainant, prepared about seven months after the termination decision that was the subject of the disability and age discrimination complaint, had enough inherent indicia of relevance to the complaint that it appeared reasonably calculated to lead to the discovery of admissible evidence. *Huempfner v. DOC*, 97-0106-PC-ER, 5/6/98

A mental status exam, conducted 7 months after complainant filed his complaint of age and disability discrimination, requested by respondent because it needed an independent medical opinion regarding complainant's fitness for duty and prepared in order to evaluate the possibility of complainant returning to work in connection with a contractual grievance, fell within the scope of §804.10 where complainant complied with respondent's request and submitted to an examination. The exam was conducted by agreement of the parties. Respondent was required to provide complainant with a copy of the report and respondent's motion for a protective order was denied. *Huempfner v. DOC*, 97-0106-PC-ER, 5/6/98

A party obtaining a report under §804.10 is to provide the report to the adverse party. Section 804.10(3)(a) applies to non-personal injury actions. *Huempfner v. DOC*, 97-0106-PC-ER, 5/6/98

Investigative materials prepared by a personnel manager for respondent, acting as a representative of the respondent's attorney, are subject to protection from discovery under the attorney work product doctrine. The protection extended to statements the personnel manager took from party witnesses as well as the portions of her report that discussed or summarized information obtained from party witnesses. However, the protection did not extend to copies of

statements obtained from non-party witnesses or to other portions of her report. *Winter v. DOC*, 97-0149-PC-ER, 3/11/98

Respondent was required to provide complainant with a non-redacted version of notes taken by the appointing authority when conducting reference checks regarding complainant. Respondent had redacted the names of the individuals who provided the information to the appointing authority. According to respondent, the appointing authority had informed the references he was speaking with them confidentially. Complainant indicated she intended to depose the individuals providing the references to discover what information they provided that was not reflected in the appointing authority's notes. Complainant's motion to compel was granted. *Kalashian v. Office of the Jefferson County District Attorney*, 97-0157-PC-ER, 2/25/98

The nature of the defense offered by respondent does not define the permissible scope of complainant's discovery inquiry. *Kalashian v. Office of the Jefferson County District Attorney*, 97-0157-PC-ER, 2/25/98

Where the document in question had been provided to complainant without having been identified as confidential, but with the implication it was *not* considered confidential and was not given to complainant in connection with a protective order issued on another date, respondent's motion for the imposition of sanctions for violating the protective order was denied. *Cygan v. DOC*, 96-0167-PC-ER, 1/28/98

In an age discrimination claim arising from a decision to reject complainant as a candidate for a tenure-track position, complainant was not entitled to discover the field of interest of current faculty or information about current faculty publication dates. Respondent had established the field of interest for the vacancy in question prior to the solicitation of candidates and scholarly activity was a hiring criterion but was defined to include more than recent publications. How-ever, complainant was allowed to discover the date of Ph.D. and the date of hire for current faculty as well as the resumes of all finalists and semi-finalists for the vacancy. *Huff v. UW (La Crosse)*, 95-0113-PC-ER, 12/17/97

Where respondent appointed a former law school professor

as "an investigator" to "conduct an impartial investigation" of complainant's allegations against a faculty member and then "report to the Chancellor, giving her findings," the professor's notes and documentation of the investigation did not constitute confidential attorney-client communication or attorney work product. The professor was acting as an impartial investigator rather than as a lawyer/advocate. The attorney-client privilege did not apply because the professor was not acting as respondent's lawyer or advocate and respondent was not acting as a client of the professor. In addition, only those materials, information, mental impressions, or strategies collected or adopted by a lawyer after retainer in preparation of litigation come within the ambit of the work product exception. *Nelson v. UW-Madison*, 97-0020-PC-ER, 11/20/97

In a claim arising from respondent's decision to abandon an initial hiring procedure and its later decision not to interview complainant as part of a second hiring process for the same position, complainant was entitled to obtain discovery of the criteria used to evaluate candidates in the first hiring procedure before that process was abandoned. Respondent claimed that the first hiring procedure was abandoned because respondent was dissatisfied with the applicant pool. Complainant's motion to compel discovery was granted even though the 300 day statute of limitations barred complainant from presenting the issue of whether respondent's decision to abandon the first hiring procedure was discriminatory. Information relating to the first procedure could be relevant and admissible to the timely-filed claim of whether discrimination occurred with respect to the decisions made in the second hiring procedure. *Vest v. UW (Green Bay)*, 97-0042-PC-ER, 9/10/97

In a claim arising from respondent's decision to abandon an initial hiring procedure and its later decision not to interview complainant as part of a second hiring process for the same position, respondent was required to provide complainant with a copy of transcripts and resumes, in its possession, for the seven individuals who were members of either the initial or final screening committee. However, respondent was not required to obtain such records if it did not possess them. *Vest v. UW (Green Bay)*, 97-0042-PC-ER, 9/10/97

No party is under an obligation to create records for no

charge in order to respond to a discovery request. No party is under an obligation to obtain records from other entities in order to respond to a discovery request. However, parties must at least check for existing records before claiming that an undue burden exists. *Vest v. UW (Green Bay)*, 97-0042-PC-ER, 9/10/97

Complainant was not entitled to obtain discovery designed to investigate possible involvement by a third party in the conduct that was the subject of the complaint of employment discrimination where the Personnel Commission lacked jurisdiction to add that entity as a party. *Vest v. UW (Green Bay)*, 97-0042-PC-ER, 9/10/97

Where respondent provided no justification for its request that certain materials relating to reference checks be reviewed in respondent's offices in Madison, and complainant lived 150 miles away, the request was denied. *Duncan v. DOC*, 96-0064-PC-ER, 7/31/97

Section 230.13(1)(a), Stats., protects disclosure of certain information "to the public." However, the provision does not bar discovery of information in the context of litigation where the request was for reference information regarding all candidates and all successful candidates and the information had potential relevance to the discrimination complaint. Complainant's use of the information was subject to the terms of a protective order previously issued by the Commission. *Duncan v. DOC*, 96-0064-PC-ER, 7/31/97

Section 230.13, Stats., does not operate to bar discovery of materials which are otherwise subject to discovery and are relevant to the case. The statute protects certain information from being disclosed "to the public." However, complainant's discovery requests were made in the context of litigation rather than as a member of the public. Respondent's request for a protective order covering complainant's use of the requested material was granted. Complainant was entitled to obtain application materials, candidates' resumes and letters, the scores given to them and the names and races of the candidates. *Balele v. DER et al.*, 97-0012-PC-ER, 7/23/97

Respondent agency was entitled to payment for copy charges associated with discovery requests. *Balele v. DER et al.*, 97-0012-PC-ER, 7/23/97

A respondent agency is not required to gather and create a document of the requested information at its own expense. *Balele v. DER et al.*, 97-0012-PC-ER, 7/23/97

The Commission's responsibility, in terms of its authority to issue a protective order, is not only to protect the parties, but also to protect other persons involved. Therefore, proposed language for a protective order was modified by the Commission to prohibit disclosure of an individual's work history to the public in order to avoid the potential of releasing information which could lead to the discovery of a candidate's identity. *Wilson v. DHSS*, 95-0043-PC-ER, 5/28/96

An "undue expense" and "undue burden" would occur if the Commission did not protect from disclosure the interview questions asked or the benchmarks used to evaluate the candidates' responses, because the employer would be forced to create new questions and benchmarks to ensure the integrity of a subsequent hiring process. *Wilson v. DHSS*, 95-0043-PC-ER, 5/28/96

Respondent's motion for an order compelling discovery under §804.12(1), Stats., was granted where respondent had explained its need for the requested materials and complainant had failed to meet the original time requirements as well as two subsequent extensions to which complainant had agreed. *Elvord v. DOT*, 95-0126-PC-ER, 4/9/96 (ruling by examiner)

In a complaint of race discrimination and retaliation based on whistleblower activities relating, in part, to respondent's conduct of assigning complainant to a particular workstation where complainant requested she not be required to move to the workstation and she based her request on her statement, along with medical documentation, that such a move would make her ill, respondent was entitled to discover, from complainant, a description of the symptoms of her mental condition, the duration of the condition and how it changed during its duration. Where, in response to an interrogatory asking her to describe, identify and specify every on-the-job injury she had suffered during her employment with respondent, complainant had merely stated she "could not function because of personnel problems in cashier unit" of respondent, complainant was required to specify the nature of the injury she suffered, to provide a description of the manifestations of the injury and to specify how the injury

was suffered. Respondent's request for an award of expenses, including attorney's fees and costs, pursuant to §804.12(1)(c), Stats., was denied, where the respondent's motion to compel was only granted in part, the interrogatories were, in some instances, overly broad and complainant was unrepresented by counsel. *King v. DOC*, 94-0057-PC-ER, 3/22/96

Respondent's motion to compel was granted where complainant's response to interrogatories was notarized but did not meet the requirement that it be "under oath" within the meaning of §804.08(1)(b), Stats. The defect was not cured by complainant's subsequent swearing before the notary as to the accuracy of the statements in his response to interrogatories. Complainant was required to resubmit his interrogatory responses to include a notary seal and notary language consistent with notary verification upon oath or affirmation. Respondent's request for an order for reimbursement of fees and costs associated with its motion to compel was denied where complainant expressed having made a good faith effort to reply to the interrogatories and the motion relied upon recently issued case law. *La Rose v. UW-Milwaukee*, 94-0125-PC-ER, 3/22/96

A complainant who has alleged discrimination as to the decision to terminate her employment as a correctional officer and has alleged harassment based on various remarks attributed to her supervisor, is entitled to information relating to other charges of discrimination/harassment which may have been lodged against the supervisor, whether or not the supervisor had a substantive role in the decision to terminate complainant's employment. *Jaques v. DOC*, 94-0124-PC-ER, 3/31/95

A complainant who requested information relating to complaints regarding "gender discrimination or harassment" by supervisory officers, without limitation, at a correctional institution, was required to limit the request in terms of time and also to those supervisory personnel who were involved in the decision and other conduct that was the subject of the complainant's charge of discrimination. *Jaques v. DOC*, 94-0124-PC-ER, 3/31/95

Respondent was entitled to a protective order relative to complainant's discovery request relating to a 1988 personnel action, described by complainant as a "demotion" and by respondent as a "reassignment," where the

complaint was untimely filed relative to that transaction. The protective order extended to information relating to complainant's contention that respondent subsequently recreated his former position and hired another person to fill it, where complainant did not contest respondent's contention that complainant did not compete for the vacancy when it was available. *LaRose v. UW-Milwaukee*, 94-0125-PC-ER, 3/31/95

In an action under the FMLA in which complainant asserted she was suffering from a serious medical condition which made requested leave medically necessary, complainant's medical records from her treating physician were discoverable, consistent with §§804.01(2)(a) and 905.04(4)(c), Stats., irrespective of whether the employer would have been entitled to request or obtain the information in reviewing a request leave under the FMLA. *Sieger v. DHSS*, 90-0085-PC-ER, 2/6/95

Respondent's request for a protective order was denied where the underlying complaint alleged discrimination based on race and arrest/conviction record regarding the failure to hire and respondent sought protection of information relating to five candidates who were not selected because they had not provided correct information concerning their criminal record as well as information concerning Affirmative Action Planning and Reporting forms for each of the Black candidates selected, the identifying information could be redacted from the materials related to the five unsuccessful candidates and where the Planning and Reporting forms simply verified information already contained in another document already supplied to the complainant. *Hamilton v. DOC*, 93-0216-PC-ER, 12/22/94

Where, in his response to the answer to his complaint, complainant recited certain alleged statements suggesting discriminatory intent by management, but subsequently refused the Commission's requests to provide specifics relating to the statements, the Commission made an inference, for purposes of the investigation only, that such alleged statement were never made. *Wentz v. DOT*, 94-0056-PC-ER, 10/24/94

Even though a request from the Commission to the complainant did not provide notice that his failure to respond could result in the imposition of sanctions identified

in §PC 2.05(4)(b), (c), and (d), where respondent's subsequently moved for such sanctions, the Commission then provided complainant a copy of the applicable rules, including al of §PC 2.05, and the complainant reiterated his decision not to provide the requested information, the complainant's refusal was a "failure to answer or produce requested information" within the meaning of §PC 2.05(4)(b). *Wentz v. DOT*, 94-0056-PC-ER, 10/24/94

Appellant, who was proceeding *pro se*, unjustifiably refused to comply with an order compelling discovery. The Commission concluded that "other circumstances" within the meaning of §804.12(2)(b), Stats., made an award of attorney's fees to respondent unjust, since the Commission already had dismissed her handicap claims and barred her from supporting two disciplinary appeals with evidence relating to her medical condition. *Mosley v. DILHR*, 93-0035-PC, etc., 6/21/94

Because petitioner alleged handicap discrimination, there was no privilege attached to her relevant medical records, and they were subject to discovery by the employer. *Mosley v. DILHR*, 93-0035-PC, etc., 1/25/94

Petitioner's refusal to comply with an order compelling discovery did not result in dismissal of all her cases, inasmuch as she is proceeding *pro se* and her refusal to permit discovery of her medical records did not relate to all her claims. However, her claims of handicap discrimination were dismissed, and she was prohibited from using any evidence concerning her medical condition in connection with her disciplinary action appeals. *Mosley v. DILHR*, 93-0035-PC, etc., 4/19/94

Respondent DMRS's request to hold discovery in abeyance (essentially to extend the time for responding to interrogatories) pending establishment of the issue for hearing was granted based on the following circumstances: DMRS's representations that it was unable to determine the issue from the pleadings, and that, once the issue was established, it might seek dismissal of the action based on jurisdictional grounds or based on res judicata or collateral estoppel; and the Commission's conclusion that it would be unnecessarily burdensome to require DMRS to respond to discovery requests prior to determining that dismissal of the action on one of these bases may be appropriate. However, DMRS failed to establish a basis for delaying the requested

discovery until a hearing date was set. *Balele v. DILHR et al.*, 94-0020-PC-ER, 6/2/94

A single unjustified failure by complainant to appear for a properly noticed deposition did not justify sanction of dismissal but did justify the award of reasonable expenses to respondent. *Dorf v. DOC*, 93-0121-PC-ER, 5/27/94

Discovery sanctions were imposed where complainant's answers to respondent's interrogatories were tardy, incomplete and evasive, and the continued tardiness had the effect of avoiding a Commission order to reply. *Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner)

Complainant's attempts to avoid sanctions were rejected where respondent's questions were relevant to its potential defense and complainant's claim that the interrogatories, consisting of over 100 questions, were overly burdensome should have been raised by a request for a protective order rather than for the first time as a defense to respondent's motion to compel. *Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner)

Where the complaint arose from a decision not to hire the complainant, the examiner denied respondent's dismissal request but granted its request that complainant be prohibited from presenting any evidence, other than her own testimony, relating to the subject matter of those interrogatories where the responses were incomplete or evasive. *Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner)

Although complainant did not violate the language of the protective orders previously agreed to by the parties, the information she conveyed to others derived from respondent's documents probably should have been prohibited and the respondent was provided an opportunity to propose a revision in the language of the existing protective orders. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 3/1/94 (ruling by examiner)

The party alleging violation of previous protective orders has the burden of establishing the existence of such violations. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 3/1/94 (ruling by examiner)

Respondent's request that complainant's accessibility to

certain documents, including test questions, rating criteria and worksheets of interviewers, and applicant resumes, be limited to the offices of the Commission and that complainant not copy these documents was denied where complainant would have greater flexibility if the documents were supplied to her attorney's office rather than in the Commission's office, complainant needed copies of interviewers' worksheets to analyze their ratings, and complainant was represented by counsel which served as a protection to confidentiality. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 12/28/93

Complainant's failure to file a response to a request for admissions and production of documents in violation of the Commission's order resulted in statements in the request being deemed admitted. The cases were dismissed pursuant to the admission that complainant had agreed to settle the claims. *Garner v. SPD*, 88-0015-PC, 88-0183-PC-ER, 8/11/93

Complainant was precluded from offering any evidence related to the subject matter of respondent's underlying discovery request where complainant failed to provide discovery until 10 months after the issuance of an order to compel, there was no showing that the underlying information was unavailable or that the delay was unintentional, and the delay reflected gross negligence and callous disregard for the discovery process and the Commission's order. *Germain v. DHSS*, 91-0083-PC-ER, 7/30/93

Where complainants simply failed to respond to a request for inspection within 30 days, the Commission has the discretion to award expenses arising from that failure once a motion has been filed under §804.12(4), Stats. Expenses were justified where complainants engaged in other conduct, including a delay in providing certain other documents and various other delays. *Harden et al. v. DRL & DER*, 90-0092-PC-ER, etc., 4/23/93

Respondent's request, as a sanction for the failure to respond to a discovery request, for expenses representing 13 hours of time was reasonable where the procedural steps included two motions, two briefs, a conference attended by the parties and a hearing on the motion. *Harden et al. v. DRL & DER*, 90-0092-PC-ER, etc., 5/20/93

Complainant's request for an extension of the discovery deadline was denied where the conference report clearly set forth the discovery schedule and complainant was aware of the deadline date, having filed his first discovery request on that designated date. Complainant's *pro se* status was insufficient in itself to justify an extension. *Stark v. DILHR*, 90-0143-PC-ER, 5/7/93 (ruling by examiner)

Respondent was entitled to an order compelling discovery where complainants failed to respond to the original request for production of documents and then, when they did respond, failed to produce certain documents that were referenced in their response despite a follow-up request from respondent's counsel. *Harden et al. v. DRL & DER*, 90-0092-PC-ER, etc., 12/17/92

In a race discrimination case involving complainant's termination from the State Patrol Academy, deposition questions about his earlier termination from the Milwaukee Police Department were within the boundaries of relevance for discovery purposes. *Owens v. DOT*, 91-0163-PC-ER, 9/18/92

Discovery is available to a party to a Fair Employment Act claim during the investigative stage of the proceeding. *Germain v. DHSS*, 91-0083-PC-ER, 5/14/92

Where respondent's deposition of a witness denominated by complainant as an "expert" did not occur "upon motion" and by "order" as provided in §804.01(2)(d), the respondent was not obligated to pay expert fees to the witness for the time spent in deposition. *Keul v. DHSS*, 87-0052-PC-ER, 5/14/92

Complainants were entitled to discovery of the investigative report prepared by respondent's affirmative action officer in response to complainant's charge of discrimination and retaliation. *Galbraith et al. v. DOT*, 91-0067-PC-ER, etc., 12/23/91

The attorney-client privilege could not rightfully be claimed for all communications that occurred at meetings where a personnel problem was discussed and advice was sought from a number of persons, one of whom was a lawyer and where it could not be said that the primary purpose of the communications made by those present at the meeting besides counsel was to facilitate the obtaining of legal advice. Respondent was ordered to provide information on

the meetings pursuant to discovery requests except that the respondent was not required to provide information regarding the content of any legal advice rendered by counsel at the meetings. *Iwanski v. DHSS*, 89-0074-PC-ER, etc., 8/21/91

Because there is nothing in either ch. 804, Stats., or the Commission rules that requires a complainant to be in pay status or otherwise be compensated while being deposed, a complainant cannot insist on being in pay status as a precondition to being deposed. *Holubowicz v. DOC*, 90-0048, 0079-PC-ER, 8/22/90

Respondent's motion to compel was granted where, in response to a series of interrogatories seeking specific information from petitioner as to the basis for her allegations of discrimination and retaliation, the petitioner stated that the information was "contained within the documents already in the Department's possession." The petitioner was not entitled to invoke §804.08(3), Stats, which allows the party on whom an interrogatory is served to specify the records from which the answer may be derived. The petitioner also was not entitled to avoid responding by claiming attorney work product. *Iwanski v, DHSS*, 89-0074-PC-ER, etc., 3/21/90

Where respondent had unsuccessfully attempted to arrange for DMRS to provide copies of certain examination documents (the examination plan, the written exam and benchmark and the oral exam and benchmarks) as the answer to complainant's interrogatory and later amended its answer to provide only some of that information, the complainant was entitled to an order compelling discovery because the respondent had not completely answered the interrogatory. *Beaverson v. DOT*, 88-0109-PC-ER, 2/22/90

In a complaint of age discrimination arising from the decision not to select the complainant for a vacant position, the complainant was entitled to discovery of the results of other hiring transactions where the same decision makers were involved. That discovery was not limited to appointments made at the same or higher salary ranges but respondent was not required to give detailed information about the transaction until there was at least a preliminary indication that the particular transactions had some meaning in the context of the statistical or similar transactions evidence that conceivably would support complainant's

case. Respondent's motion for protective order was granted to prevent the discovery of the hiring patterns of other supervisors in the agency. *Beaverson v. DOT*, 88-0109-PC-ER, 2/22/90

In a complaint arising from respondent's decision to discharge the complainant, the complainant was entitled to review the personnel files of co-workers and supervisors because the files could contain information relating to the comparative work performances of the co-workers and information relating to the supervisors' attitudes and performance relating to affirmative action. The files were not privileged. *Awe v. DATCP*, 89-0040-PC-ER, 2/9/90

In a complaint arising from respondent's decision to discharge the complainant, complainant was not entitled to obtain information regarding vacancies for which he was considered but not hired, where those decisions preceded his selection for the position from which he was later discharged. *Awe v. DATCP*, 89-0040-PC-ER, 2/9/90

Where complainant alleged he was not hired despite ranking second on the civil service exam and that his nonselection was part of a pattern extending to at least two prior rejections, complainant was granted discovery of criteria utilized for both the exam and the post-certification decision, information concerning the officials or agencies responsible for the examination process, and information regarding those persons who were certified after taking any of the last three examinations for the particular classification. Discovery was denied as to information regarding those persons who were not certified. *Beaverson v. DOT*, 88-0109-PC-ER, 6/29/89

Nothing prevents a party from first obtaining information via a deposition or interrogatories and then seeking an admission covering the same information. The purpose of requests for admission is to narrow the issues for trial. Therefore, the fact that the requesting party is already in possession of certain of the items he is requesting the respondent to admit to is not determinative. *Wing v. UW-Stout*, 85-0104-PC-ER, 1/9/89

The Commission rejected the respondent's contention that requests for admissions were inappropriate because they amounted to complainant's arguments as to what inferences should be drawn from various pieces of documentary

evidence. The Commission went on to individually address the appropriateness of numerous requests. *Wing v. UW-Stout*, 85-0104-PC-ER, 1/9/89

Where complainant appeared *pro se*, his motion to compel was not simply denied *in toto* because of its vagueness. Rather, in an effort to eliminate unnecessary delays, the examiner went on to rule on the motion after having assumed the complainant had redrafted his requests with greater specificity. *Asadi v. UW-Platteville*, 85-0058-PC-ER, 11/13/87

Discovery was limited to a period not extending beyond 5 years prior to the date the claim was filed. Complainant is entitled to discovery for the period subsequent to his filing, as well. *Asadi v. UW-Platteville*, 85-0058-PC-ER, 11/13/87

Where the complaint arose from respondent's decision not to renew his tenure track employment at the Department of Industrial Engineering in the College of Engineering, UW-Platteville, complainant was entitled to discovery of faculty evaluations and contracts for all of the UW-Platteville rather than only the College of Engineering. Restrictions were imposed in an effort to protect the information from unnecessary disbursement. *Asadi v. UW-Platteville*, 85-0058-PC-ER, 11/13/87

Complainant was granted discovery of claims or cases of discrimination based on national origin that had been filed by faculty members against persons at UW-Platteville subsequent to a date 5 years prior to the date complainant filed his own claim of discrimination based on national origin. Discovery was not granted as to the broader category of all lawsuits and charges of discrimination against the UW System. *Asadi v. UW-Platteville*, 85-0058-PC-ER, 11/13/87

The Commission discovery rule, §PC2.02, Wis. Adm. Code (1980) applies to any contested case filed with the Commission under §230.45, Stats., including complaints of discrimination. *Friedman v. UW*, 84-0033-PC-ER, 8/l/84

A discovery request designed to elicit information to determine whether the complaint was timely filed relates to a "defense of the party seeking discovery" as provided in §804.01(2)(a), Stats., and is appropriate. *Friedman v. UW*, 84-0033-PC-ER, 8/1/84

While this digest has been prepared by Personnel Commission staff for the convenience of interested persons, it should be remembered that the decisions themselves are the ultimate source of Commission precedent.

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 786 through 786.04

[Previous material] [Next material]

---

786 Fair Employment Act retaliation

786.01 Generally

Simply asking an employe to verify their leave status rather than having a supervisor research such status does not rise to the level of an "adverse employment action" within the context of a retaliation charge. *Bower v. UW-Madison*, 95-0052-PC-ER, 8/15/96

The use of the term "bitch" to refer to complainant does not, in and of itself, lead to a finding of discrimination/retaliation. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95

An allegation that an employe was terminated in retaliation for having taken FMLA covered leave states a claim under the FMLA. Additionally, an employe who alleges she attempted to exercise a right under the FMLA and then was retaliated against because of that states a claim under the FEA retaliation provisions, §111.322(2m)(a), Stats. *Ripp v. UW-Extension*, 93-0113-PC-ER, 6/21/94

Retaliatory motives need only have played some part in the adverse employment action to support a finding of discrimination, and the Commission rejects the "but for" test (i.e., the decision would not have been reached "but for" discrimination) for determining whether retaliation played a legally sufficient part in the decision. *Smith v.*

***UW*, 79-PC-ER-95, 6/25/82**

786.02(1) Finding of probable cause

Probable cause existed as to a decision to transfer the complainant, as opposed to someone else, to another position within the agency where one of the reasons respondent articulated for its decision was not supported by the record and certain other conduct cast doubt on the other reasons. However, no probable cause was found with respect to a claim of sex discrimination. *Ruff v. Office of the Commissioner of Securities*, 86-0141-PC-ER, 87-0005-PC-ER, 9/26/88

Probable cause was found with respect to respondent's decision not to assign the complainant to a three day weekend work pattern where the respondent failed to produce a copy of the posting of the vacancy, complainant's interest in that work pattern was well-known and respondent had contended it hired a non-foreign person from outside the institution because no existing employes had responded to the posting. No probable cause was found as to other reassignment decisions. *Boyle v. DHSS*, 84-0090, 0195-PC-ER, 9/22/87, modified 10/21/87

Probable cause was found with respect to respondent's decision to place the complainant on a leave of absence where complainant had previously said he might commence legal action to attempt to obtain an accommodation and an employe of the affirmative action office said "We can play hardball too." *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

786.02(2) Finding of *no* probable cause

There was no probable cause to believe respondent discriminated against complainant based on sex or retaliated against complainant when respondent terminated his employment, citing 8 specific acts of patient abuse, abusing a co-worker, reading while in work status, demonstrating an undermining attitude, leaving the unit for a smoking break, shoving and screaming at a co-worker and leaving

the work unit for an extended break without permission. Although complainant presented evidence that co-workers took unauthorized smoke breaks and read papers, books or magazines in unauthorized areas, complainant failed to show these incidents were seen by or reported to supervisors. *Henebry v. DHSS*, 96-0023-PC-ER, 7/29/98

No probable cause was found as to complainant's FEA retaliation, occupational safety and whistleblower claims arising from the decision not to reclassify his position where respondent contended that the request was denied because complainant's position did not meet the requirements of the higher classification and complainant did not show respondent's decision was unreasonable or that respondent applied the specification's requirements more stringently for him than for employes who had not engaged in protected activities. *Holubowicz v. DOC*, 96-0136-PC-ER, 4/24/97

No probable cause was found as to complainant's FEA retaliation claim arising from the decision to require him to undergo an interview for a vacant position along with other names on the certification list rather than to transfer into the position without an interview where the record was insufficient to establish that the decision-maker was aware of complainant's participation in activities protected under the FEA. *Holubowicz v. DOC*, 96-0136-PC-ER, 4/24/97

There was no probable cause with respect to respondent's exercise of discretion setting complainant's starting rate of pay where the person who made the decision was not aware of the complainant's identity. *Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92

No probable cause was found with respect to the decisions not to select the complainant for either of two vacancies where the successful candidates were better qualified for the positions. Even though there was no showing that one of the interviewers was aware of the complainant's prior protected activities, that interviewer's ranking of the candidates was the same as the other interviewers. *Cozzens-Ellis v. UW-Madison*, 87-0070-PC-ER, 2/26/91

No probable cause was found with respect to the decision not to create a new position for which the complainant would likely have been a candidate where, even though there were some anomalies, the respondent's staffing pattern did not provide for such a position. *Harris v.*

***DILHR*, 86-0021, 0022-PC-ER, 2/22/90**

No probable cause was found with respect to the decision not to promote the complainant, an Unemployment Benefit Specialist 2, for a vacant UBS 4 position where the appointing authority had, without exception since 1985, only promoted persons to the UBS 4 level who were already UBS 3's. Reclassification from UBS 2 to 3 was premised on passing a review of the quality of work performed while employed as a UBS 2. Others who were not in the same protected category as the complainant were similarly treated. *Harris v. DILHR*, 86-0021, 0022-PC-ER, 2/22/90

No probable cause was found with respect to a decision not to hire the complainant, who had previously filed a discrimination complaint, where two of the three interview panelists were unaware, at the time they scored the interviews, of complainant's protected activities and deficiencies in the selection process affected all of the candidates and were not specifically directed at the complainant. *Bloedow v. DHSS*, 87-0014-PC-ER, etc., 8/24/89

No probable cause was found with respect to a decision not to hire the complainant for two assistant professorship vacancies where the complainant had not renewed her expired application. *Chandler v. UW-La Crosse*, 87-0124-PC-ER, 88-0009-PC-ER, 8/24/89

No probable cause was found with respect to various nonselection decisions where complainant failed to show that her experience, knowledge, interest and motivation or interview performance were actually superior to those of the successful candidates, that the hiring criteria were not properly related to the duties and responsibilities of the subject position, or that the criteria were not properly applied by the individuals with effective hiring authority. In addition, there was no evidence that the individuals with hiring authority knew or had any reason to know that complainant had filed a discrimination complaint. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

No probable cause was found with respect to two decisions denying reclassification of the complainant's position where the duties and responsibilities of the position did not appear to meet the requirements for classification at the higher level and, as to one of the decisions, the complainant

acknowledged that her position did not merit reclassification. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

No probable cause was found with respect to a memo critical of complainant's work performance where the problems cited in the memo were ongoing and had been observed and reported by a previous supervisor and by more than one co-worker. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

No probable cause was found with respect to various disciplinary actions where the complainant admitted most of the charges against him, complainant's disciplinary problems started substantially before he filed his first discrimination complaint and respondent could have discharged him earlier when it found he had falsified a medical excuse but instead allowed him to continue working. *Sheridan v. UW-Madison*, 86-0103-PC-ER, 87-0141-PC-ER, 2/22/89

No probable cause was found with respect to the decisions to issue complainant a written reprimand, suspend him and discharge him, as well as to certain conditions of employment where complainant repeatedly called in sick, left work and ultimately failed to appear at work. Complainant filed a complaint of discrimination after there had been recommendations to discharge him and on the same day in which he failed to appear at an investigatory meeting. *Rose v. DOA*, 85-0169-PC-ER, 7/27/88

No probable cause was found as to the decision not to select the complainant for a vacant permanent position of English teacher, where the successful candidate had a higher score on the questionnaire and complainant, who had been filling the position as an limited term employe, had an inferior job reference based on respondent's first-hand knowledge of complainant's work performance. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

No probable cause was found as to claims relating to discharge and providing negative job references where complainant's employment as a limited term employe ended when complainant used compensatory time to finish the 1044 hour maximum of his LTE appointment and respondent's references were based on complainant's poor work record. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

No probable cause was found as to respondent's decision to deny complainant's reclassification request. *Schultz v. DER*, 83-0119-PC, 84-0252-PCO 85-0029-PC-ER, *Schultz v. DER & DILHR*, 84-0015-PC-ER, 8/5/87

No probable cause was found as to the decision not to rehire the complainant to an LTE position where in 1981 and 1982, her supervisors believed her attitude and performance had deteriorated to below the level of a good employe. The complainant's protected activity post-dated this substandard attitude and performance. *Rose v. DNR*, 83-0055-PC-ER, 84-0081-PC-ER, 4/15/87

There was no probable cause in regard to the discharge of the complainant from his Building Maintenance Helper 2 position where there was no evidence that retaliations played a part in the decisions and where complainant did not perform his work properly, made threatening statements/gestures to co-workers, supervisors and non-employes and had unexcused absences. *Brummond v. UW-Madison*, 84-0185-PC-ER, 85-0031-PC-ER, 4/1/87

No probable cause was found with respect to a selection decision (decision #2) for a vacant position which, when filed two months earlier (decision #1) had caused complainant to file a discrimination complaint. In decision #1, respondent had ranked complainant behind the successful candidate (A) and a back-up candidate (B) at a time before complainant's first charge had been filed and before there was any possible motive for retaliation. When A indicated he would be leaving after only a few months on the job, the respondent had a strong reason to attempt to reactivate the register and to offer the job to the backup candidate, rather than to have gone through another staffing process that would have resulted in the position being vacant for several more months. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

The complainant failed to establish a causal connection between the filing of her initial complaint in 1979 and her layoff in 1983 where, in the interim 4 year period, she was subjected to no disciplinary action, received satisfactory performance evaluations, and had no employment problems and where the layoff was clearly based on budget considerations and a change in computer operations from a "batch" system to an "on-line" system. *Mitchell v. UW-Milwaukee*, 84-0170-PC-ER, 4/4/86

No probable cause was found with respect to suspensions and conditions of employment where complainant did not accept management's consistently applied limitations as to the type of assistance to be provided by persons employed in the Disabled Veteran Outreach Program (as was the complainant) and where complainant failed to establish that he was treated any differently than his co-workers. *Poole v. DILHR*, 83-0064-PC-ER, 12/6/85

The Commission found no probable cause where complainant based his claim on a civil action he had filed in circuit court and where the civil complaint did not refer to any actions on complainant's part to oppose any discriminatory practices or to make a complaint, testify, or assist in any proceeding under the Wisconsin Fair Employment Act. *Bisbee v. DHSS*, 82-PC-ER-54, 6/23/83; affirmed by Dane County Circuit Court, *Bisbee v. State Pers. Comm.*, 617-636, 10/3/84

No probable cause was found on the issue of retaliatory discrimination with respect to respondent's failure to hire the complainant in the misdemeanor unit of respondent's adult criminal division where, before the complaint was filed, the respondent had consistently refused to hire the complaint in that unit. *Taylor v. State Public Defender*, 79-PC-ER-136, 8/5/82

The Commission found no probable cause in regard to the termination of complainant's employment where there was ample evidence of the complainant's inadequate performance, there was little if any evidence that her asthmatic condition was causative with respect to her performance problems, and although the complainant's supervisor was aware of certain complaints by the complainant to the vice-chancellor, this was considered of little significance against her record of inadequate performance. *Way v. UW*, 78-122-PC, 79-PC-ER-4, 3/8/82

The Commission found no probable cause to believe the complainant had been discriminated against on the basis of sex and retaliation with respect to her non-appointment to a faculty position, where she was not placed on the "short list" for further consideration, and the record fully supported the new staff committee's opinion that she was not a historical geographer, the article that she had published was not considered that impressive or that material by the Committee members, and, with respect to

alleged "contradictions" in the respondent's position, the Commission stated that it should not be considered unusual that a number of faculty members testifying as to their understanding as to the needs of the department, and their evaluations of candidates for a faculty position, would not speak with one voice, nor should it be considered unusual that the search process was not able to meet its goals at every step of the process. *Rubin v. UW*, 78-PC-ER-32, 2/18/82

No probable cause was found where the transfer of a handicapped employe was preceded by a reasonable good faith inquiry into his medical condition and physical capabilities. *Kleiner v. DOT*, 80-PC-ER-46, 1/28/82

No probable cause was found in decision not to hire complainant as an instructor in the geography department of UW-Oshkosh where an initial decision was made before complainant had filed a written application, the process was then reopened and complainant was still not hired. Four members of the department's faculty who were also members of the selection committee all had poor opinions of the complainant based on complainant's earlier experience as a teacher there. In addition, nothing in the materials submitted to the selection committee indicated that complainant had been active in the geography profession during the previous 10 years. *Thalhofer v. UW-Oshkosh*, 79-PC-ER-22, 9/23/81; affirmed by DILHR, 11/7/83; affirmed by LIRC, 2/16/84

No probable cause was found with respect to a complaint of retaliation in connection with a failure to appoint where it was noted that the decision was a collegial one participated in by the departmental faculty, and that the complainant had not applied for a current vacancy but rather had asked the department in essence to create a new professorship in an area that the department had already established as a relatively low priority. *Acharya v. UW*, 78-PC-ER-53, 2/13/81; affirmed by DILHR, 11/20/81; affirmed by LIRC, 1/9/82

No probable cause found. *Stasny v. DOT & DP*, 79-192-PC, etc., 1/12/81

786.03(1) Finding of retaliation

Respondent retaliated against complainant by failing to provide him, within a reasonable period of time, a chair with a headrest as requested by complainant in a Disability Accommodation Report form. Complainant had previously filed discrimination complaints with respondent's affirmative action office and with the Personnel Commission. Respondent failed to explain or justify the delay of more than a year. *Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98

786.03(2) Finding of *no* retaliation

The record established that respondent did not retaliate against complainant for taking FMLA leave, but instead that he was given a negative performance evaluation and merit award reduction as the result of his failure to make up canceled classes or to secure coverage by colleagues, as well as his failure to make satisfactory progress on the requirements of his tenure-review plans, and that he was required to return to a five-day work week because respondent was concerned about recent legislative attention and was seeking to avoid potential conflicts with state work reporting and leave requirements. *Lubitz v. Wis. Pers. Comm. & UW System*, Court of Appeals, 99-0628, 2/24/00, affirming *Lubitz v. UW*, 95-0073-PC-ER, 1/7/98

Respondent did not retaliate against complainant when it directed her to check in and out of work via electronic mail. Complainant had a flexible schedule and respondent was otherwise unable to know her actual work hours. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Respondent did not retaliate against complainant when it issued her a written reprimand. Complainant admitted she had violated her supervisor's directive, the reprimand was consistent with respondent's disciplinary policy and complainant had been given a verbal warning on the same topic. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

There was no basis for concluding there was anything questionable about the rating panel's evaluation of complainant's Achievement History Questionnaire materials where the complainant had been instructed to submit a two page AHQ addressing four factors, complainant, alone

among the applicants, submitted four pages, and the specialist administering the selection process removed two pages after deciding it would be inappropriate and unfair to evaluate complainant on the basis of all four pages. The rating panel evaluated the two pages of complainant's materials and appropriately assigned him a score below the passing level. Complainant's race discrimination and retaliation claims failed. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

It was in keeping with the civil service code and other evidence of record that existing career executives would be certified for consideration in filling a vacant career executive position, without having to go through an examination process. The selection process for the position was conducted on an "Option IV" basis under the career executive program. Applicants who were not career executives were evaluated on the basis of an Achievement History Questionnaire. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

An employer's failure to follow its own policies can be probative of pretext. Where the staffing manual called for the use of "blind" scoring procedures whenever possible, and there was no apparent reason why applicants' names were not deleted from the resumes they submitted as part of their Achievement History Questionnaire, this could constitute some evidence of pretext. However, in light of the other evidence of record, complainant failed to show that respondent's explanation for rejecting complainant for the position in question was a pretext for race discrimination or retaliation. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Where the record established that a balanced panel was desirable under relevant civil service policies but was not mandatory, and where respondents did not provide an explicit explanation as to why they did not have a balanced panel, the absence of a balanced panel could be considered to be probative of pretext. However, in light of the other evidence of record, complainant failed to show that respondent's explanation for rejecting complainant for the position in question was a pretext for race discrimination or retaliation. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Respondent did not retaliate against complainant under the Family Medical Leave Act or the Fair Employment Act for

having filed prior FMLA claims when it terminated his employment where respondent's action was consistent with the manner in which respondent treated other apparently similarly situated employes and where there was no showing that respondent's action was *per se* unreasonable. Complainant had chronic attendance problems over a lengthy period of time and the record did not support a conclusion that complainant's termination resulted from anything other than complainant's lengthy and continuing history of attendance problems. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

In *dicta*, the Commission concluded that respondent did not retaliate against complainant for engaging in fair employment activities when it investigated him for a possible work rule violation where there was no evidence to contradict respondent's witnesses that the procedure followed in complainant's case was consistent with how other disciplinary cases were handled by the agency, even though that procedure was contrary to a training manual issued by the Department of Employment Relations where the respondent had never formally adopted any formal disciplinary procedure. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97

Complainant failed to show pretext with respect to various disciplinary actions where there was no evidence to rebut the testimony of his immediate supervisor 1) that he was unaware of complainant's protected activities and 2) that he had not been directed by anyone else in management to impose the discipline, and where complainant had not demonstrated that there were other employes who were actually similarly situated to him who did not receive similar discipline because 1) those employes were under a different supervisor and 2) complainant failed to establish the reasons for the other employe's absences in light of respondent's attendance policy which called for consideration of mitigating circumstances before the imposition of discipline. *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97

Complainant failed to sustain his burden of establishing that a 10 day suspension constituted discrimination based on national origin or ancestry or retaliation for engaging in FEA activities where respondent believed that a coworker was genuinely upset by complainant's comments and where

complainant had a disciplinary history which included a letter of reprimand and a one-day suspension which also involved allegations of harassing or threatening conduct, even though the coworker's reaction to complainant's conduct was unreasonable. *Zeicu v. DHSS [DHFS],* 96-0043-PC-ER, 1/16/97

Complainant failed to sustain his burden of establishing that the decision not to select him for a temporary position constituted discrimination based on national origin or ancestry or retaliation for engaging in FEA activities where the successful candidate was better qualified and complainant's work history included a five-day suspension. Even though the successful candidate also had received a five-day suspension, the nature of those offenses were not as serious as complainant's in the context of the vacancy. *Zeicu v. DHSS [DHFS],* 96-0043-PC-ER, 1/16/97

No discrimination based on sex, sexual orientation or race, violation of FMLA, or retaliation based on FEA activities was found with respect to respondent's decision to discharge the complainant where respondent concluded that complainant had violated various work rules when she gave a suggestive note to a coworker, telephoned the same coworker at home, and admitted to using profanity towards various other coworkers and about a client. *Mitchell v. DOC,* 95-0048-PC-ER, 8/5/96

No discrimination was found on the bases of age, national origin/ancestry or sex, nor was FEA retaliation found, relative to the decision not to retain complainant as a faculty member in respondent's Industrial Engineering Department where complainant did not complete her Ph.D. by the date to which she had contractually agreed and where respondent had concerns about complainant's teaching effectiveness, the evidence of which included routine student evaluations as well as a petition filed by a group of students with a dean. *Nowaczyk-Pioro v. UW-Platteville,* 93-0118-PC-ER, 4/16/96

Respondent did not discriminate on the basis of arrest/conviction record or retaliate against the complainant for FEA activities regarding its decision to reprimand him, even though other employes similarly situated were not reprimanded, where at the time the reprimand was imposed, the supervisor did not have knowledge of the actions of the other employes and management revoked the reprimand

thereafter. *Erickson v. WGC*, 92-0207-PC-ER, 92-0799-PC, 5/15/95

No sex discrimination or FEA retaliation existed as to a variety of conditions of employment, including relocation, removing a sign in complainant's office, discussing an internal complaint, denying complainant's request for an adjusted work schedule, declining to investigate the defacement of articles written by complainant, not including complainant in a meeting, the nature of working relationships with co-workers, disclosing to co-workers that complainant had been disciplined, requiring complainant to attend certain training, assignment of duties, responses to complainant's requests for changing her duties, scheduling meetings, use of a job performance improvement plan and union representation at weekly meetings. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95

No discrimination occurred when respondent did not hire complainant, who is black and had previously filed a race discrimination claim against respondent, for a limited term carpenter job where no authorization to hire had been received as of the date the complainant reported for work. A second applicant, who was white, was also not hired on that date, although the second applicant did get hired on a later dated. *Weaver v. UW-Madison*, 93-0022-PC-ER, 11/3/94

Numerous incidents which complainant alleged constituted a pattern of harassment against her because of her handicap and in retaliation for pursuing an accommodation request and making disclosures covered by the Whistleblower Law were analyzed and it was found that complainant failed to satisfy her burden of proof. As to two matters for which respondent's explanations did not have an accurate basis in fact, any ulterior motives by management were far more likely related to labor-management strife and a related FLSA lawsuit than to complainant's handicap or her protected activities in connection therewith. A conclusion of discrimination is not mandated by a finding of pretext. *St. Mary's honor Center v. Hicks*, 125 L.Ed. 2d 407, 113 S.Ct. 1742 (1993); *Kovalic v. DEC Intl. Inc.*, 161 Wis. 2d 863, 876-78, 469 N.W. 2d 224 (Ct. App. 1991). *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant failed to demonstrate sex discrimination or fair employment retaliation with respect to her performance

evaluation where the statements in her evaluation were an accurate reflection of her failure to meet clearly established performance expectations. *Stricker v. DOC*, 92-0058-PC-ER, 92-0201-PC-ER, 3/31/94

Complainant failed to show disparate treatment or retaliation in regard to respondent's request for medical information where complainant had been absent on medical leave for a substantial period of time, where complainant had resisted all attempts by respondent to obtain information relating to her medical condition, and where respondent needed to arrange for coverage of complainant's responsibilities as a lead worker. *Dahlberg v. UW-River Falls*, 88-0166-PC-ER, 89-0048-PC-ER, 3/29/94

The faculty vote not to retain the complainant resulted from his ineffectiveness as a teacher and a schism within the faculty between those with and without a Ph.D. rather than due to complainant's support for the hire of a minority for a vacant instructor post. *Fleming v. UW-River Falls*, 92-0012-PC-ER, 12/13/93

Respondent's decision to terminate the complainant's employment was upheld where only one of three of the persons involved in deciding to terminate his employment was aware of the prior protected activity, that person's notes and conduct were comparable to those of persons who were unaware of the protected activity and complainant failed to show that he performed his job satisfactorily. *Green v. DHSS*, 92-0237-PC, 12/13/93

Respondent did not retaliate under the FEA against complainant, who had brought his salary overpayment to respondent's attention through the filing of an appeal, when respondent then attempted to resolve it prior to hearing. *Harris v. DILHR*, 89-0151-PC-ER, 6/23/93

Respondent did not retaliate against complainant by taking action to collect a salary overpayment where complainant failed to show that a situation identical to or similar to his had arisen and been resolved by respondent in a manner different than how complainant's situation was resolved. *Harris v. DILHR*, 89-0151-PC-ER, 6/23/93

Where the complainant was incapable of working at all, and there was no foreseeable change in his condition, the employer had a legitimate, nondiscriminatory reason for termination which was not shown to have been a pretext for

retaliation. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

Respondent did not discriminate against complainant on the basis of handicap or retaliation with respect to conditions of employment. While the record reflected a poor relationship between complainant and his supervisor, there was no reason to conclude that this was attributable to appellant's handicap or to retaliation as opposed to a number of other possible reasons. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

No retaliation or handicap discrimination was found as to a termination decision where there were consistently negative evaluations of complainant's work by a number of supervisors and the supervisor who spent the most time directly supervising complainant was then unaware of his earlier complaint. The complainant also grabbed a co-worker's wrist, bruising it enough that a doctor recommended a brace and a week's absence from work. *Bjornson v. UW-Madison*, 91-0172-PC-ER, 8/26/92

No retaliation was found with respect to the decision to transfer the complainant where the decision was found to have been based on legitimate objectives associated with the functioning of the respondent rather than in retaliation for complainant's prior complaint of discrimination. *Ruff v. Office of the Commissioner of Securities*, 87-0005-PC-ER, 6/25/90; modifying decision issued 5/16/90

Respondent was found not to have retaliated against complainant in failing to hire him. It was logical to conclude that once the appointing authority learned that it would be illegal to ignore complainant's application for a vacant position merely because complainant had previously filed a discrimination complaint, the appointing authority did not continue to consider the complaint as a factor in the hiring decision and the appointing authority agreed with the unanimous recommendation of an advisory committee that another applicant was more suitable. *Smith v. UW*, 79-PC-ER-95, 6/25/82

Although there was evidence that certain unspecified transfers had been accomplished by the respondent in an expedited manner, the transfer in question was handled within a normal or average time range and the fact that it had not been processed more expeditiously was not found to have been retaliatory. *McGhie v. DHSS*, 80-PC-ER-67,

3/19/82

No discrimination was found where the complainant's contract was not renewed, the evidence showed only that there was a dispute between her and other faculty members regarding a curriculum matter, the substantive reasons for non-renewal given by respondent were not challenged, five of the six instructors non-renewed were males, and the complainant was afforded all of her rights of appeal set forth in the statutes and administrative code. *Cole v. UW*, 79-PC-ER-50, 1/13/81

Complainant failed to show she was discriminated against in regard to her discharge where she had been advised that a state car should never be kept out overnight without management approval and one week later, without management approval, she parked a state car overnight in front of her home and it was damaged in an accident. Complainant had filed a charge of discrimination with the Commission approximately one month prior to the state car incident but there was no showing that respondent was aware of the existence of the complaint. *Stonewall v. DILHR*, 79-PC-ER-19, 5/30/80

786.04 Prima facie case

Complainant's conduct of objecting to alleged harassment from a supervisor by being "short" with the supervisor and engaging in an argument with him did not constitute engaging in protected activities under the Fair Employment Act. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

Complainant failed to establish a prima facie case of retaliation with respect to a decision not to hire complainant for a vacant supervisory position where the person who made the decision that complainant was insufficiently qualified to merit a second interview was unaware that complainant had participated in any activity protected under the Fair Employment Act. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

Complainant failed to state a claim of FEA retaliation relating to a non-selection decision where respondent's only knowledge of complainant's protected activity was a comment made to one member of the search committee that

complainant resigned her position with another state agency because it was "political." Complainant's contention that respondent should have deduced some bias from this remark was too tenuous to constitute an awareness by respondent of complainant's protected activity, a necessary element of a prima facie case of retaliation discrimination. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

Complainant's alleged request for respondent to stop the "probe" of his mental health potentially could be characterized as opposing a "discriminatory practice" within the meaning of §111.322(3), Stats. *Prochnow v. UW (La Crosse)*, 97-0008-PC-ER, 8/26/98

Filing a FMLA request and filing two actions with the Personnel Commission constitute protected activities under the FMLA as well as under the Fair Employment Act. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed Dane County Circuit Court, 98-CV-2387, 12/6/99

A wage claim, two grievances concerning safety issues and an application for FMLA leave constitute protected activities under at least one statute among the FEA, occupational safety and health provisions and the FMLA. *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97

Discusing an internal complaint with shift supervisors is not an adverse employment action. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95

An allegation that an employe was terminated in retaliation for having taken FMLA covered leave states a claim under the FMLA. Additionally, an employe who alleges she attempted to exercise a right under the FMLA and then was retaliated against because of that states a claim under the FEA retaliation provisions, §111.322(2m)(a), Stats. *Ripp v. UW-Extension*, 93-0113-PC-ER, 6/21/94

Complainant's request for handicap accommodation, which she pursued through several layers of management, constitutes an activity pursuant to §111.322(3), Stats., that is protected against retaliation. Additionally, any discrimination against an employe because of a request for accommodation would be subsumed within the FEA's proscription of handicap discrimination per se in §111.34(1)(b). *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Respondent's action temporarily placing complainant on leave with pay while it sought clarification of her medical restrictions was not an adverse employment action, where she was not required to use any leave time and there was no demonstrable negative impact on her employment. *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant did not establish a prima facie case of fair employment retaliation because she did not show that the decisionmakers who terminated her probationary employment were aware that she had filed a discrimination complaint. *Schmidt v. DOC*, 91-0099-PC-ER, 2/3/94

Respondent's decision to discipline the complainant was not retaliatory where the discipline was not imposed by anyone who had knowledge of complainant's FEA activities, nor was the imposition of discipline influenced by anyone with such knowledge. *Larsen v. DOC*, 90-0374-PC, 91-0063-PC-ER, 5/14/92

In a retaliation case, the complainant must, as part of the prima facie case, introduce evidence sufficient merely to raise an inference that, if the respondent's action remain unexplained, it is more likely than not that such actions were discriminatory. *Smith v. UW*, 79-PC-ER-95, 6/25/82

The complainant failed to establish a prima facie case because of the strong evidence of inadequate job performance. She also failed to request an accommodation for her asthmatic condition or to inform her supervisor that she had a handicap which was exacerbated by working conditions. *Way v. UW*, 78-PC-ER-52, 3/8/82

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 726 through 730

[Previous material] [Next material]

---

726 Issue for hearing

The proposed decision erred where it addressed matters outside the scope of the notice of hearing. Complainant claimed he was discriminated against based on arrest and conviction record. The statement of the issue was phrased in terms of whether respondent discriminated on the basis of arrest or conviction record in connection with the last paragraph of a letter it issued to complainant. The letter stated that it served as a last chance warning to complainant that "any subsequent driving while intoxicated or similar charges" would result in termination of his employment. The statement of the issue did not provide adequate notice to the parties that the Commission would consider whether respondent's conduct violated §111.322(2), Stats, which prohibits circulating any statement which implies or expresses any limitation, specification or discrimination; or an intent to make such limitation, specification or discrimination because of any prohibited basis. The original charge of discrimination did not mention the circulation issue. The initial determination also did not mention that issue, nor had either party addressed that issue prior to the issuance of the proposed decision and order. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

Where the hearing examiner erred in deciding, in a proposed decision and order, an issue that was not properly noticed, circumstances were consistent with a remand for further proceedings before the hearing examiner. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

Adjudicative bodies should decide cases on the basis of the result the law requires, regardless of whether the particular legal theory is brought to bear by the parties or, *sua sponte*, by the adjudicative body, so long as the parties have sufficient notice and an adequate opportunity to be heard on the issue in question. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

The only unilateral action available to a complainant who is appealing a no probable cause finding in an initial determination is the request for a hearing on the issue of probable cause, rather than a hearing on the merits. §PC 2.07(3), Wis. Adm. Code. The complainants did not request waiver of the investigation of their complaints so unilateral waiver of the probable cause determination by complainants was not available. *Kumrah & Pradhan v. DATCP & DER*, 94-0146, 0147-PC-ER, 2/27/97

Even though the complainant had failed to amend her complaint or otherwise raise, as a claim per se, her argument that respondent retaliated against her by tampering or interfering with her witnesses, such allegations could be considered because it could affect the witnesses' testimony and otherwise compromise the integrity of the hearing process. *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

Pursuant to §PC 2.07(4), Wis. Adm. Code, after a mixed initial determination of probable cause and no probable cause, a complainant may not unilaterally decide to proceed directly to a hearing on the merits as if probable cause had been found as to all claims. Only if the parties agree can complainant bypass a no probable cause hearing as to those claims for which the initial determination found no probable cause. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 4/16/96

It is consistent with principles of judicial economy to convene one hearing to include claims that are still at the probable cause stage as well as claims for which probable cause has been found. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 4/16/96

Complainant's request to amend the issue for hearing to add a claim under the whistleblower law was denied where the request was filed four months after the parties had stipulated to an issue limited to sex discrimination and was

also filed three days after closure of discovery. Complainant failed to show any reason for the delay and failed to show that the stipulation as to the issue resulted from inadvertence or mistake, and there was no allegation of whistleblower retaliation in the original complaint. *Florey v. DOT*, 91-0086-PC-ER, 9/16/93

Complainant's proposed issue, that "General treatment… during her… employment was sexual discrimination" was rejected as vague. Complainant's request to reserve the right to add issues in the future was rejected where 2.5 years had elapsed since complainant was last employed by respondent. *Schmit (Klumpyan) v. DOC*, 90-0028-PC-ER, 91-0024-PC-ER, 9/3/92

In an appeal from an initial determination of no probable cause, the Commission refused to adopt the complainant's proposed issue which failed to reflect the probable cause context of the hearing. *Acharya v. DOR*, 89-0014, 0015-PC-ER, 7/14/89

Where at the close of a hearing in a matter noticed for hearing under §230.44(1)(d), the parties entered into a discussion which had the effect of modifying the agreed upon issue for hearing to include a claim of handicap discrimination, the Commission construed the conduct of the parties as a joint waiver of the investigation and an agreement to a hearing on an issue of probable cause rather than a hearing on the merits. *Lauri v. DHSS*, 87-0175-PC, 11/3/88

The Commission established an issue for hearing in a case arising from the reallocation of the complainant's positions in comparison to the classification of certain other positions. *Conrady & Janowski v. DILHR & DP*, 81-PC-ER-9, 19, 3/27/85

An issue established for hearing may reflect the Commission's authority to consider a charge that a classification survey and resultant position standards operated to discriminate on the basis of sex and with respect to compensation. *Conrady & Janowski v. DILHR & DP*, 81-PC-ER-9, 19, 3/27/85

The Commission declined to grant complainant's request to expand the scope of a probable cause hearing to include an allegation of sex discrimination where the notice of hearing only referred to discrimination based on race, color and

handicap, where the request was filed two days before the scheduled hearing, where there was no attempt to show why the request wasn't made earlier and there was no basis on which to relieve complainant of the stipulation by counsel as to the issue for hearing. Allowing a complainant to completely bypass the investigation stage would increase the likelihood of unnecessary hearings and decrease the opportunity for conciliation. *Johnson v. DHSS*, 83-0032-PC-ER, 1/30/85

728.3 Role of hearing examiner/substitution

Complainant had the burden of proof in his age discrimination case arising from the decision not to appoint him to a faculty position. The Commission has no authority to prosecute the case on complainant's behalf. *Huff v. UW (Superior)*, 97-0105-PC-ER, 3/10/99

The Personnel Commission has the authority to require a certain standard of decorum in its proceedings. *Benson v. UW (Whitewater)*, 98-0179-PC-ER, 11/20/98

Where complainant had been warned repeatedly about using inappropriate language in his filings and where he had failed to make use of an express opportunity to correct the inappropriate language, his complaint was dismissed due to complainant's failure to maintain an appropriate level of decorum. *Benson v. UW (Whitewater)*, 98-0179-PC-ER, 11/20/98

There is no precedent or other basis for calling, as a witness in a subsequent hearing, the hearing examiner who prepared a decision issued in a previous case in order to provide his or her interpretation of that decision. The decision speaks for itself. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Respondent's request for substitution of the hearing examiner was granted where a party had identified the examiner as a witness regarding events which had reasonable probative value. *Hinze v. DATCP*, 91-0085-PC-ER, 7/13/93

The Commission denied the complainant's request for a new hearing, where complainant argued that she had been without counsel and that the examiner had had a duty to

assist her. The Commission noted that the examiner's impartial role precludes acting as an attorney or advocate for the complainant, but that the examiner could and did assist the complainant with respect to explaining matters of evidence and procedure, that the complainant was not denied a fair hearing, and that the absence of counsel alone cannot be the basis for a new hearing. *Cole v. UW*, 79-PC-ER-50, 1/13/81

728.8 Transcript

Complainant's request that a copy of the transcript of the hearing be provided him without charge was denied where complainant failed to show legal need for the transcript. The request was made at the conclusion of the hearing and after the parties had agreed to make closing arguments rather than to submit post-hearing briefs. No transcription of the hearing existed and the only recording was on magnetic tape. The complainant's arguments as to need related to a potential use of the transcript after the Commission issued a decision. *Pugh v. DNR*, 86-0059-PC-ER, 7/13/88

728.9 Other

It is not necessary that a party engaged in an oral argument concerning a proposed decision explicitly address every argument of the opposing party to avoid a conclusion of waiver or admission of that party's arguments. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Complainant's request to move the hearing location from a correctional institution to a city hall was denied, without prejudice, where complainant failed to show that inmates would testify more truthfully if the hearing was held off institution grounds. Complainant contended the inmates would not freely testify in a case against prison management if the hearing would be conducted in the prison administration building adjacent to the inmate resident dormitories or cells. *Egan v. DOC*, 96-0111-PC-ER, 3/11/98

Complainant's request that respondent's post-hearing brief be disregarded as untimely filed and improperly captioned was denied where the due dates of all briefs were to be measured by postmark date, not be actual date of receipt, the actual date of receipt by complainant was just one day after the date by which the brief was to be mailed, resulting in the conclusion that the brief was not untimely filed, and neither the date of receipt nor the incorrect captioning impaired complainant's ability to meet his timetable for filing a response. *Holubowicz v. DOC*, 96-0136-PC-ER, 4/24/97

Having decided to proceed *pro se*, a complainant does not have the right to recess the hearing whenever he decides he wants to consult with counsel. *Smith v. DOC*, 95-0134, 0169-PC-ER, 11/14/96

A party does not have the right to insist on a private conference with the examiner in the middle of a hearing at which the other party appears. *Smith v. DOC*, 95-0134, 0169-PC-ER, 11/14/96

Complainant's final post-hearing brief was not considered where he failed to take adequate steps to ensure that he remembered the due date correctly and where a letter from the examiner to the parties recited the revised due dates. *Krueger v. DHSS*, 92-0068-PC-ER, 7/23/96

730 Evidence

Where testimony of complainant and of respondent's witness, who interviewed the applicants for the vacancy in question, did not differ in a substantive way, it would be inappropriate to apply a jury instruction, requested by complainant, that the failure to produce a document within a party's control raised an inference that the document contained evidence unfavorable to that party's case. Complainant had contended the jury instruction should be applied because respondent had lost complainant's application materials. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

A response that was required by the Commission pursuant to §PC 2.04, Wis. Adm. Code, as part of its investigation of an equal rights complaint, would not generally be

regarded as the type of pleading presumptively considered part of the factual record for decision purposes. *Enke v. DOT*, 97-0202-PC-ER, 12/16/98

A chart compiled by complainant to reflect the results of a telephone survey he had made to state agencies to obtain statistical information relating to the use of a resume screen procedure as part of a selection process, was not received in the record, after objection, because complainant could offer no supporting documentation concerning the survey. Therefore, the document was a compilation of summaries of hearsay statements to complainant and could not reasonably be relied on for the purpose complainant intended. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Information a party provides in response to an interrogatory is not controlling as to that information. While the party propounding the interrogatory is free to rely on the information by offering the answer in evidence, or by not objecting to the answering party's offer, he also can dispute the information contained in the interrogatory answer. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

There is no precedent or other basis for calling, as a witness in a subsequent hearing, the hearing examiner who prepared a decision issued in a previous case in order to provide his or her interpretation of that decision. The decision speaks for itself. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Where complainant, who was asked to resign from her employment as an assistant district attorney (ADA) after her arrest for operating a vehicle while intoxicated and while on call and carrying an office beeper, contended she was held to a different standard while carrying the beeper than two male ADAs, complainant was entitled to offer evidence tending to show differential treatment of the two male ADAs with respect to other terms and conditions of complainant's employment, including caseload and performance expectations. However, evidence relating to caseloads and performance standards for other ADAs (i.e. other than the complainant and the two specified males) and by the district attorney was cumulative, repetitive and too tangential to the essence of complainant's contentions to have reasonable probative value. Evidence relating to the manner in which drunk driving arrests of employes were handled by other employers would not have reasonable probative value. Respondent's motion in limine was denied

in part and granted in part. *Christie v. Office of the District Attorney of Fond du Lac County*, 96-0003-PC-ER, 2/25/98

In a case arising from a decision to appoint someone other than complainant, on an *acting* basis, to the position of director of administrative computing, evidence relating to the subsequent *permanent* appointment of the same candidate to the position was relevant. The evidence showed that the permanent appointment was made without any kind of recruitment or competition and because the candidate who had been selected for the acting position had done a good job while in that capacity. This evidence was admitted because the parties disagreed as to whether complainant's failure to have been appointed on an acting basis should be considered as an adverse personnel transaction. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 6/25/96; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

Complainant's answers to interrogatories were properly admissible as exhibits at hearing rather than being admitted only for purposes of impeachment. *Van Zutphen v. DOT*, 90-0141-PC-ER, 12/20/96

Even though the complainant had failed to amend her complaint or otherwise raise, as a claim per se, her argument that respondent retaliated against her by tampering or interfering with her witnesses, such allegations could be considered because it could affect the witnesses' testimony and otherwise compromise the integrity of the hearing process. *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

The admission of hearsay evidence is discretionary with the examiner pursuant to §PC 5.03(5), Wis. Adm. Code. *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

The examiner did not abuse his discretion in 1) admitting statements by witnesses about what students had said about complainant, where those statements presumably went to respondent's state of mind or the information it had before it reached the decision not to retain complainant and 2) sustaining objections to testimony by complainant about comments that students had made to her about what respondent's decision-maker had said to the students about complainant, where those comments presumably went to the

truth of the matters asserted. *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

Petitioner was denied the opportunity to present 35 rebuttal witnesses for the purpose of asking them whether they had ever heard him say an offensive remark where the relevant inquiry was not whether petitioner actually lacked interpersonal skills, but whether the interviewers who believed he had such problems had an explanation for their belief other than discrimination, illegality or an abuse of discretion. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al*, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

Evidence was properly admitted relating to the instances cited by the interview panel members as the basis for the opinion that petitioner lacked interpersonal skills. The concept of hearsay was inapplicable to the extent that such testimony was offered to show the basis of an interviewer's belief, as opposed to the truth of the matters asserted. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al*, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

Complainant's summary of information gleaned from a second document was ruled inadmissible where complainant failed to provide a complete version of the second document. Complainant's attempt to submit the entire second document after hearing was rejected *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

Respondent's motion in limine to exclude the testimony of a former employe who claimed respondent discriminated against him in a manner similar to that alleged to have been done to complainant was denied where the former employe had worked for respondent 8-10 years earlier, the alleged discriminator was the same in both situations, and complainant's situation involved the same work site. The length of time since the events could affect the weight given the testimony by the examiner. *Weaver v. UW-Madison*, 93-0022-PC-ER, 12/8/93 (ruling by examiner)

Respondent's motion in limine to exclude evidence

regarding complainant's earlier charge of discrimination which resulted in a settlement agreement was denied to the extent that complainant was permitted to establish, as a basis for his claim of FEA retaliation, that he had filed the earlier complaint and that the alleged retaliators were aware of the complaint. *Weaver v. UW-Madison*, 93-0022-PC-ER, 12/8/93 (ruling by examiner)

Respondent was allowed to submit evidence regarding complainant's alleged behavior, in reaction to what was negotiated during settlement discussions, which respondent contended could corroborate impressions or beliefs held by those involved in the hiring process, i.e. to validate a factor already considered by the appointing authority. Sec. 908.04, Stats., which creates a general prohibition in court proceedings to evidence of settlement offers, did not prohibit presentation of such testimony at hearing before the Commission. *Hinze v. DATCP*, 91-0085-PC-ER, 7/13/93

Respondent's motion to give preclusive effect to a recent arbitration award determining the contractual grievance of complainant's discharge was denied. The arbitration decision did not address complainant's claims of race or arrest record discrimination. It was not possible, at the motion stage, to disentangle the more general findings by the arbitrator, i.e., that there was just cause for the discharge, that there was a nexus between complainant's actions and the demands of his job, and that the discipline was not excessive, from the issues of race and arrest record discrimination which were not involved in the arbitration. However, the arbitration award and record could be used in evidence at the discrimination hearing, citing *Dohve v. DOT*, 84-0100-PC-ER, 11/3/88. *Whitley v. DOC*, 92-0080-PC-ER, 7/9/93

Contemporaneous statements should provide a more reliable indication of a person's subjective intent at the time than statement made later, after a complaint of intentional discrimination has been filed, and the matter has been prepared for hearing. *Thomas v. DOC*, 91-0161-PC-ER, 4/30/93

The fact that a test (Minnesota Multiphasic Personality Inventory), which served as a basis for a psychiatric evaluation, had been lost did not preclude testimony by the psychiatrist about the evaluation or the test, but could affect the weight accorded the testimony. Motion in limine

denied. *Boinski v. UW-Milwaukee*, 92-0233-PC-ER, 92-0702-PC, 4/19/93 (Ruling by examiner)

Although the Commission is not bound by an evidentiary rule applicable to a "civil proceeding," the Commission is not required to disregard it in determining whether or not evidence be admitted as part of the hearing record or in determining the weight to be accorded admitted evidence. *Butzlaff v. DHSS*, 90-0097, 0162-PC-ER, 4/2/93

Complainant was permitted to testify relating to the substance of unwitnessed conversations he allegedly had with his supervisor, as direct evidence of an intent by the supervisor to discriminate/retaliate against complainant, even though the supervisor had died after the complaints were filed. Respondent was aware the supervisor was terminally ill and was aware of the complainant's intent to use the substance of the conversations in his case, yet took no action to preserve the supervisor's testimony prior to his death. The weight of the complainant's testimony regarding the conversations would be limited, however. *Butzlaff v. DHSS*, 90-0097, 0162-PC-ER, 4/2/93

In a handicap discrimination claim, evidence of complainant's employment after his termination could be relevant to the issue of complainant's ability to perform the duties of the position from which he was discharged and to the issue of accommodation, in terms of complainant's ability to perform other positions to which he could have transferred. Respondent's motion in limine was denied. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 3/19/93

An objective standard is used to determine if the employer was correct in concluding that a handicapped employe is unable to effectively perform and that no accommodation is feasible. That the employer may have acted in good faith in assessing the handicapped employe's abilities is not a defense. Accordingly, evidence which postdates the personnel transaction which may have no relevance to the employer's intent when the employer made its assessment, may be admissible as relevant to the employe's capacity to perform and accommodation. Respondent's motion in limine was denied. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 3/19/93

Petitioner's motion in limine with respect to evidence relating to her visits to the Personnel Commission, her

conversations with Commission staff as well as conversations about the petitioner amongst Commission staff was denied where the Commission could not conclude that evidence concerning the observations and concerns of Commission staff that were transmitted to the employer would have no probative value, where they were allegedly part of respondent's motivation for requiring a psychological exam of the petitioner and were allegedly cited in the termination letter. The evidence sought did not fit within the confines of conciliation efforts and no other recognized privilege had been asserted or appeared to be involved. *Iwanski v. DHSS*, 89-0074-PC-ER, etc., 12/2/91

Because the question of document enlargement involved a technical, specialized field outside the realm of a "generally recognized fact" and there had been no foundation in the record of what the "established technical or scientific facts" were, the Commission could not take official notice of the degree of document enlargement necessary in order for a document to be read by complainant who had 20/200 vision. *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

The investigator's conclusion that there was a prima facie case as to one of complainant's charges is not binding on the Commission. The Commission is not precluded from reaching an opposite conclusion depending on the nature of the evidence presented at the hearing. *Acharya v. DOR*, 89-0014, 0015-PC-ER, 7/14/89

A typewritten transcription of complainant's handwritten notes was not relevant in light of the fact that the events reported in the document were not alleged to have occurred until after the complaints of discrimination had been filed with the Commission. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

In determining whether respondent discriminated against the complainant based on handicap when it terminated his employment as a Correctional Officer 2, the Commission may consider a re-injury suffered by the complainant shortly before his termination, even though the respondent was unaware of that particular re-injury, where complainant's physician was aware of the injury at the time he wrote respondent that complainant "will most likely never return to his old job duties" and where the physician's letter precipitated the decision to terminate complainant's

employment. *Conley v. DHSS*, 84-0067-PC-ER, 6/29/87

The hearing examiner properly refused to accept the initial determination in evidence for other than jurisdictional purposes. *Berryman v. DHSS*, 81-PC-ER-53, 8/1/84

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 788 through 788.25

[Previous material] [Next material]

---

788 Sex discrimination

788.01 Generally

In terms of the Fair Employment Act's prohibition against discrimination in compensation on the basis of sex for equal or substantially equal work, Wisconsin courts look to the Equal Pay Act rather than to Title VII for guidance. The employe bears the burden of showing that the jobs being compared have equal skill, effort and responsibility, and that men and women were paid differently. If the jobs held by men required different skill, effort and responsibility than the job compared by the woman employe, there is no Equal Pay Act violation. Additional duties held by other employes may take them out of the Equal Pay Act analysis even if they share some duties in common with the petitioner. Where petitioner sought comparison with male employes who had significant different and additional job responsibilities, the Commission was justified in dismissing petitioner's Equal Pay Act claim. *Meredith v. Wis. Pers. Comm.*, Dane County Circuit Court., 93CV3986, 8/29/94

The use of the term "bitch" to refer to complainant does not, in and of itself, lead to a finding of discrimination/retaliation. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95

It was not sex discrimination to use expanded certification to increase the number of women who gain access to

interviews where it was used in conjunction with an approved affirmative action plan which complied with the requirements of ch. 230, Stats., and of ch. ER 43, Wis. Admin. Code. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

Probable cause to believe discrimination occurred was found where complainant, a 63 year old woman, was laid off from her teaching job, and where the institution had an underutilization of professional women, where her layoff contributed to that underutilization as well as to the institution's failure to meet established affirmative action goals, and where the male employe who was permitted to bump the appellant was essentially admittedly unqualified under the labor contract. *Cowie & Decker v. DHSS*, 80-PC-ER-115,114, 5/28/82

788.02(1) Finding of probable cause

There was probable cause with respect to the respondent's decision to terminate the complainant's employment rather than to permit him to resign where a female employe was permitted to resign and where there was no real basis to distinguish between the two employes other than that the other employe had filed an informal complaint. *Bender v. DOC*, 90-0049-PC-ER, 8/8/91

Probable cause was found with respect to the decision to terminate the complainant's probation where complainant, a male, had been asked out on four occasions by his female supervisor and his employment was terminated relatively shortly after he declined the invitations. Complainant's work performance was comparable in many respects to that of his peers and many of the specific points relied on by respondent in support of his termination were unfounded. *Kloehn v. DHSS*, 86-0009-PC-ER, 9/8/89

Probable cause was found where 12 of 13 intake and processing supervisors classified at the Job Service Supervisor 2 level were women and while the position standard also identified hearing office manager positions at that level, 3 of 4 hearing office manager positions were classified at the Job Service Supervisor 3 level and 2 of those 3 positions were filled by men. *Conrady & Janowski v. DILHR & DP*, 81-PC-ER-9, 81-PC-ER-19, 11/9/83

788.02(2) Finding of *no* probable cause

No probable cause was found with respect to the actions of denying complainant overtime on two occasions, where respondent's actions were consistent with the provisions of the correctional facility's BFOQ plan. Complainant, a male, did not attack the validity of the BFOQ plan. *Schrubey v. DOC*, 96-0048-PC-ER, 1/27/99

There was no probable cause to believe respondent discriminated against complainant based on sex or retaliated against complainant when respondent terminated his employment, citing 8 specific acts of patient abuse, abusing a co-worker, reading while in work status, demonstrating an undermining attitude, leaving the unit for a smoking break, shoving and screaming at a co-worker and leaving the work unit for an extended break without permission. Although complainant presented evidence that co-workers took unauthorized smoke breaks and read papers, books or magazines in unauthorized areas, complainant failed to show these incidents were seen by or reported to supervisors. *Henebry v. DHSS*, 96-0023-PC-ER, 7/29/98

No probable cause was found on the basis of sex or age as to respondent's decision to use promotion rather than reallocation as a method for moving employes to a higher classification level in light of management's understanding that the union opposed reallocation and the absence of any indication that the lengthy promotional procedure, which resulted in decisions to hire 1 of 2 female candidates and 7 of 8 candidates older than 40, was undertaken because of the complainant's age or sex. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No probable cause was found on the basis of sex or age as to respondent's decision not to select complainant, a female over the age of 40, where information beyond the raw scores from interviews was relied upon in making the final decisions whether to promote a particular candidate, this information related to a large extent to the performance or work record of the candidate, complainant's performance was marginal and other employes who were promoted did

not have similar performance problems as complainant. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No probable cause was found on the basis of sex or age as to respondent's decision not to assign complainant, a female over the age of 40, to respond to a herbicide drift that occurred within complainant's region of the state. Complainant lacked basic knowledge about the herbicide involved and the person selected by respondent to respond was the expert in the Division. The person selected was older than complainant, had expressed a desire to work alone and management had a goal of sending only one person in response to a complaint. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No probable cause was found with respect to the decisions not to select the complainant for either of two vacancies where the successful candidates were better qualified for the positions and one of the two persons hired was of the same sex as the complainant. *Cozzens-Ellis v. UW-Madison*, 87-0070-PC-ER, 2/26/91

No probable cause was found with respect to the decision not to select the complainant for a vacant position where the questions used by the interview panel were job-related, the questions were asked of all the candidates, the answers were scored using a pre-established benchmark rating system, the actual scores awarded were based on the candidates' responses, the panel members did their ratings individually and the scores were not altered. There was nothing in the record to show that the questions or ratings were biased towards males or females or were pretextual. *Jahnke v. DHSS*, 89-0094-PC-ER, 89-0098-PC, 12/13/90

No probable cause was found with respect to the decision not to create a new position for which the complainant would likely have been a candidate where, even though there were some anomalies, the respondent's staffing pattern did not provide for such a position. *Harris v. DILHR*, 86-0021, 0022-PC-ER, 2/22/90

No probable cause was found with respect to the decision not to promote the complainant, an Unemployment Benefit

Specialist 2, for a vacant UBS 4 position where the appointing authority had, without exception since 1985, only promoted persons to the UBS 4 level who were already UBS 3's. Reclassification from UBS 2 to 3 was premised on passing a review of the quality of work performed while employed as a UBS 2. Others who were not in the same protected category as the complainant were similarly treated. *Harris v. DILHR*, 86-0021, 0022-PC-ER, 2/22/90

No probable cause was found with respect to two decisions not to hire complainant, a female. In the first transaction, two of the three interview panelists were female, the successful applicant was also female, the petitioner was not as qualified as other candidates based on the structured interviews conducted of all of the candidates and deficiencies in the selection process affected all of the candidates equally. In the second transaction, two of the three interview panelists were female and there was no evidence that complainant was better qualified than the successful candidates. *Bloedow v. DHSS*, 87-0014-PC-ER, etc., 8/24/89

No probable cause was found with respect to a decision not to hire the complainant, a 42 year old female, for assistant professorships where the selection process resulted in hiring four out of six females and three of the six selected candidates were in the protected age category. The successful candidates had more relevant degrees, had more recent experience teaching in the field, for the most part had more teaching experience, and had better recommendations than the complainant. *Chandler v. UW-La Crosse*, 87-0124-PC-ER, 88-0009-PC-ER, 8/24/89

No probable cause was found with respect to a decision not to hire the complainant, a male, where there was nothing in the record from which to conclude that the respondent's explanation was not legitimate, the explanation was clearly non-discriminatory on its face and the complainant failed to show a relationship between respondent's actions and complainant's sex. *Ozanne v. DOT*, 87-0107-PC-ER, 1/31/89

No probable cause was found with respect to a decision to deny the complainant, a male, a discretionary performance award where the agency head, also a male, had received reports that the complainant had improperly divulged confidential information and perceived two other incidents

of poor judgment. *Ruff v. Office of the Commissioner of Securities*, 86-0141-PC-ER, 87-0005-PC-ER, 9/26/88

Despite evidence of pretext, no probable cause was found with respect to a decision by the agency head, a male, to transfer the complainant, also a male, to a position in another division in the agency where there was no suggestion that there was any affirmative action element involved in the transaction, due to the inherent improbability of a male discriminating against another male. However, probable cause was found as to the claim of FEA retaliation. *Ruff v. Office of the Commissioner of Securities*, 86-0141-PC-ER, 87-0005-PC-ER, 9/26/88

No probable cause was found as to the decision not to select the complainant for a vacant permanent position of English teacher, where the successful candidate had a higher score on the questionnaire and complainant, who had been filling the position as a limited term employe, had an inferior job reference based on respondent's first-hand knowledge of complainant's work performance. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

No probable cause was found as to claims relating to discharge and providing negative job references where complainant's employment as a limited term employe ended when complainant used compensatory time to finish the 1044 hour maximum of his LTE appointment and respondent's references were based on complainant's poor work record. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

No probable cause was found as to respondent's decision to reallocate the position filled by complainant, a female, where the statistical records showed that of all positions covered by the classification survey, a greater percentage of women went up one or more pay ranges than men and a smaller percentage of women went down one or more pay ranges than men. *Schultz v. DER*, 83-0119-PC, 84-0252-PCP 85-0029-PC-ER, *Schultz v. DER & DILHR*, 84-0015-PC-ER, 8/5/87

No probable cause was found as to respondent's decision to deny complainant's reclassification request. *Schultz v. DER*, 83-0119-PC, 84-0252-PC, 85-0029-PC-ER, *Schultz v. DER* & DILHR, 84-0015-PC-ER, 8/5/87

There was no probable cause with respect to the decision not to rehire the complainant to an LTE position where her

last three supervisors independently believed her attitude and work performance had deteriorated over the last two years below the level of a good employe. *Rose v. DNR*, 83-0055-PC-ER, 84-0081-PC-ER, 4/15/87

Complainant's verbal complaint about "sexist cronyism" falls within the scope of a protected activity under the Fair Employment Act. However, there was no evidence that said complaint was causal with respect to the subsequent decision to place him on a leave of absence where there was strong evidence that that decision was motivated by respondent's perception of complainant's medical condition. *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

No probable cause was found with respect to a decision not to select the complainant, a 41 year old male, for a position of Laboratory Animal Caretaker 2 which included both animal and plant care, where the successful candidate, a 32 year old female, was qualified for the position, had more current work experience, had experience involving both animal and plant care and was formally educated in both animal science and horticulture. Complainant ranked first on the written examination and had extensive work experience in animal care. *Krause v. UW- La Crosse*, 85-0026-PC-ER, 1/22/87

No probable cause was found as to complainant's resignation where she had been unable to work effectively with her staff where the complainant was treated in the same manner as other bureau administrators and where complainant's predecessor, also a woman, had effectuated good rapport with her staff during the nine months she had filled the position in an acting capacity. *Lindas v. DHSS*, 80-PC-ER-96, 1/3/85

No probable cause was found as to respondent's decision to assign state troopers in response to an inmate disturbance at a correctional facility where the procedure followed by respondent was reasonable in view of the circumstances, was neutral on its face and there was no evidence to demonstrate it was not followed uniformly. *German v. DOT*, 83-0034-PC-ER, 11/8/84

For a complaint arising out of a hiring decision, no probable cause was found where a successful candidate, a female, and the complainants, both males, had generally equivalent work experience and the content of their

respective answers during the oral interview were approximately equal but where the successful candidate's manner of presentation was more "dynamic" and indicative of the supervisory traits necessary for the position. A prior designation of the successful candidate to fill the position on an acting basis did not indicate pretext. *Meyett & Rabideaux v. DILHR*, 80-PC-ER-140, 81-PC-ER-2, 4/15/83

No probable cause was found with respect to the probationary termination of a white female Institution Aide by a black male supervisor, where the record clearly supported the finding that the complainant's work was unsatisfactory, the record included the testimony of many of her white, female co-workers, and this testimony overshadowed the fact that her Performance Planning and Development Report reflected that she had met certain objectives. *Shilts v. DHSS*, 81-PC-ER-16, 2/9/83

No probable cause was found where the complainant was not appointed to fill a vacant Offset Press Operator 2 position, and although the complainant had not had recent experience with the press used for the performance test, it was the only press on which all 3 applicants had had some experience, and the complainant scored significantly lower on the performance test. *McCrae v. UW-Milwaukee*, 81-PC-ER-99, 2/7/83

Probable cause to believe discrimination occurred was not found where complainant, a 57 year old woman, was laid off from her teaching job, where, although the institution had an underutilization of professional women, and her layoff contributed to that underutilization as well as to the institution's failure to meet established affirmative action goals, the respondent relied on a plausible contract interpretation in determining that there was only one available exemption from layoff, and that was utilized for another older woman teacher. With respect to the argument that the institution failed to give the complainant as much information about alternative certification as a male teacher, this was consistent with the fact that institutional records showed that the complainant was only certified in one area and the male teacher in several. *Cowie & Decker v. DHSS*, 80-PC-ER-115,114, 5/28/82

No probable cause was found where the complainant was never certified for the vacancy in question so that the respondent could not have considered her for appointment.

***Hagengruber v. DHSS*, 79-PC-ER-131, 4/29/82**

The Commission found no probable cause to believe the complainant had been discriminated against on the basis of sex and retaliation with respect to her non-appointment to a faculty position, where she was not placed on the "short list" for further consideration, the record fully supported the new staff committee's opinion that she was not a historical geographer, the article that she had published was not considered that impressive or that material by the Committee members, and, with respect to alleged "contradictions" in the respondent's position, the Commission stated that it should not be considered unusual that a number of faculty members testifying as to their understanding as to the needs of the department, and their evaluations of candidates for a faculty position, would not speak with one voice, nor should it be considered unusual that the search process was not able to meet its goals at every step of the process. *Rubin v. UW*, 78-PC-ER-32, 2/18/82

No probable cause was found in decision not to hire complainant as an instructor in the geography department of UW-Oshkosh where an initial decision was made before complainant had filed a written application, the process was then reopened and complainant was still not hired. Four members of the department's faculty who were also members of the selection committee all had poor opinions of the complainant based on an earlier experience as a teacher there. In addition, nothing in the materials submitted to the selection committee indicated that complainant had been active in the geography profession during the previous 10 years. Evidence that 90% of those qualified to teach geography are men accounted for the absence of any tenured women on the department's faculty. *Thalhofer v. UW-Oshkosh*, 79-PC-ER-22, 9/23/81; affirmed by DILHR, 11/7/83; affirmed by LIRC, 2/16/84

No probable cause was found where a male was hired at the same rank at a higher salary, did not have a Ph.D. as did the complainant, but had fulfilled his Ph.D. course work and had broader experience than she did. Complainant's salary was in the mid range of the BAVI staff. *Boyce v. UW*, 79-PC-ER-33, 2/17/81

788.03(1) Finding of discrimination

Respondent's action of discharging the complainant, a black female, from her position as a correctional officer for engaging in disorderly or illegal conduct and failing to provide accurate or complete information when requested constituted discrimination where complainant worked in a sexually and racially hostile environment, respondent decided to discharge the complainant before it had conducted its fact-finding investigation and white male employes, disciplined under the same personnel policy, were treated less harshly than complainant. *Bridges v. DHSS*, 85-0170-PC-ER, 3/30/89

Respondent lacked a creditable reason for not selecting the complainant, a woman, for one of two Building Maintenance Helper 2 positions. Work experience was the main criterion for filling the positions and complainant's qualifications were better than one selectee and at least as good as the other selectee. In addition, one of the two persons who made the hiring decision was biased against hiring a female for the positions because he felt they could not handle the job. *Wolfe v. UW-Stevens Point*, 84-0021-PC-ER, 10/22/86

Discrimination was found where complainant, a female math teacher, was bumped (laid off) from her position by a male guidance counselor who was not certified to teach math nor was he eligible for provisional certification in math and where the same male guidance counselor who was also not certified to teach art was not allowed to bump a male art teacher. Respondent was found to not have followed the clear language of the applicable bargaining agreement requiring subject matter certification by the bumping employe and to have misrepresented the male guidance counselor's certification, resulting in the retention of two male teachers and the layoff of a female teacher. *Cowie v. DHSS*, 80-PC-ER-115, 4/15/83

Agency discriminated on the basis of sex by failing to hire the complainant as director of a district Job Service office where complainant had performed the duties as office director under a temporary interchange agreement for one year prior to decision not to hire, had been certified as number one for the position and where there was statistical evidence of under-utilization of females at or above the pay level in question. *Anderson v. DILHR*, 79-PC-ER-173,

79-320-PC, 7/2/81; affirmed and remanded for additional findings on issue of mitigation of damages by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm.*, 81-CV-4078, 6/7/82

Despite the failure to fill the disputed position for a number of years after the hiring decision in question and attempts to raise the position's salary level, the position remained "open" for purposes of the Fair Employment Act where the duties did not change and where the agency continued to look for someone other than the complainant to do a job for which the complainant was qualified. *Anderson v. DILHR*, 79-PC-ER-173, 79-320-PC, 7/2/81; affirmed and remanded for additional findings on issue of mitigation of damages by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm.*, 81-CV-4078, 6/7/82

788.03(2) Finding of *no* discrimination

No discrimination was found to exist where complainant, a male, was not selected for a typist position at a state correctional camp where question by member of selection panel asking complainant how he would handle "razzing" by 55 male camp residents for being in a "typically female position" was asked because complainant, who had a history of mental depression, might have difficulty handling verbal harassment. Commission's finding of discrimination based on sex was reversed, although finding of handicap discrimination was upheld. *DHSS v. Pers. Comm. (Busch)*, Dane County Circuit Court, 81-CV-2997, 3/9/82

Complainant's separation from employment resulted directly and solely from her failure to show up for work, to call in her absences, to offer an explanation for her absences, or to appear at the last pre-disciplinary meeting, rather than from illegal retaliation. Complainant's attempt to link her attendance problems to an alleged mental health condition resulting from alleged sexual harassment was not credible. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

Complainant failed to establish that he was qualified for a supervisory position where respondent was seeking applicants with experience exercising authority to hire, fire and evaluate subordinate employes, and complainant's supervisory experience occurred about 10 years prior to the

interviews and did not include such authority. No sex discrimination was found. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

Respondent did not discriminate against complainant, a supervisor, based on sex when it permitted him to substitute sick leave for 6 weeks, rather than 12 weeks, of paternity leave. Complainant was permitted to take leave without pay or to substitute vacation or other types of paid leave, except sick leave, for the second 6 week period. The complainant's only entitlement to the use of sick leave after the birth of his child derived from the Wisconsin Family Medical Leave Act which provides a maximum of 6 weeks of family leave. Complainant failed to show that he was similarly situated to comparison females who were granted more than 6 weeks of sick leave where the females underwent pregnancy and childbirth which could have qualified them for medical leave as well as family leave. Therefore, complainant failed to establish a prima facie case of sex discrimination. The different treatment cited by complainant as the basis for his claim resulted from the medical consequences of pregnancy and childbirth, not from gender. In order to prevail, complainant would have had to show that a similarly situated female, e.g., one who had adopted a child, was granted more than 6 weeks of sick leave as family leave in order to care for this child after the adoption. *Enke v. DOT*, 97-0202-PC-ER, 12/16/98

No sex discrimination was found with respect to respondent's decision to discharge the complainant from her food service worker position at a correctional facility for violating the fraternization policy where complainant gave a watch to an inmate, received a personal note from the inmate and sent a birthday card to the inmate, all without informing her supervisor. Complainant unsuccessfully sought to show pretext by comparing herself to males who had violated the fraternization policy yet were not discharged or had violated other work rules. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

Complainant failed to show an objectively hostile environment where complainant was only assigned "from time to time" to the work location where she was subject to supervision by the alleged harasser, she "generally avoided" the supervisor at work and she listed only 6 statements, an unquantified number of requests to visit complainant at home and one invitation to attend a convention together as

having occurred over a period of six months. In *dicta*, the Commission also found that complainant failed to demonstrate the existence of a subjectively hostile environment where she never complained about the supervisor's actions until management explicitly encouraged her to do so and where complainant was interested in moving from her utility position, where she only had periodic contact with the supervisor in question, into a permanent assignment that would have been directly subordinate to that supervisor. Also in *dicta*, the Commission found that respondent would not be liable for the acts of the supervisor because: 1) the complainant did not establish *quid pro quo* harassment, 2) respondent acted immediately after complainant and three other employes told management about the supervisor's actions, suspended the supervisor and then demoted him to a non-supervisory position, 3) the supervisor's conduct was clearly outside the scope of his employment and respondent was not negligent in supervising the supervisor, and 4) the supervisor did not have any significant, independent authority relating to complainant's termination, promotion, rate of pay or discipline. *Butler v. DHSS*, 95-0160-PC-ER, 1/14/98

No discrimination was found as to complainant's claim of sex discrimination arising from the time it took for her position to be reclassified from Agrichemical Specialist-Entry to the Agrichemical Specialist-Developmental level, where complainant was the first and only person to have been reclassified between these two levels and, on balance, comparison to employes who were reclassified under the prior classification structure was of little value. Even if the 11 other employes reclassified under the previous structure were considered to be similarly situated, there was insufficient support for a finding of discrimination where the median reclass period for all 12 employes would be 18.5 months, appellant was reclassified in 23 months which was the same as one male and shorter than two other males and the only other female was reclassified after 18 months. In addition, at the time of her first evaluation, approximately 21 months after she began working, her supervisor identified performance difficulties and concluded that complainant needed a lot of additional training. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No discrimination based on sex, sexual orientation or race, violation of FMLA, nor retaliation based on FEA activities was found with respect to respondent's decision to discharge the complainant where respondent concluded that complainant had violated various work rules when she gave a suggestive note to a coworker, telephoned the same coworker at home, admitted to using profanity towards various other coworkers and about a client. *Mitchell v. DOC*, 95-0048-PC-ER, 8/5/96

No discrimination based on creed, sex or sexual orientation was found with respect to respondent's actions of removing complainant from his position as program leader and setting the level of his pay in his backup position of associate professor, where concerns about complainant's managerial abilities were heightened by receipt of an affirmative action complaint against complainant from one of complainant's colleagues, and where respondent concluded that complainant's leadership was not meeting program needs. Complainant's comparisons relating to his salary claim involved circumstances that were distinctly different from those of complainant. *Kinzel v. UW (Extension)*, 92-0218-PC-ER, 8/21/96

Despite complainant's contentions to the contrary, respondent did not have a policy which required pregnant police officers to go on light duty or to take leave. Complainant notified her supervisors of her desire to be placed on light duty and it was management's clear understanding that she had made a request to be taken off patrol duty and placed on light duty for the duration of her pregnancy. Respondent's policy of placing pregnant police officers on light duty only upon their request was not discriminatory. *Bower v. UW-Madison*, 95-0052-PC-ER, 8/15/96

No discrimination was found on the bases of age, national origin/ancestry or sex, nor was FEA retaliation found, relative to the decision not to retain complainant as a faculty member in respondent's Industrial Engineering Department where complainant did not complete her Ph.D. by the date to which she had contractually agreed and where respondent had concerns about complainant's teaching effectiveness, the evidence of which included routine student evaluations as well as a petition filed by a group of students with a dean. *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER,

4/16/96

No sex discrimination was found with respect to respondent's decision to terminate complainant's employment while she served a probationary period as a social worker where complainant, a female, was one of two social workers hired during the relevant time period, and the other hiree, a male, was also terminated, and there was no evidence to support complainant's claim that the misconduct was unsubstantiated. *Krenzke-Morack v. DOC*, 91-0020-PC-ER, 3/22/96

No sex discrimination was found with respect to respondent's decision to terminate complainant's employment while she served a probationary period as a correctional officer. Respondent applied its policy of terminating a probationary correctional officer who is involved in a work rule violation or violations that would be the basis of a suspension or greater penalty for a permanent employe. The record did not support complainant's contentions that 1) that she was not at fault as to some of the occasions she was late; 2) her supervisor held females to a different standard than males; and 3) the institution engaged in a pattern or practice in terms of uneven discipline of male and female correctional officers. *Jaques v. DOC*, 94-0124-PC-ER, 3/7/96

Petitioner failed to establish race or sex discrimination regarding a selection decision where the person selected possessed a greater amount of non-technical skills, such skills were related to the supervisory position and respondent determined to seek a candidate with these non-technical skills prior to knowing who the candidates were. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al*, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

The decision not to select the complainant was based upon his responses to the interview questions, rather than upon his sex. The successful candidate, a female, was selected because she was the top-rated candidate during the interviews and her references maintained that ranking. Complainant was ranked number 4, behind two other males. While complainant identified two selection criteria upon which he felt he should have been ranked higher than

the successful candidate, it was not complainant's prerogative to choose the selection criteria for the position. The interview questions were used to fill a variety of vacancies, rather than just the one in question. Benchmark responses were developed well in advance of the interviews, all the interviewers participated in all of the interviews, all the interviews followed the same procedure, the panelists' notes and scores were reasonably consistent, questions were graded individually and each panelist denied that sex played a role in the analysis or was discussed. Although the supervisor of the vacant position told the complainant that the sex of the successful candidate was the basis for the decision not to select complainant, this statement was false and was a misguided effort to avoid telling complainant, in a very public setting, the true reasons for the decision. *Dorf v. DOC*, 93-0121-PC-ER, 6/9/95

Respondent did not discriminate on the basis of sex regarding its decision to initiate an investigation of complainant's conduct when a co-worker had informed management that complainant's attentions were unwelcome and there was no evidence that management would have acted differently if the sexes of the "stalker" and "victim" had been reversed. *Erickson v. WGC*, 92-0207-PC-ER, 92-0799-PC, 5/15/95

Complainant, a correctional officer, failed to sustain her burden of showing age or sex discrimination relating to the decision to terminate her probationary employment, where 8 witnesses testified that complainant's job performance was poor. *Snee v. DHSS*, 92-0030-PC-ER, 4/17/95

No sex discrimination or FEA retaliation existed as to a variety of conditions of employment, including relocation, removing a sign in complainant's office, discussing an internal complaint, denying complainant's request for an adjusted work schedule, declining to investigate the defacement of articles written by complainant, not including complainant in a meeting, the nature of working relationships with co-workers, disclosing to co-workers that complainant had been disciplined, requiring complainant to attend certain training, assignment of duties, responses to complainant's requests for changing her duties, scheduling meetings, use of a job performance improvement plan and union representation at weekly meetings. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95

No discrimination based on race or sex was shown in regard to complainant's performance evaluation where complainant, a Building Maintenance Helper, had failed to notify her supervisors of health and safety violations in her building, had failed to communicate effectively with her supervisors on various occasions, had failed to carry out a work assignment and had failed to wear proper safety equipment. *McKibbins v. UW-Milwaukee*, 94-0099-PC-ER, 4/4/95

No discrimination based on sex occurred with respect to the decision to discharge the complainant, a female correctional officer, who had been found to have engaged in the purchase and use of crack cocaine while off-duty and to have been untruthful to management about that conduct. Respondent had also discharged a male correctional employe who had been convicted for an off-duty battery incident, and respondent had suspended a second male employe for 10 days who had engaged in gambling with an inmate, had initially denied the conduct but then admitted the conduct of the following day. Complainant had not admitted her misconduct until an arbitration hearing more than one year after the incident. *Bohl v. DOC*, 93-0004-PC-ER, 2/20/95

No discrimination occurred when the female successful candidate was a member of a group identified in an approved affirmative action plan as an underutilized group for the particular job category, where the employing agency clearly showed she was qualified for the job and where the interview process otherwise was free of discrimination. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

Complainant failed to show sex discrimination regarding respondent's decision to reinstate a male employe rather than to hire complainant, where complainant failed to establish general underutilization of women, complainant was less qualified than the person appointed and respondent followed its normal practice of reinstating employes. *Pennybacker v. DHSS*, 91-0139-PC-ER, 7/7/94

Where respondent failed to offer complainant (female coach of the women's basketball team) a full-time appointment her second year of employment, as it had done with respect to her male predecessor and the male coach of the men's basketball team, the complainant failed to mount a successful challenge to respondent's rationale that it was

due to budgetary constraints. *Meredith v. UW-La Crosse*, 90-0170-PC-ER, 9/15/93; affirmed, *Meredith v. Wis. Pers. Comm.*, Dane County Circuit Court., 93CV3986, 8/29/94.

The rationale for the imposition of a requirement of a physician's verification for absences was not shown to be pretextual where this requirement was imposed in accordance with a collective bargaining agreement and other applicable requirements, and complainant was not treated differently than any other similarly situated employe. *Miller v. DHSS*, 91-0106-PC-ER, 5/27/94

The rationale for the extension of complainant's probation was not shown to be pretextual where the record did not support complainant's contention that he had not been worried about the possible results of his absenteeism. It was not necessary for respondent to demonstrate that complainant's absences had a negative impact on the operation of his unit in order to enforce its absenteeism policies. *Miller v. DHSS*, 91-0106-PC-ER, 5/27/94

Complainant failed to demonstrate sex discrimination or fair employment retaliation with respect to her performance evaluation where the statements in her evaluation were an accurate reflection of her failure to meet clearly established performance expectations. *Stricker v. DOC*, 92-0058-PC-ER, 92-0201-PC-ER, 3/31/94

Sexual harassment had not been shown where certain actions, e.g., placing nude photos and figurines on complainant's desk and placing soap in her desk drawers, were directed at one of complainant's male co-workers as well; where the other allegations concerned the circulation of rumors to which complainant contributed as well, and as to those two statements made to complainant which did constitute "unwelcome verbal conduct of a sexual nature;" respondent took immediate and appropriate action once made aware of complainant's concerns. *Dahlberg v. UW-River Falls*, 88-0166-PC-ER, 89-0048-PC-ER, 3/29/94

Respondent's failure to have awarded complainant a .25% additional merit increase did not constitute sex discrimination where respondent's articulated rationale for its decision--that such an award to a male employe was based on a special assignment, while complainant was not assigned equivalent responsibilities and did not meet the other criteria for such an award--was not shown to have

been pretextual. Complainant's contention that since she and the male employe were in equivalent positions they should have received equivalent compensation is inconsistent with the legitimate, non-discriminatory criteria of the compensation plan. Complainant's contention that she performed duties at a higher level that were more complex and had more impact than was the case with similar jobs was not supported by the record. *Mosby v. WGC*, 91-0033-PC-ER, 1/11/94

Complainant failed to establish that respondent's decision not to select complainant for a Regulation Compliance Investigator position was based on age or sex where the successful candidate 1) had more persuasive and conciliatory communication and conflict resolution skills, 2) had superior interest in the position, regulatory program experience and initiative, and where complainant had not shown good judgment in comments he had made relating to his prospects for obtaining a position prior to the interviews. *Hinze v. DATCP*, 91-0085-PC-ER, 12/28/93

No sex discrimination was found as to respondent's decision to hire a female rather than complainant, a male, for a costume technology faculty position where the successful candidate was selected by a male committee, had more relevant qualifications than complainant, and was the only candidate who initiated contact with members of the selection committee. There was insufficient evidence to show that there is systemic discrimination against men in filling faculty level costume technology positions. *Schmitt v. UW-Milwaukee*, 90-0047-PC-ER, 9/24/93

A complaint of sex discrimination under the FEA fails to state a claim upon which relief can be granted where the complaint consists primarily of allegations of an unsatisfactory work environment involving specific problems complainant experienced with supervisors (most of whom were of the same gender), coworkers, and others. In responding to the motion to dismiss, complainant's attorney did not attempt to explain how these incidents involved sex discrimination, except to the extent it was alleged that the clerical staff were treated as "emotional punching bags" by their supervisors, who were frustrated and intimidated by treatment they were receiving at the hands of *their* supervisors. Assuming all of complainant's allegations to be true for the purpose of deciding this motion, the chain of causation--complainant's supervisors

react to a sexist atmosphere created by their supervisors by using complainant as an "emotional punching bag"--is too extended for a conclusion that respondent discriminated against complainant because of sex in violation of §111.322(1), Stats. Also, management had no obligation to act where the conditions about which complainant was concerned did not involve sex discrimination but rather involved disagreements with her supervisor about her approach to supervision. *Makl v. UW-Stevens Point,* 92-0038-PC-ER, 4/30/93

Complainant did not establish that her probationary termination involved sex discrimination, where she failed to successfully challenge respondent's assertions that she was performing below normal expectations and that she was not provided any less training than any other new employe. She also failed to establish that any animosity which may have existed between complainant and her supervisor was due to her gender. *Mongold v. UW-Madison,* 89-0052-PC-ER, 12/17/92

Respondent's decision to terminate the complainant's employment rather than to permit him to resign was upheld. Complainant relied upon a comparison with a female employe who was permitted to resign but the complainant was involved in a security-related disciplinary situation (sleeping on his post) while the female employe's misconduct, excessive absenteeism and tardiness, was not security-related. *Bender v. DOC,* 90-0049-PC-ER, 8/8/91

Complainant was not discriminated against on the basis of marital status, sex or sexual orientation when she was denied family health insurance coverage for her homosexual non-spousal partner with whom complainant shared finances and maintained many attributes usually associated with the marital relationship. The failure of DETF to have promulgated a rule that would have included complainant's partner within the definition of a dependent, for purposes of family insurance coverage, is not discriminatory because precedent and legislative history establishes that the legislature did not intend that such coverage be provided, complainant was not similarly situated with respect to married employes whose relationships were legally recognized by Wisconsin family law, and DETF was not obligated by the Fair Employment Act to recognize relationships for the purpose of defining dependents that are not legally recognized by family law but which arguably are

parallel to legally recognized relationships. *Phillips v. DETF & DHSS*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; affirmed by Dane County Circuit Court, *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92

No discrimination was found as to respondent's decisions to select four males rather than complainant, a female, for vacant positions, where the candidates were ranked by interview panels and the complainant had not shown by a preponderance of the evidence that respondent's reasons for selecting the successful candidates were not the true reasons. The successful candidates all possessed supervisory or lead work experience, held higher level positions and had more technical experience than complainant, there was nothing irregular about the oral interview process and complainant's statistical evidence was insufficient for a finding that respondents practiced sex discrimination during the period in question. While one witness gave complainant an opinion as to who would be selected prior to the actual decision, there was no evidence of preselection. *Stroud v. DOR*, 82-PC-ER-97, 9/26/85

No discrimination was found where respondent reasonably discharged the complainant, a female who was employed at a correctional institution, where complainant acknowledged she had an affair with a male co-worker who had transferred to another institution five months prior to complainant's discharge, where respondent had reasonably concluded that complainant was also involved in a romantic relationship with an inmate at the institution and where there were no comparisons establishing that respondent imposed a different level of discipline against male employes who had been romantically involved with inmates. *Winterhack v. DHSS*, 82-PC-ER-89, 8/31/84

No discrimination was found as to respondent's decision to discharge the complainant, a male, where respondent's stated reasons for the discharge were credible and justified termination and where complainant failed to establish that female employes with similar or worse work records serving an original probation were retained while complainant was discharged. *Berryman v. DHSS*, 81-PC-ER-53, 8/1/84

No discrimination was found where no female troopers in the State Patrol were ordered to report to the Waupun

Correctional Institution to quell an inmate disturbance, where respondent ordered troopers to the institution based on their already scheduled work shift for the day in question, where the procedure used was reasonable and neutral on its face and where no evidence was produced to show it was not followed uniformly. *German v. DOT*, 83-0034-PC-ER, 1/8/84

No discrimination was found on the issue of sex discrimination with respect to respondent's refusal to assign complainant to the misdemeanor unit of the adult criminal division rather than the juvenile unit, where the Commission was unconvinced that criminal law is generally considered to be a more worthy pursuit than juvenile law, where evidence indicated that respondent's decision was based on program needs and its evaluation of the complainant, and where respondent had a high percentage of women in its misdemeanor unit as well as in other units. *Taylor v. State Public Defender*, 79-PC-ER-136, 8/5/82

No discrimination was found in the respondent's failure to reinstate complainant where it was found that during the course of her prior employment with the agency she had caused friction because of her inability to get along with her co-employes, and that she bad failed to follow the chain of command. *Austin v. DMA*, 81-PC-ER-30, 2/9/82

The Commission found that the respondent's explanation for the termination of complainant's probationary employment was not pretextual where her prior performance had been unsatisfactory in some respects and where she was six hours late for work one day and failed to offer any explanation therefore. *Glaser v. DHSS*, 79-PC-ER-63, 79-66-PC, 7/27/81

No discrimination was found where the complainant's contract was not renewed. The evidence showed only that there was a dispute between her and other faculty members regarding a curriculum matter, the substantive reasons for non-renewal given by respondent were not challenged, five of the six instructors non-renewed were males, and the complainant was afforded all of her rights of appeal set forth in the statutes and administrative code. *Cole v. UW*, 79-PC-ER-50, 1/13/81

Complainant failed to show she was discriminated against in regard to her discharge where she had been advised that a

state car should never be kept out overnight without management approval and one week later, without management approval, she parked a state car overnight in front of her home and it was damaged in an accident. Complainant had filed a charge of discrimination with the Commission approximately one month prior to the state car incident but there was no showing that respondent was aware of the existence of the complaint. *Stonewall v. DILHR*, 79-PC-ER-19, 5/30/80

788.04 Prima facie case

Complainant failed to establish a prima facie case of sex discrimination with respect to respondent's alleged failure to follow its internal complaint procedure where complainant failed to establish that he filed either an oral or a written complaint under respondent's harassment policy. Instead, complainant's supervisors took the initiative in ensuring that an investigation occurred. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

Complainant failed to establish that he was qualified for a supervisory position where respondent was seeking applicants with experience exercising authority to hire, fire and evaluate subordinate employes, and complainant's supervisory experience occurred about 10 years prior to the interviews and did not include such authority. No sex discrimination was found. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

Respondent did not discriminate against complainant, a supervisor, based on sex when it permitted him to substitute sick leave for 6 weeks, rather than 12 weeks, of paternity leave. Complainant was permitted to take leave without pay or to substitute vacation or other types of paid leave, except sick leave, for the second 6 week period. The complainant's only entitlement to the use of sick leave after the birth of his child derived from the Wisconsin Family Medical Leave Act which provides a maximum of 6 weeks of family leave. Complainant failed to show that he was similarly situated to comparison females who were granted more than 6 weeks of sick leave where the females underwent pregnancy and childbirth which could have qualified them for medical leave as well as family leave. Therefore, complainant failed

to establish a prima facie case of sex discrimination. The different treatment cited by complainant as the basis for his claim resulted from the medical consequences of pregnancy and childbirth, not from gender. In order to prevail, complainant would have had to show that a similarly situated female, e.g., one who had adopted a child, was granted more than 6 weeks of sick leave as family leave in order to care for this child after the adoption. *Enke v. DOT*, 97-0202-PC-ER, 12/16/98

Complainant, a female, failed to state a claim of sex discrimination with respect to a non-selection decision where a female was hired and where complainant failed to argue any other type of prima facie case nor did one appear from complainant's factual allegations. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

No age or sex discrimination occurred with respect to the decision to discharge the complainant, who worked in a clerical capacity, where she failed to show she performed her job duties satisfactorily and the replacement employes were also in complainant's same protected category. *Smith v. UW-Manitowoc County*, 93-0173-PC-ER, 4/17/95

Discusing an internal complaint with shift supervisors is not an adverse employment action. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95

Complainant, who was terminated from her position as a house fellow at a campus dormitory, did not establish that she performed her job satisfactorily, where she had violated several requirements of the position by serving alcohol to underage house fellows in her room, using funds for improper purposes, accompanying underage residents to events where alcohol was served and failing to advise her superior of her absence. *Jazdzewski v. UW-Madison*, 92-0179-PC-ER, 2/20/95

In a case arising from a selection decision, complainant failed to establish a prima facie case of sex discrimination where the sole evidence he presented was that 3.6% of Program Assistant 2 positions are held by males. *Durfee v. DATCP*, 94-0042-PC-ER, 12/22/94

In a case arising from a selection decision, complainant failed to establish a prima facie case of sex discrimination where the main evidence he presented to raise an inference of discrimination was the fact that the positions at that

classification level in respondent agency were filled almost exclusively by females. The makeup of respondent's workforce without comparison to the available labor force is insufficient to establish a prima facie case. *Durfee v. DOJ*, 94-0047-PC-ER, 12/14/94

Complainant (female coach of the women's basketball team) failed to establish a prima facie case with respect to an equal pay act type of claim where she failed to establish that she performed substantially the same work as her male predecessor or the male coach of the men's basketball team whose positions had other significant duties in addition to coaching. *Meredith v. UW-La Crosse*, 90-0170-PC-ER, 9/15/93; affirmed, *Meredith v. Wis. Pers. Comm.*, Dane County Circuit Court., 93CV3986, 8/29/94.

Complainant failed to show a prima facie case of sex discrimination where the manner in which her supervisor communicated with her was consistent with the style by which he communicated with other male and female employes. *Stricker v. DOC*, 92-0058-PC-ER, 92-0201-PC-ER, 3/31/94

Complainant failed to establish prima facie case where he did not show that different wage-eligibility factors were used for him than were used for all other employes regardless of their race and/or sex and he did not show that the uniform wage-eligibility factors impacted less favorably on the group of employes with the same sex and/or race as complainant. *Christensen v. DOC & DER*, 90-0144-PC-ER, 2/3/94

Complainant failed to establish a prima facie case of sex discrimination with respect to a hiring decision where the appointing authority who made the decision was of the same gender as complainant and her question about complainant's pregnancy was not part of the interview but was asked to show interest in complainant as a person, and the percentages of men and women hired for these kinds of positions were about the same. Even if a prima facie case had been present, complainant failed to show that management's rationale for its decision was pretextual. *Rosenbauer v. UW-Milwaukee*, 91-0086-PC, 91-0071-PC-ER, 9/24/93

In a nonselection case, a complainant is not precluded from establishing a prima facie case because the successful

candidate is in the same protected category as the complainant. *Bloedow v. DHSS*, 87-0014-PC-ER, etc., 8/24/89

Complainant failed to show that an inference of discrimination could be drawn from the subject hires where the sex of the successful candidates was not indicated in the record. *Ozanne v. DOT*, 87-0107-PC-ER, 1/31/89

Complainant failed to establish a prima facie case of sex discrimination in a hire case where the successful candidate was also female. *Larson v. DILHR*, 86-0019-PC-ER, 86-0013-PC, 1/12/89

Complainant, a male, failed to establish a prima facie case with respect to a decision by the agency head, also a male, to deny complainant a discretionary performance award, even though two females performing similar duties were granted DPA's. The Commission went on to analyze the case as if a prima facie case had been established. *Ruff v. Office of the Commissioner of Securities*, 86-0141-PC-ER, 87-0005-PC-ER, 9/26/88

Complainant, a woman, established a prima facie case in a claim arising from a non-selection decision, even though a woman was ultimately hired for one of the two positions where the top 4 candidates were males, two males were selected for the vacant positions, and no females were in consideration until after one of the males did not report to work. The hiring of the woman was technically a different hiring transaction. *Wolfe v. UW-Stevens Point*, 84-0021-PC-ER, 10/22/86

788.06 Statistical analysis

It was impossible to draw conclusions regarding the respondents hiring practice where the complainant failed to provide data showing the sex of the individuals who were considered for the positions. *Ozanne v. DOT*, 87-0107-PC-ER, 1/31/89

In analyzing whether there is probable cause as to respondent's decision to reallocate the complaint's position in order to determine if there is some pattern probative of gender bias, one should look at the statistics reflecting how

the employer treated all the employes affected by the survey (in the absence of some showing that this would not produce an accurate picture of the employer's attitude) rather than the statistics relating to the particular classification series. *Schultz v. DER*, 83-0119-PC-ER, 84-0252-PC, 85-0029-PC-ER, *Schultz v. DER & DILHR*, 87-0015-PC-ER, 8/5/87

Complainant's statistical showing was weakened by failing to have controlled for certain variables, particularly seniority. *Schultz v. DER*, 83-0119-PC-ER, 84-0252-PC, 85-0029-PC-ER, *Schultz v. DER & DILHR*, 87-0015-PC-ER, 8/5/87

The Commission discounted the complainant's argument that once the department had reached "full utilization" for women, it stopped hiring them, since the department would not have had to have hired its third woman under this theory, and the percentage of women in the department compares favorably with other departments around the country. *Rubin v. UW*, 78-PC-ER-32, 2/18/82

788.10 Disparate impact

The disparate impact theory is only available with respect to practices, procedures or tests. A claim arising from a personnel survey and the development of new position standards followed by hundreds of reallocation decisions was ill-suited to the theory. Furthermore, complainant failed to demonstrate that some "employment practice, other than use of a personnel survey, could have been utilized that would not have had such an adverse impact on female employes. *Schultz v. DER*, 83-0119-PC-ER, 84-0252-PC, 85-0029-PC-ER, *Schultz v. DER & DILHR*, 87-0015-PC-ER, 8/5/87

788.15 Bonafide occupational qualification (BFOQ)

No probable cause was found with respect to the actions of denying complainant overtime on two occasions, where respondent's actions were consistent with the provisions of the correctional facility's BFOQ plan. Complainant, a male,

did not attack the validity of the BFOQ plan. *Schrubey v. DOC*, 96-0048-PC-ER, 1/27/99

Where it was not disputed that the agency had an interest in having some patient care employes of the same sex as patients available for privacy and role modeling needs, and there were a limited number of positions subject to the BFOQ, it was held that the statutory requirements for a BFOQ were met. *Chadwick v. DHSS*, 81-PC-ER-14, 4/2/82

788.25 Sexual harassment

Where complainant's effort to prove that she had been sexually harassed rested entirely on her own description of the alleged incidents, there was no evidence in the record to otherwise corroborate her description, the only information solicited from the one individual complainant claimed to have viewed an incident failed to sustain complainant's version of events, and where there were numerous deficiencies in complainant's credibility, complainant failed to sustain her burden of establishing that she was sexually harassed as alleged. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

In *dicta*, the Commission noted that when no tangible employment action was taken, the employer is vicariously liable for the supervisor's harassing conduct unless it can prove by a preponderance of the evidence that: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the employe unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise, citing *Burlington Industries, Inc., v. Ellerth*, 188 S.Ct. 2257 (1998); and *Faragher v. City of Boca Raton*, 188 S.Ct. 2275 (1998). Promulgating an anti-harassment policy with a complaint procedure, and enforcing it may satisfy the first element of the affirmative defense. Failure on the part of an employe to use an existing complaint procedure may suffice to satisfy the employer's burden as to the second element. The Commission proceeded to address complainant's allegations that the respondent unreasonably delayed its investigation and that its remedial action after concluding the investigation was inadequate. The Commission also

addressed facts relating to the second element. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

In *dicta*, the Commission concluded that complainant did not effectively provide notice of the harassment to her employer until she disclosed the name of the alleged harasser. Respondent took appropriate action

within a reasonable time after that date, so complainant failed to show that the presumption of liability under §111.36(3), Stats., should apply. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

Complainant's separation from employment resulted directly and solely from her failure to show up for work, to call in her absences, to offer an explanation for her absences, or to appear at the last pre-disciplinary meeting, rather than from illegal retaliation. Complainant's attempt to link her attendance problems to an alleged mental health condition resulting from alleged sexual harassment was not credible. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

In determining whether various incidents constituted sexual harassment, the Commission considered the totality of the circumstances relating to the allegations, including, but not limited to, their number, severity and duration. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

In concluding that various incidents, considered collectively, were not sufficiently severe or pervasive to interfere substantially with a reasonable person's work performance or to create an intimidating, hostile or offensive work environment under §111.36(1)(b), Stats., the Commission considered whether the conduct was directed at complainant, whether he complained about the conduct, whether respondent took appropriate corrective action regarding incidents of which it was aware, and whether respondent was aware of the conduct. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

Exposure to sexually objectionable material, which complainant could avoid but which he instead ferrets out or dwells upon, is not covered under the Fair Employment Act. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

In order for comments to be considered actionable under §111.36(1)(br), Stats., they must have been directed at complainant. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

A co-worker's use of e-mail for non-business purposes and the alleged failure by the employer to correct that conduct were not shown to be actions based on complainant's sex and were not actionable under §111.36(1)(br), Stats. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

The action of a group of employes of one sex to gather together outside of the workplace is not a condition of employment or other action prohibited under the Fair Employment Act. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

In order for anti-male comments ("men are morons," "men are idiots," "men are pigs") to be considered actionable under §111.36(1)(br), Stats., they must have been directed at complainant. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

Conduct of a co-worker, on more than one occasion, to make complainant, a male, feel excluded from "girls night out" social gatherings, and one comment, directed at complainant, that "men are pigs," was insufficient for a reasonable person under the same circumstances to consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment under §111.36(1)(br), Stats. Complainant contributed to the inappropriate comments at work and complainant did not tell respondent about the conduct involved in these allegations. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

Two alleged references by a program manager to "choking this chicken" as well as hand gestures by the same program manager mimicking masturbation, all made during the same meeting with complainant and two others, were not sufficiently severe or pervasive to satisfy the statutory definition of sexual harassment. The statements were mere offensive utterances which occurred on the same day. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Summary judgment was granted with respect to a claim of sexual harassment based on two events occurring in the workplace, a correctional institution, on the same day. In one, a male supervising officer touched complainant's hair and asked, "Are you tight?" Complainant did not dispute that it was an ongoing joke at the institution that the

tightness of her hair bun was an indicator of her mood for the day, that other co-workers had touched her hair and numerous co-workers asked about the "tightness" of her hair, and that complainant did not believe her co-workers' actions were sexually harassing. In the second incident, the same supervising officer asked, "Are you sure you want to go through with it?" in reference to complainant's upcoming marriage. Complainant did not show, or allege, that the two events interfered substantially with her work performance, nor were the events sufficiently pervasive, severe, threatening or humiliating that a reasonable person under the same circumstances would feel the working environment was intimidating, hostile or offensive. *Winter v. DOC*, 97-0149-PC-ER, 5/6/98

Complainant, a female food service worker at a correctional facility, did not establish that a reasonable person under the same circumstances would have considered two incidents of sex harassment, both occurring within her first 3 months of employment, as sufficiently severe or pervasive to interfere substantially with her work performance or to create an intimidating, hostile or offensive work environment. In one incident, a male correctional officer told complainant that a prison was not a place for a woman to work. In the second, another officer referred to complainant as a "bitch" and/or a "slut." Complainant did not report the first incident and failed to establish that the comment made in the second incident reflected an attitude that was pervasive at the institution. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

Complainant failed to show an objectively hostile environment where complainant was only assigned "from time to time" to the work location where she was subject to supervision by the alleged harasser, she "generally avoided" the supervisor at work and she listed only 6 statements, an unquantified number of requests to visit complainant at home and one invitation to attend a convention together as having occurred over a period of six months. In *dicta*, the Commission also found that complainant failed to demonstrate the existence of a subjectively hostile environment where she never complained about the supervisor's actions until management explicitly encouraged her to do so and where complainant was interested in moving from her utility position, where she only had periodic contact with the supervisor in question, into a permanent assignment that would have been directly

subordinate to that supervisor. Also in *dicta*, the Commission found that respondent would not be liable for the acts of the supervisor because: 1) the complainant did not establish *quid pro quo* harassment, 2) respondent acted immediately after complainant and three other employes told management about the supervisor's actions, suspended the supervisor and then demoted him to a non-supervisory position, 3) the supervisor's conduct was clearly outside the scope of his employment and respondent was not negligent in supervising the supervisor, and 4) the supervisor did not have any significant, independent authority relating to complainant's termination, promotion, rate of pay or discipline. *Butler v. DHSS*, 95-0160-PC-ER, 1/14/98

In order to establish liability for sexual harassment, complainant had to establish that the conduct by her occasional supervisor created a work environment that was objectively hostile or offensive and that complainant herself perceived the work environment that way. *Butler v. DHSS*, 95-0160-PC-ER, 1/14/98

Sexual harassment includes 1) conduct falling under §111.36(1)(b), Stats., i.e. either a) "quid pro quo" conduct or b) unwelcome conduct of a sexual nature, as defined in §111.32(13), Stats.; 2) disparate treatment on the basis of sex with respect to terms, conditions or privileges of employment, i.e. conduct under §111.36(1)(a), Stats.; or 3) harassment on the basis of gender of a non-sexual nature in violation of §111.36(1)(br). *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

There was no sexual harassment where either the alleged conduct did not occur or was not unwelcome. Even if the conduct had occurred and was unwelcome, liability would not attach to respondent where 1) the majority of the conduct allegedly occurred during the evaluation of complainant's practicum performance by a faculty member, 2) respondent had a clearly articulated and publicized policy which prohibited sexual harassment and provided for retaliation-free reporting to an individual (other than the alleged harasser) with the authority to remedy the problem, 3) complainant failed to utilize the reporting policy until after the employment relationship ended despite her knowledge of the policy and many opportunities to utilize it and 4) respondent took prompt action to investigate and took remedial action once the alleged harassment was reported in accordance with the policy. *Rutland v.*

***UW-Stout*, 92-0221-PC-ER, 6/22/95; petition for rehearing denied, 8/14/95**

Complainant, who worked in a clerical position, was not subjected to sexual harassment when her male supervisor took reasonable steps to correct complainant's telephone behavior in which she referred to business callers as "hon" or "honey." *Smith v. UW-Manitowoc County*, 93-0173-PC-ER, 4/17/95

Complainant failed to establish that her work environment was hostile, abusive or offensive where her supervisor's statements were gender neutral, were not sexually offensive or suggestive, were phrased and delivered in a manner consistent with addressing other employes, and were not intended to ridicule, insult or abuse her. *Stricker v. DOC*, 92-0058-PC-ER, 92-0201-PC-ER, 3/31/94

Sexual harassment had not been shown where certain actions, e.g., placing nude photos and figurines on complainant's desk and placing soap in her desk drawers, were directed at one of complainant's male co-workers as well; where the other allegations concerned the circulation of rumors to which complainant contributed as well, and as to those two statements made to complainant which did constitute "unwelcome verbal conduct of a sexual nature;" respondent took immediate and appropriate action once made aware of complainant's concerns. *Dahlberg v. UW-River Falls*, 88-0166-PC-ER, 89-0048-PC-ER, 3/29/94

Vague allegations relating to a "women-hating" atmosphere or to conversations in which others engaged relating to a third person's attitude toward women do not satisfy the statutory definition of sexual harassment stated in §111.32(13), Stats. *Chelcun v. UW-Stevens Point*, 91-0159-PC-ER, 3/9/94

A complaint of sex discrimination under the FEA fails to state a claim upon which relief can be granted where the complaint consists primarily of allegations of an unsatisfactory work environment involving specific problems complainant experienced with supervisors (most of whom were of the same gender), coworkers, and others. In responding to the motion to dismiss, complainant's attorney did not attempt to explain how these incidents involved sex discrimination, except to the extent it was alleged that the clerical staff were treated as "emotional

punching bags" by their supervisors, who were frustrated and intimidated by treatment they were receiving at the hands of *their* supervisors. Assuming all of complainant's allegations to be true for the purpose of deciding this motion, the chain of causation--complainant's supervisors react to a sexist atmosphere created by their supervisors by using complainant as an "emotional punching bag"--is too extended for a conclusion that respondent discriminated against complainant because of sex in violation of §111.322(1), Stats. Also, management had no obligation to act where the conditions about which complainant was concerned did not involve sex discrimination but rather involved disagreements with her supervisor about her approach to supervision. *Makl v. UW-Stevens Point*, 92-0038-PC-ER, 4/30/93

Complainant's complaint of sex discrimination was dismissed for failure to state a claim upon which relief can be granted because complainant did not allege quid pro quo harassment or that she was subjected to conduct of a sexual nature that amounted to a claim of sexual harassment nor did she identify any specific term and/or condition of her employment that was affected by the allegedly sexist atmosphere of the office in which she worked. Complainant's failure to allege any acts of sex discrimination against her could not be attributed to a generalized pleading because complainant provided ample details regarding her dissatisfaction with her working conditions and relationships with fellow employes. *Weeks v. UW-Stevens Point*, 92-0036-PC-ER, 4/30/93

Complainant's assignment to open the Chancellor's personal mail which contained two arguably "offensive sexually graphic materials" held not to satisfy the statutory definition of sexual harassment as "deliberate, repeated display" of such materials. The complaint was dismissed for failure to sate a claim. *Erdmann v. UW-Stevens Point*, 92-0104-PC-ER, 4/23/93

Probable cause was found with respect to the decision to terminate the complainant's probation where complainant, a male, had been asked out on four occasions by his female supervisor and his employment was terminated relatively shortly after he declined the invitations. Complainant's work performance was comparable in many respects to that of his peers and many of the specific points relied on by respondent in support of his termination were unfounded.

***Kloehn v. DHSS*, 86-0009-PC-ER, 9/8/89**

While complainant, a female, suffered isolated incidents of sexual harassment, respondent, upon notice of such conduct, took immediate action to remedy the matter. Complainant was not subjected to continuous sexual harassment which caused her to fail probation but was terminated when respondent concluded she could not master the necessary job skills within the probationary period. No probable cause was found. *Bender v. DOR*, 87-0032-PC-ER, 8/24/89

An employer has a duty, when it knows or should know of sexual harassment between fellow employes, to take appropriate action to deal with the problem, and acquiescence to such conduct by its employes constitutes discrimination on the basis of sex with respect to conditions of employment. *Glaser v. DHSS*, 79-PC-ER-63, 79-66-PC, 7/27/81

No sex discrimination was found where the respondent investigated complainant's allegation of sexual harassment against a co-employe and took certain steps to reduce the possibility of a re-occurrence, but took no disciplinary action against the co-employe because the investigation had not revealed objective evidence upon which to base disciplinary action. *Glaser v. DHSS*, 79-PC-ER-63, 79-66-PC, 7/27/81

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Section 732

[Previous material] [Next material]

---

732 Motions

Section 227.42(1)(d), Stats., provides authority for state agencies, such as the Personnel Commission, to develop appropriate summary disposition procedures, where the disposition does not require the resolution of any disputes of material fact, unless such summary procedures are otherwise precluded by statute. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

The Commission's consideration of matters beyond those plead in the complaint does not preclude the Commission from granting a motion for failure to state a claim. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, 98-1432, 12/23/98

Appellant was put on notice that a motion to dismiss was pending due to his failure to appear at the scheduled hearing and he was given more than a fair opportunity to explain, in writing, his absence. Appellant failed to explain his absence by the established deadline. The Commission was not required to give him a separate hearing on whether he had good cause for missing the hearing. *Oriedo v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98 CV 0260, 12/11/98

Respondent's motion to dismiss for failure to prosecute was granted, where complainant had previously submitted a written statement that he would not attend the scheduled hearing the following week, which he described as "essentially meaningless," and would not withdraw his

complaint of age discrimination relating to the failure to select him for a faculty vacancy. *Huff v. UW (Superior),* 97-0105-PC-ER, 3/10/99

Dismissal (or default judgment) for a party's first failure to appear at a prehearing conference is appropriate only where sufficiently egregious circumstances exist. *Balele v. DOR,* 98-0002-PC-ER, 2/24/99

The failure of respondent's attorney to inform complainant of respondent's request to postpone the prehearing conference was not a sufficiently egregious circumstance to justify granting default judgment. *Balele v. DOR,* 98-0002-PC-ER, 2/24/99

Failure to dispute pleadings did not automatically entitle complainant to a judgment by default. *Balele v. DOR,* 98-0002-PC-ER, 2/24/99

Respondent's motion to dismiss for failure to state a claim was denied as to complainant's allegation of FEA retaliation against the Department of Health and Family Services (DHFS), where complainant, who was employed by the University of Wisconsin - Green Bay, contended she had "actively resisted the DHFS actions that the Commission has found in the Initial Determination to be discriminatory." It was not clear that complainant could not prevail as to the retaliation claim. *Olmanson v. UW (Green Bay) & DHFS,* 98-0057-PC-ER, 2/10/99

Complainant's motion for judgment on the pleadings and respondent's motion for summary judgment were the equivalent of opposing motions for summary judgment. *Oriedo v. DOC,* 98-0124-PC-ER, 2/2/99

Where respondent's motion for summary judgment was filed 3 days after complainant's motion for judgment on the pleadings but did not mention complainant's motion, and where respondent did not submit a brief relating to complainant's motion pursuant to a schedule established by the Commission, complainant still was not entitled to default judgment because the motion for summary judgment and the motion for judgment on the pleadings were competing motions. *Oriedo v. DOC,* 98-0124-PC-ER, 2/2/99

Respondent's motion for summary judgment was denied where complainant contended that respondent's

discretionary decision to reassign a career executive employe to a vacant career executive position within the agency was discriminatory because respondent knew the reassignment had a disparate impact on minorities and because respondent knew that complainant, who is black, was an applicant for the vacancy. The applicable administrative rule, §ER-MRS 30.07(1), Wis. Adm. Code, permit an appointing authority to make such a reassignment "provided it is reasonable and proper," but there was nothing in complainant's submission suggesting complainant conceded the reassignment was reasonable and proper. *Oriedo v. DOC*, 98-0124-PC-ER, 2/2/99

In determining whether complainant had identified a conflict between the administrative rules, which permitted reassignment from one career executive position to a vacant career executive position in the same agency "provided it is reasonable and proper," and statutory provisions, respondent was entitled to summary judgment with respect to complainant's contention that the rule was invalid where the rule did not establish any criteria nor specify the results to be obtained by an appointing authority when deciding whether or not to grant a reassignment request. *Oriedo v. DOC*, 98-0124-PC-ER, 2/2/99

No other sanction short of dismissal adequately addressed complainant's pattern of contumacious behavior. Respondent's motion to dismiss for failure to prosecute was granted where complainant's actions amounted to egregious conduct. Complainant was allowed a great deal of latitude in proceeding with his cases and was given every reasonable opportunity to present his cases, but failed to appear at the fourth day of hearing and failed to provide any medical documentation that he was too ill to have attended the hearing. Complainant's credibility had been severely debilitated and he demonstrated a lack of good faith in his approach to the processing of his cases at the hearing stage. *Allen v. DOC*, 95-0057-PC-ER, etc., 11/4/98

Where there were disputed issues of fact regarding the suitability of positions offered to complainant before her resignation and where complainant claimed that she was forced to resign due to respondent's failure to accommodate her disability, respondent's motion to dismiss for failure to state a claim was denied. *Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98

An allegation that respondent's answer to a complainant "poisoned" complainant's chances to return to work with respondent in a positive atmosphere did not constitute an adverse employment action and could not serve as the basis for a discrimination claim, citing *Larsen v. DOC*, 91-0063-PC-ER, 7/11/91. Complainant had previously resigned from her position with respondent. Respondent's motion to dismiss for failure to state a claim was granted. *Gurrie v. DOJ*, 98-0130-PC-ER, 11/4/98

Dismissal was too severe a sanction for complainant's failure to appear at a conference relating to a Family Medical Leave Act claim. Even though complainant knew of the importance of appearing at the conference and had no good excuse for failing to appear, she telephoned the hearing examiner three hours after the conference to explain her failure to appear and made herself available for a second conference to attempt to resolve the matter informally. *Neumaier v. DHFS*, 98-0180-PC-ER, 11/4/98

Complainant, a female, failed to state a claim of sex discrimination with respect to a non-selection decision where a female was hired and where complainant failed to argue any other type of prima facie case nor did one appear from complainant's factual allegations. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

Complainant failed to state a claim of marital status discrimination with respect to a non-selection decision where there was no allegation that anyone on the search committee knew complainant was divorced. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

Complainant failed to state a claim of marital status discrimination when she contended management in the state agency that previously employed her disapproved of a relationship she had with another employe of that agency who was married, thereby affecting the references provided to her prospective employer, a second agency. If her former employer disapproved of complainant's relationship with a married person, the basis for that disapproval had nothing to do with complainant's marital status. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

Complainant failed to state a claim of FEA retaliation relating to a non-selection decision where respondent's only knowledge of complainant's protected activity was a

comment made to one member of the search committee that complainant resigned her position with another state agency because that it was "political." Complainant's contention that respondent should have deduced some bias from this remark was too tenuous to constitute an awareness by respondent of complainant's protected activity, a necessary element of a prima facie case of retaliation discrimination. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

Respondent's motion to dismiss for failure to state a claim of disability discrimination relating to a non-selection decision was denied, even though respondent denied that anyone on the search committee perceived complainant as having a mental impairment, where complainant pointed to various remarks provided to the committee and argued the committee must have inferred a disability of mental impairment. The Commission was unable to conclude as a matter of law that there was no conceivable way that complainant could establish that element of a disability claim. *Olmanson v. UW (Green Bay) & DHFS*, 98-0057-PC-ER, 10/21/98

It is complainant's burden of proof to demonstrate that the allegations raised in his complaint were timely filed. When analyzing this question in the context of respondent's motion to dismiss, it was appropriate to construe the allegations raised in the complaint in a light most favorable to complainant. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Filing a complaint of whistleblower retaliation is itself a protected activity under the whistleblower law. Therefore, a disciplinary action threatened or imposed after respondent learned of complainant's charge of whistleblower retaliation could constitute illegal retaliation under the whistleblower law. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's motion for summary judgment was denied as to complainant's disability claim arising from two alleged decisions not to recall the complainant even though the person who selected the other two individuals for the positions was not aware of complainant's disability at the time. The record did not indicate who had excluded complainant from the recall process. *Sheskey v. DER*, 98-0063-PC-ER, 8/26/98

Respondent's motion for summary judgment was denied as to a claim of disability discrimination arising from an alleged failure to recall the complainant. The Commission rejected respondent's theory that complainant's receipt of disability benefits based on a representation of total disability should operate as an automatic bar to the disability discrimination claims where the disability benefit plan's definition of "total disability" did not take into account whether complainant could work with accommodations. Issues of fact remained. *Sheskey v. DER*, 98-0063-PC-ER, 8/26/98

Respondent's motion to dismiss for failure to state a claim was denied where complainant alleged that he was not interviewed, not selected, not appointed and not notified of the appointment to fill a particular vacancy, because of his protected status. *Oriedo v. DPI et al.*, 98-0042-PC-ER, 8/12/98

Respondent's motion to dismiss for failure to state a claim was denied where complainant alleged that, because of his protected status, respondents did not investigate his concerns and used discriminatory post-certification practices, including unbalanced interview panels. *Oriedo v. DPI et al.*, 98-0042-PC-ER, 8/12/98

Respondent's motion to dismiss for failure to state a claim was denied where complainant alleged he was not hired because, at least in part, he had previously filed complaints of discrimination against the respondents. *Oriedo v. DPI et al.*, 98-0042-PC-ER, 8/12/98

The filing of a Fair Employment Act complaint with the Personnel Commission is not a protected activity under the whistleblower law that entitles a complainant to protection under §230.80(8)(a), Stats., citing *Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92. Where the only protected activity identified by complainant was having filed previous Fair Employment Act complaints against respondents, respondents' motion to dismiss for failure to state a claim was granted. *Oriedo v. DPI et al.*, 98-0042-PC-ER, 8/12/98

There was no genuine issue of material fact regarding complainant's claims of race discrimination arising from respondent's failure to select complainant for any of five positions where the persons selected for the positions were

all of complainant's race. *Heinz-Breitenfeld v. DOC*, 95-0153, 0155-PC-ER, 5/6/98

There was no genuine issue of material fact regarding complainant's claim of race discrimination arising from a selection decision where complainant was hired for the position in question. The question as to why complainant had to compete for the position was not connected with the race discrimination issue. *Heinz-Breitenfeld v. DOC*, 95-0153, 0155-PC-ER, 5/6/98

As to the question of whether complainant received less pay than a co-worker, there was no genuine dispute of material fact where complainant alleged discrimination based on race and it was undisputed that the pay of the co-worker was predicated on her voluntary demotion and the applicable administrative rules. The ethnicity of the co-worker would not affect the outcome of the case. *Heinz-Breitenfeld v. DOC*, 95-0153, 0155-PC-ER, 5/6/98

Summary judgment was granted with respect to a claim of sexual harassment based on two events occurring in the workplace, a correctional institution, on the same day. In one, a male supervising officer touched complainant's hair and asked, "Are you tight?" Complainant did not dispute that it was an ongoing joke at the institution that the tightness of her hair bun was an indicator of her mood for the day, that other co-workers had touched her hair and numerous co-workers asked about the "tightness" of her hair, and that complainant did not believe her co-workers' actions were sexually harassing. In the second incident, the same supervising officer asked, "Are you sure you want to go through with it?" in reference to complainant's upcoming marriage. Complainant did not show, or allege, that the two events interfered substantially with her work performance, nor were the events sufficiently pervasive, severe, threatening or humiliating that a reasonable person under the same circumstances would feel the working environment was intimidating, hostile or offensive. *Winter v. DOC*, 97-0149-PC-ER, 5/6/98

Respondent's motion to dismiss for failure to prosecute was granted in April of 1998 with respect to a complaint filed in December of 1994, where even though complainant had been incarcerated since June of 1997, he did nothing to process his complaint during the prior six months. While incarcerated, complainant did not advise the Commission of

his circumstances or address or make any attempt to keep his complaint alive. *Tetzner v. SPD*, 94-0182-PC-ER, 4/29/98

Summary judgment was granted for a complaint alleging discrimination based on sex with respect to the decision to terminate complainant's probationary employment where complainant and her supervisor were both female and complainant admitted she had alleged sex discrimination because: "I felt that the supervisor had personal differences with me. . . . I chose sex, because I was pregnant at the time, and only women could have children, and my co-worker, who was treated favorably, was pregnant as well. Anything to get my case reviewed by someone other than the lower line management." *Payne v. DOC*, 95-0095-PC-ER, 1/9/98

Where complainant, who was asked to resign from her employment as an assistant district attorney (ADA) after her arrest for operating a vehicle while intoxicated and while on call and carrying an office beeper, contended she was held to a different standard while carrying the beeper than two male ADAs, complainant was entitled to offer evidence tending to show differential treatment of the two male ADAs with respect to other terms and conditions of complainant's employment, including caseload and performance expectations. However, evidence relating to caseloads and performance standards for other ADAs (i.e. other than the complainant and the two specified males) and by the district attorney was cumulative, repetitive and too tangential to the essence of complainant's contentions to have reasonable probative value. Evidence relating to the manner in which drunk driving arrests of employes were handled by other employers would not have reasonable probative value. Respondent's motion in limine was denied in part and granted in part. *Christie v. Office of the District Attorney of Fond du Lac County*, 96-0003-PC-ER, 2/25/98

Where the document in question had been provided to complainant without having been identified as confidential, but with the implication it was *not* considered confidential and was not given to complainant in connection with a protective order issued on another date, respondent's motion for the imposition of sanctions for violating the protective order was denied. *Cygan v. DOC*, 96-0167-PC-ER, 1/28/98

Where complainant remained an employe of respondent and it was possible that a controversy could arise in the future between the parties relating to the impact of an alleged whistleblower disclosure on complainant's requests for overtime pay, the fact that respondent had made payments to complainant in 1997 for overtime hours he had accrued in 1995, did not cause complainant's allegation of retaliation, arising from respondent's denial of overtime pay in 1995, to be moot, citing *Watkins v. DILHR*, 69 Wis. 2d 782, 12 FEP Cases 816 (1975). Respondent failed to show that there was no reasonable expectation that the alleged violation would recur and that the 1997 overtime payment made to complainant had completely and irrevocably eradicated the effects of the alleged violation. Respondent's motion to dismiss the claim was denied. *Nolen v. DILHR [DOCom]*, 95-0163-PC-ER, 12/17/97

Respondent's motion to dismiss a religious discrimination claim for failure to state a claim over which the Commission had jurisdiction was granted where complainant claimed that respondent's action of not allowing him to wear a hat while it allowed Muslim employes to wear head coverings constituted discrimination. Complainant's significant rights associated with his position (such as his wages and length of employment) had not been affected by the religious accommodation made to the Muslim employees and the impact on complainant was *de minimus*. *Darrington v. DOC*, 97-0108-PC-ER, 12/3/97

Summary judgment was granted with respect to complainant's claims of discrimination based on age, race and sex with respect to the failure to hire complainant for a specific vacancy, where the successful candidate was also a white male and was two years older than complainant. Because the successful candidate was the same race, same sex and several years older than complainant and in the absence of other facts, disputed or otherwise, relative to complainant's claims, complainant failed to present any evidence that his age, race or sex were motivating facts in the decision not to select him and he had not raised a genuine issue of material fact sufficient to withstand summary judgment. *Starck v. UW (Oshkosh)*, 97-0057-PC-ER, 11/7/97

Respondent's motion to dismiss for lack of prosecution was granted where the only notice that was provided with respect to complainant's failure to appear at the scheduled

hearing was 1) a message from complainant's wife left early in the morning on the day of hearing on the answering machine of the personnel manager at respondent's institution and 2) a message at the office of respondent's attorney after he had left for the hearing. Although complainant contended his absence was due to an "ulcerative colitis flare-up," he failed to submit any documentation. The hearing had previously been postponed, one day before it had been scheduled to commence, due to the death of complainant's mother. The fact that the prehearing conference had been postponed twice at respondent's request was of little significance. *Coffey v. DHSS*, 95-0076-PC-ER, 7/16/97

Summary judgment was denied where there was a disputed question of fact as to whether the respondent received actual or effective notice that complainant's absence was due to a serious health condition. *Preller v. UWHCA*, 96-0151-PC-ER, 4/11/97

Although the pleading requirements of a complaint of discrimination/retaliation are extremely minimal, where respondent had filed a motion to dismiss which specifically cited complainant's failure to identify a protected fair employment activity and, even so, complainant did not identify in his written response to the motion any protected fair employment activity and none could be fairly implied, the FEA charge should be dismissed. *Pfeffer v. UW (Parkside)*, 96-0109-PC-ER, 3/14/97

Respondent's motion to dismiss was granted where only one of complainant's allegations of discrimination was timely filed and that one allegation was precluded by an earlier ruling on sanctions which barred complainant from presenting evidence that was the subject of respondent's discovery request, and where it had been nearly 3 years since complainant's motion to stay proceedings had been granted pending a decision on complainant's claim in state or federal court but complainant never filed in court. It was not inappropriate to revisit the motion to dismiss which respondent had filed as part of its request for discovery sanctions where, in its ruling on that motion, the Commission declined to dismiss the complaint "at this time" which implied possible reconsideration of the question at a later stage in the proceedings. *Germain v. DHSS*, 90-0005-PC-ER, 91-0083-PC-ER, 4/11/97

Where the material facts underpinning a claim were in dispute, a motion for summary dismissal was inappropriate. *Jacobsen v. DHFS*, 96-0089-PC-ER, 2/6/97

In ruling on a motion to dismiss for failure to state a claim, all facts alleged in the complaint and all facts alleged in opposition to the motion to dismiss were accepted as true. *Elmer v. DATCP*, 94-0062-PC-ER, 11/14/96

No sanctions were appropriate where respondent filed its answer 9 days late, where there was no prejudice either argued or shown by the complainant and no aggravated circumstances were present. *Rupiper v. DOC*, 95-0181-PC-ER, 8/15/96

Respondent's motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction was denied where complainant, employed by UW-Parkside's Physical Plant, alleged race discrimination when UW-Parkside police questioned him about a missing rug and he was required to post $100 bail due to an unrelated warrant which was discovered by the police when they checked complainant's record. Complainant's supervisor made a report to the campus police which implicated complainant as a suspect in the disappearance of the rug. Respondent's contention, that it was acting as a law enforcement agency rather than as an employer, was rejected. *Graves v. UW (Parkside)*, 96-0055-PC-ER, 10/2/96

Respondent's motion to dismiss, based upon the existence of a pending claim filed in circuit court under Title VII of the Civil Rights Act of 1964, was denied, distinguishing *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 8/18/87. The Commission granted a stay of the proceeding until after a determination by the other forum as to whether her Title VII claims will be heard in that forum. Respondent failed to explain how it would be irreparably harmed by such a stay. *Doro v. UW*, 92-0157-PC-ER, 8/15/96

While respondent did not formally discipline the complainant, its motion to dismiss for failure to state a claim was denied where complainant was directed to appear at a meeting to discuss a possible work rule violation and the letter directing him to appear could be construed as accusatory or even judgmental and complainant alleged that respondent failed to follow established policies for handling potential disciplinary matters. *Klein v. DATCP*,

95-0014-PC-ER, 12/20/95

In those FEA cases where it is clear that a complaint fails to state a claim, e.g., the complainant is not a member of a protected category, the complainant's retaliation complaint rests on an activity not covered by the FEA, it may be appropriate to dismiss the complaint on the basis of a motion supported by a factual showing establishing the defect in the claim. However, where the parties differ about such things as whether a supervisor's complaints about complainant's work were racially motivated and whether complainant's choice of options presented by management rendered the personnel transaction in question voluntary or involuntary, the claim cannot be resolved dispositively on such a motion and complainant is entitled to have his complaint investigated and then to proceed to a hearing. ***Masuca v. UW-Stevens Point*****, 95-0128-PC-ER, 11/14/95**

Disqualification of agency counsel was not justified at the prehearing stage where counsel had denied having any involvement whatsoever in the hiring which was the subject matter of the proceeding and it was not clear whether counsel would be called as a witness at hearing. Complainant alleged that counsel had made statements, to others, of a discriminatory nature. ***Balele v. DNR et al.*****, 95-0029-PC-ER, 6/22/95**

Respondent's motion for a hearing to determine the appropriate remedy was granted where the hearing on the merits found employer liability but the issue of remedy was not fully litigated. The parties were permitted to supplement the record, where necessary, with respect to the remedy issue. ***Keul v. DHSS*****, 87-0052-PC-ER, 2/3/94**

Complainant's request to amend the issue for hearing to add a claim under the whistleblower law was denied where the request was filed four months after the parties had stipulated to an issue limited to sex discrimination and was also filed three days after closure of discovery. Complainant failed to show any reason for the delay and failed to show that the stipulation as to the issue resulted from inadvertence or mistake, and there was no allegation of whistleblower retaliation in the original complaint. ***Florey v. DOT*****, 91-0086-PC-ER, 9/16/93**

In ruling on respondent's motion to dismiss on the bases of untimely filing and for failure to state a claim, a claim

should not be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that complainant can prove in support of his allegations, citing Morgan v. Pa. Gen. Ins. Co., 87 Wis. 2d 723, 275 N.W. 2d 660 (1979). *Getsinger v. UW-Stevens Point*, 91-0140-PC-ER, 4/30/93

The fact that a test (Minnesota Multiphasic Personality Inventory), which served as a basis for a psychiatric evaluation, had been lost did not preclude testimony by the psychiatrist about the evaluation or the test, but could affect the weight accorded the testimony. Motion in limine denied. *Boinski v. UW-Milwaukee*, 92-0233-PC-ER, 92-0702-PC, 4/19/93 (Ruling by examiner)

In a handicap discrimination claim, evidence of complainant's employment after his termination could be relevant to the issue of complainant's ability to perform the duties of the position from which he was discharged and to the issue of accommodation, in terms of complainant's ability to perform other positions to which he could have transferred. Respondent's motion in limine was denied. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 3/19/93

An objective standard is used to determine if the employer was correct in concluding that a handicapped employe is unable to effectively perform and that no accommodation is feasible. That the employer may have acted in good faith in assessing the handicapped employe's abilities is not a defense. Accordingly, evidence which postdates the personnel transaction which may have no relevance to the employer's intent when the employer made its assessment, may be admissible as relevant to the employe's capacity to perform any accommodation. Respondent's motion in limine was denied. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 3/19/93

Where complainant failed to establish a prima facie case of age discrimination regarding a selection decision, the employer's motion for dismissal, made after complainant had presented his case in chief, was granted *Ludeman v. DER*, 90-0108-PC-ER, 12/29/92

Although the Wisconsin Administrative Procedure Act does not provide explicitly for a summary judgment procedure, if it can be determined that there are no disputed issues of material fact, the Commission can issue a decision without

an evidentiary hearing in what amounts functionally to a summary judgment proceeding. The Commission went on to apply the summary judgment methodology set forth in *In re Cherokee Park Plat,* 113 Wis. 2d 1212, 116, 334 N.W.2d 580 (Ct. App. 1983). *Balele v. UW-Madison,* 91-0002-PC-ER, 6/11/92

Where complainant stated a claim under the Fair Employment Act and made a number of contentions which were facially probative of pretext and contributed to a disputed factual issue concerning the subjective intent of those who participated in the selection process, summary judgment was denied. *Balele v. UW-Madison,* 91-0002-PC-ER, 6/11/92

Respondent's motion to dismiss was granted where it demonstrated that as a matter of law it had an effective affirmative defense that would enable it to prevail on the issue of liability. The complaint arose from respondent's action of removing the complainant from the enforcement cadet register for failing to meet the minimum hearing standard. However, the respondent established by affidavit that complainant's rank on the register ultimately would have been too low to have resulted in certification. The respondent's affirmative defense foreclosed a finding of liability against the employer. *Kohl v. DOT & DMRS,* 89-0064-PC-ER, 5/1/91

Complainant's motion, made after the commencement of the hearing, for disqualification of the hearing examiner was denied where the complainant failed to supply any grounds for disqualification on the basis of bias or prejudice: the examiner's action of hitting the table with her hand and slightly raising her voice was not an inappropriate response in the context of trying to maintain control of the hearing, the examiner's evidentiary rulings appeared to have been well founded legally and were not indicative of partiality and complainant was properly denied the opportunity to testify in rebuttal after each of respondent's witnesses. *Acharya v. DOR,* 89-0014, 0015-PC-ER, 9/11/89

Respondent's motion to dismiss for failure to state a claim upon which relief can be granted was ultimately granted as to a discrimination complaint under the Fair Employment Act involving a denial of family health insurance coverage. However, the Commission concluded that the complaint did

involve an actual controversy and a claim which DETF had an interest in contesting and was not a "non-justiciable controversy." *Phillips v. DETF & DHSS*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; affirmed by Dane County Circuit Court, *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92

Complainant's motion for summary judgment was denied where there were many disputed issues of fact. Respondent's failure to renew its position on each of the issues of fact and of law in its briefs on the complainant's motion did not operate as a waiver of the defenses presented previously or operate as an implicit adoption of the complainant's version of the facts. *Acharya v. DOA*, 88-0197-PC-ER, 5/3/89

Appellant's motion for summary judgment was granted in an appeal of an examination where in a previous interim order, the Commission held that the invalidity of the subject examination was deemed admitted by operation of §804.11, Stats. However, the motion was not granted as to companion equal rights proceeding because the underlying interim order specifically limited its application to the appeal and the issue in the equal rights case extended beyond the examination. *Doyle v. DNR & DMRS*, 86-0192-PC, 87-0007-PC-ER, 11/3/88

Complainant's motion for default judgment was denied where the motion was based on the failure of the respondent to produce at hearing one of the three agency employes who allegedly discriminated against the complainant. Respondent agency appeared by legal counsel at the hearing so the provisions of §PC 5.03(8)(a), Wis. Adm. Code, were inapplicable. *Pugh v. DNR*, 86-0059-PC-ER, 9/26/88

In ruling on a motion to dismiss for failure to state a claim, the Commission must analyze the complainant's allegations liberally in favor of the complainant and grant the motion only if it appears with certainty that no relief can be granted. *Canter-Kihlstrom v. UW-Madison*, 86-0054-PC-ER, 6/8/88

Respondent was not permitted to withdraw its motion to dismiss for lack of subject matter jurisdiction after the motion had been heard and a proposed decision issued, absent a stipulation by the parties. *Pfeifer v. DILHR*, 86-0149-PC-ER, 86-0201-PC, 12/17/87

The Commission considered arguments raised by complainant in a letter received one day after the time restriction recited in the Commission's scheduling letter but postmarked two days prior to the due date where the period for filing arguments was very brief. *Fliehr v. DOA*, 85-0155-PC-ER, 12/17/85

The Commission denied respondent's motion to dismiss and directed that the investigation of the matter proceed where the complainant alleged that respondent had discriminated against him when it withdrew an offer of employment and the respondent contended in its motion that there were no approved employment vacancies for which complainant was eligible. The Commission's conclusion was based on the existence of a factual dispute between the parties. *Cleary v. UW-Madison*, 84-0048-PC-ER, 11/21/85

The Commission granted respondent's motion for an expedited hearing in order to limit damages where respondent did not contest liability except as to the issue of remedy. The Commission established specific truncated periods for holding a prehearing conference, completing discovery and responding to discovery requests. The hearing was to be held "as soon after the… discovery period as is feasible." *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 10/14/85

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 790 through 790.04

[Previous material] [Next material]

---

790 Discrimination based on sexual orientation

790.02(2) Finding of *no* probable cause

It would have been speculative to conclude there was any connection between complainant's sexual preference and his failure to be reinstated to a vacant position where the decision-maker was unaware of complainant's sexual orientation and the person alleged by complainant to have had an animus against complainant because of his homosexuality had an extremely limited role in the selection process. *Ames v. UW-Milwaukee,* 85-0113-PC-ER, 12/23/88

No probable cause was found where complainant failed to produce any evidence indicating the persons comprising the interview panel or the person making the hiring decision was aware or should have been aware that the complainant was bisexual. *Bisbee v. DHSS*, 82-PC-ER-54, 6/23/83; affirmed by Dane County Circuit Court, *Bisbee v. State Pers. Comm.*, 617-636, 10/3/84

790.03(2) Finding of *no* discrimination

The legislature has decided that heterosexual marriage and/or the presence of dependent children, not mere actual

dependence, will determine eligibility for family health insurance benefits, and did not empower administrative agencies to extend family health insurance benefits to alternative families. Therefore, the complainant, who had a homosexual non-spousal partner but was not legally married, was not similarly situated to heterosexual married persons for purposes of finding discrimination. Public policy objectives justified disparate treatment of complainant and others with alternative families. *Phillips v. Wis. Pers. Comm.*, Dane County Circuit Court, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92

No discrimination based on sex, sexual orientation or race, violation of FMLA, or retaliation based on FEA activities was found with respect to respondent's decision to discharge the complainant where respondent concluded that complainant had violated various work rules when she gave a suggestive note to a coworker, telephoned the same coworker at home, and admitted to using profanity towards various other coworkers and about a client. *Mitchell v. DOC*, 95-0048-PC-ER, 8/5/96

The rationale for the imposition of a requirement of a physician's verification for absences was not shown to be pretextual where this requirement was imposed in accordance with a collective bargaining agreement and other applicable requirements, and complainant was not treated differently than any other similarly situated employe. *Miller v. DHSS*, 91-0106-PC-ER, 5/27/94

The rationale for the extension of complainant's probation was not shown to be pretextual where the record did not support complainant's contention that he had not been worried about the possible results of his absenteeism, and it was not necessary for respondent to demonstrate that complainant's absences had a negative impact on the operation of his unit in order to enforce its absenteeism policies. *Miller v. DHSS*, 91-0106-PC-ER, 5/27/94

Complainant was not discriminated against on the basis of marital status, sex or sexual orientation when she was denied family health insurance coverage for her homosexual non-spousal partner with whom complainant shared finances and maintained many attributes usually associated with the marital relationship. The failure of DETF to have promulgated a rule that would have included complainant's

partner within the definition of a dependent for purposes of family insurance coverage is not discriminatory because precedent and legislative history establishes that the legislature did not intend that such coverage be provided, complainant was not similarly situated with respect to married employes whose relationships were legally recognized by Wisconsin family law, and DETF was not obligated by the Fair Employment Act to recognize relationships for the purpose of defining dependents that are not legally recognized by family law but which arguably are parallel to legally recognized relationships. *Phillips v. DETF & DHSS*, 87-0128-PC-ER, 3/15/89, 4/28/89, 9/8/89; affirmed by Dane County Circuit Court, *Phillips v. Wis. Pers. Comm.*, 89 CV 5680, 11/8/90; affirmed by Court of Appeals, 167 Wis. 2d 205, 2/13/92

790.04 Prima facie case

The Commission properly ruled that complainant failed to state claim for denial of her application for family insurance coverage for her lesbian companion, where challenged rule distinguished between married and unmarried employees, not between homosexual and heterosexual employees. Complainant's contention that she was not married to her companion only because she could not legally marry another woman was not a claim of sexual orientation discrimination but was instead a claim that marriage laws are unfair because of their failure to recognize same-sex marriages. It was that restriction, not insurance eligibility limitations in statutes and rule, that resulted in complainant being unable to extend her state employee health insurance benefits to her companion. *Phillips v. Wis. Pers. Comm.*, 167 Wis. 2d 205 (Court of Appeals, 1992)

Complainant failed to establish a prima facie case with respect to the decision to terminate his employment where the record did not reflect whether he was replaced by an employe who was, or was perceived by the employer as, heterosexual and where there was no other evidence which created an inference that the termination was based on complainant's sexual preference. *Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 11/6/91

While this digest has been prepared by Personnel Commission staff for the convenience of interested persons, it should be remembered that the decisions themselves are the ultimate source of Commission precedent.

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 734 through 738.4

[Previous material] [Next material]

---

734 Postponement/delays

Petitioner's two discrimination complaints were held in abeyance in light of her request for a stay while they were processed by the federal Equal Employment Opportunity Commission, even though respondent had filed a motion to dismiss the complaints as untimely filed, moot and for failure to state a claim. Petitioner was directed to inform the Personnel Commission, after approximately 5 months, of the status of her federal claim. However, the Commission refused to hold petitioner's related classification appeal in abeyance. *Tyus v. DER et al.*, 97-0078-PC, etc., 1/27/99

Complainant's request to hold 8 cases in abeyance while proceeding on a 9th case was denied, where the issues and parties in the cases were not the same and the primary thrust of discovery would be different. *Balele v. WTCSB et al.*, 97-0097-PC-ER, etc., 12/18/98

The hearing examiner did not err in denying complainant's request for postponement of the hearing by providing respondent an opportunity to respond to complainant's suggestion that the hearing be postponed until some time the following year. It is the presiding official's responsibility to give each side an opportunity to reply to issues raised. *Oriedo v. DPI*, 96-0124-PC-ER, 1/14/98; affirmed by Dane County Circuit Court, *Oriedo v. Wis. Pers. Comm. et al.*, 98-CV-0260, 12/11/98

Complainant's motion to hold the matter in abeyance

pending resolution of parallel proceedings in federal court was granted where the two proceedings involved the same parties, facts and causes of action and it was undisputed that judgment on the merits of the federal claim would be conclusive as to the matter before the Commission. *Goetz v. DOA & Office of the Columbia County District Attorney*, 95-0083-PC-ER, 1/16/98

Complainant's request for a second hearing opportunity was denied and respondent's motion to dismiss granted where complainant did not appear on the noticed date for hearing, respondent moved to dismiss a half-hour after the time the hearing was scheduled to commence, complainant appeared at the appointed hour and location on the day after her scheduled hearing and complainant had no excuse for not appearing one day earlier other than describing it as "an unfortunate error" on her part. Complainant failed to show good cause for her failure to appear under §PC 5.03(8)(a), Wis. Adm. Code. *Finley v. UW-Madison*, 95-0007-PC-ER, 3/26/97

Having decided to proceed *pro se*, a complainant does not have the right to recess the hearing whenever he decides he wants to consult with counsel. *Smith v. DOC*, 95-0134, 0169-PC-ER, 11/14/96

Respondent's motion to dismiss, based upon the existence of a pending claim filed in circuit court under Title VII of the Civil Rights Act of 1964, was denied, distinguishing *Harris v. DHSS*, 84-0109-PC-ER, 85-0115-PC-ER, 8/18/87. The Commission granted a stay of the proceeding until after a determination by the other forum as to whether her Title VII claims will be heard in that forum. Respondent failed to explain how it would be irreparably harmed by such a stay. *Doro v. UW*, 92-0157-PC-ER, 8/15/96

The interests of the public would not be served by permitting a party who has received an adverse proposed decision from a hearing examiner after five days of hearing to re-litigate substantially identical claims in another forum. Complainant's request for an indefinite stay was denied. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 2/8/95

Complainant's request for a stay of her whistleblower complaint due to having filed a claim in circuit court which included a cause of action alleging violation of her rights

under §230.80, et. seq., was denied. Instead, the complaint was dismissed as required by §230.88(2), Stats. *Tolley v. Office of the Commissioner of Transportation*, 93-0086-PC-ER, 2/22/95

Complainant's hearing postponement request was denied where the parties chose the hearing date five months in advance, respondent objected to the request and although the complainant had recently filed a second complaint, consolidation of the two cases was denied. *Soliman v. DATCP*, 93-0049-PC-ER, 94-0018-PC-ER, 3/2/94 (ruling by examiner)

This FMLA complaint was dismissed for lack of prosecution where complainant and her union representative were aware of the 60-day hearing requirement and agreed to the scheduling of the date for hearing, complainant's subsequent request for postponement was denied, complainant and her representative failed to prepare for hearing in reliance on the filing of a second postponement request which had no prospects for being granted and which was denied at the commencement of the hearing, and the hearing could not be completed on the scheduled date because of delays in commencing the proceeding due to complainant's actions and due to complainant's stated intention to depart from the proceedings prior to their completion. *Bush v. UW-Madison*, 93-0069-PC-ER, 9/30/93

Complainant's request for a hearing postponement, to seek counsel or to prepare her case herself, was denied when it was made approximately 2 weeks prior to hearing. Complainant had more than 3 months notice of the hearing date and significant time had been committed by respondent and by the Commission to ensure complainant had a full opportunity to litigate her claim. *Iheukumere v. UW-Madison*, 90-0185-PC-ER, 9/15/93

The examiner properly declined to delay the completion of a hearing in order to permit complainant, who appeared pro se, to subpoena a witness, a physician, where complainant had indicated at the commencement of the hearing that she would not call the physician or any other witnesses, complainant changed her mind after completing her own testimony, complainant failed to make any arrangements with the physician to insure the physician's availability and where the witness stated she was unwilling to appear and

did not have the time to appear. *Smith v. UW-Madison*, 90-0033-PC-ER, 7/30/93

Petitioner's request for an indefinite stay of proceedings in order to pursue his case in federal court was denied where petitioner had not yet filed a federal action, respondent opposed the request and respondent had the burden of proof as to one of the two cases before the Commission. The Commission modified petitioner's request and granted him a stay until the earlier of September 1 or 30 days from the service of any federal court proceeding, at which time the request for an indefinite stay was to be reconsidered. *Hodorowicz v. WGC*, 91-0078-PC, 91-0177-PC-ER, 4/23/93

The Commission denied the complainant's postponement request where there had already been a significant delay in the hearing and the respondent had consistently raised objection to further postponements. The fact that complainant had moved out of state was not a sufficient basis for postponing a hearing another six and one-half months, where the proceeding had already been postponed approximately one year for the same reason. *Adams v. UW-Madison*, 90-0051, 0052-PC-ER, 12/29/92

The examiner properly denied complainant's request for a postponement in order to subpoena a witness where the complainant had been informed in writing and before the commencement of the hearing that the witness had moved to California, the postponement request was made after testimony of all scheduled witnesses had been completed and the parties were making arguments regarding the admission of certain exhibits, and the parties had agreed before the last day of hearing as to which witnesses remained to testify and the California witness was not identified at that point. *Pugh v. DNR*, 86-0059-PC-ER, 9/26/88

The Commission granted respondent's motion for an expedited hearing in order to limit damages where respondent did not contest liability except as to the issue of remedy. The Commission established specific truncated periods for holding a prehearing conference, completing discovery and responding to discovery requests. The hearing was to be held "as soon after the… discovery period as is feasible." *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 10/14/85

The Commission declined to grant what was in effect, a hearing postponement, so that complainant could seek to retain another attorney, where a proposed decision had been issued in the matter, several postponements had already been granted in the case and the complainant knew or should have known that he would be required to present witnesses and exhibits in support of his charge at the hearing. *Harris v. DILHR*, 81-PC-ER-52, 6/21/83

735 Settlement efforts and agreements (also see 717.5 and 738.4)

A settlement agreement reached in a case before the Commission was subject to release to the public under the open records law where the agreement revealed that: 1) an employment dispute existed that led ultimately to the termination of employment; 2) the employe disputed the grounds for the termination and challenged it before the Commission, claiming the termination was discriminatory; 3) the employe agreed to resign, not seek future employment with the employer, drop his claims and be provided with a neutral reference; and 4) the parties agreed that a performance evaluation, letter of reprimand and letter of termination would be pulled from the employe's personnel file and held separately. Disclosure of those other documents was not before the court. There was nothing in the settlement agreement that created any reasonable expectation of non-disclosure on the part of the employe. *Carter v. Wis. Pers. Comm.*, 98-CV-2620, Dane County Circuit Court, 1/28/99

Where it was undisputed that the parties reached a settlement agreement on the Friday before the Monday on which the hearing was scheduled to begin, complainant was not permitted to attempt to revive a hearing on the merits after he had changed his mind about settling the case over the weekend and appeared for hearing on Monday wishing to proceed. The settlement reached by the parties was a reasonable attempt to resolve the alleged discriminatory practice and did not appear to be contrary to the policies underlying the FEA. Complainant did not allege the agreement was procured by fraud or bad faith and there had been a meeting of the minds as to all terms of the settlement agreement. *Geen v. DHFS*, 97-0100-PC-ER, 1/13/99

736 Dismissal (includes failure to respond to 20 day letter)

Appellant was put on notice that a motion to dismiss was pending due to his failure to appear at the scheduled hearing and he was given more than a fair opportunity to explain, in writing, his absence. Appellant failed to explain his absence by the established deadline. The Commission was not required to give him a separate hearing on whether he had good cause for missing the hearing. *Oriedo v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0260, 12/11/98

Respondent's motion to dismiss for failure to prosecute was granted, where complainant had previously submitted a written statement that he would not attend the scheduled hearing the following week, which he described as "essentially meaningless," and would not withdraw his complaint of age discrimination relating to the failure to select him for a faculty vacancy. *Huff v. UW (Superior)*, 97-0105-PC-ER, 3/10/99

The 20 day period for responding to a certified letter from the Commission commences on the date of the Commission's letter rather than the day complainant received the certified letter. Complainant knew or should have known that the 20 day filing period commenced with the date of the Commission's letter. *Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99

Complainant's contention that he had been under the care of physicians due to stress caused by his work situation and that he was forced to take "some leave" during the period for responding to a 20 day letter, was an insufficient basis on which to conclude that the stress he experienced prevented him from picking up the certified letter, which he admittedly knew was at the post office waiting for him, or from filing a timely response to the certified letter. Complainant failed to reasonably cooperate with the Commission's attempts to process his discrimination complaints. His FEA claims were dismissed for failure to comply with the 20 day requirement. *Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99

Lack of prosecution issues in regard to public employe safety and health claims and whistleblower claims are

analyzed under §PC 2.05(4)(b), Wis. Adm. Code, rather than the 20 day certified letter provision in §111.39(3), Stats. *Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99

Complainant's public employe safety and health and whistleblower claims were dismissed where complainant failed to provide a copy of his suspension letter despite repeated requests. *Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99

Where complainant had been unresponsive to prior letters but answered the Commission's final letter requesting information one day late, the Commission imposed an inference at the investigative stage of complainant's public employe safety and health and whistleblower claims that respondent had no knowledge of the events that served as the basis for his retaliation claims. The net effect of the inference was to issue a "no probable cause" initial determination as to those claims. *Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99

Where complainant had been warned repeatedly about using inappropriate language in his filings and where he had failed to make use of an express opportunity to correct the inappropriate language, his complaint was dismissed due to complainant's failure to maintain an appropriate level of decorum. *Benson v. UW (Whitewater)*, 98-0179-PC-ER, 11/20/98

Dismissal, though an extreme sanction, was appropriate where complainant failed to attend his scheduled deposition and the failure was intentional and in bad faith. Complainant refused to attend the deposition that had been scheduled with relatively short notice although it had been scheduled to take advantage of complainant's presence in Wisconsin to attend another Personnel Commission proceeding. The deposition had been discussed during two separate telephone conferences with the designated hearing examiner and the parties. Complainant also refused to respond to specific questions posed by the designated hearing examiner in a letter to the parties establishing a briefing schedule on respondent's motion to dismiss. *Huff v. UW (Stevens Point)*, 97-0092-PC-ER, 11/18/98

No other sanction short of dismissal adequately addressed complainant's pattern of contumacious behavior. Respondent's motion to dismiss for failure to prosecute was

granted where complainant's actions amounted to egregious conduct. Complainant was allowed a great deal of latitude in proceeding with his cases and was given every reasonable opportunity to present his cases, but failed to appear at the fourth day of hearing and failed to provide any medical documentation that he was too ill to have attended the hearing. Complainant's credibility had been severely debilitated and he demonstrated a lack of good faith in his approach to the processing of his cases at the hearing stage. *Allen v. DOC,* 95-0057-PC-ER, etc., 11/4/98

Dismissal was too severe a sanction for complainant's failure to appear at a conference relating to a Family Medical Leave Act claim. Even though complainant knew of the importance of appearing at the conference and had no good excuse for failing to appear, she telephoned the hearing examiner three hours after the conference to explain her failure to appear and made herself available for a second conference to attempt to resolve the matter informally. *Neumaier v. DHFS,* 98-0180-PC-ER, 11/4/98

Where complainant consistently and successfully avoided or ignored the Commission's requests for information on January 9, January 27, February 20, May 4 and June 15, regarding the two complaints, consistently ignored the warning given him by the Commission and ignored the notice of sanctions if he failed to answer or to produce requested information, his complaints were dismissed for lack of prosecution. Complainant had submitted various materials to the Commission, including four new cases, during the same period in which he alleges he was unavailable or too busy to respond to the Commission's requests for information. *Benson v. UW (Whitewater),* 98-0004, 0014-PC-ER, 8/26/98

The fact that complainant may not have claimed, opened or read the correspondence from the Commission does not absolve him from his responsibilities to pursue his case. *Benson v. UW (Whitewater),* 98-0004, 0014-PC-ER, 8/26/98

Complainant's complaint was dismissed where neither complainant nor her attorney appeared at hearing. Even if complainant, herself, did not receive notice of the hearing, her attorney did receive proper notice. Any lack of notice to complainant was the direct result of her failure to keep

either her attorney or the Commission apprised of her whereabouts, which is complainant's responsibility under §PC 1.03(1), Wis. Adm. Code. Complainant failed to provide any reason for not meeting her responsibility. *Thyrion v. DHFS*, 96-0081-PC-ER, 7/15/98

Respondent's motion to dismiss for failure to prosecute was granted in April of 1998 with respect to a complaint filed in December of 1994, where even though complainant had been incarcerated since June of 1997, he did nothing to process his complaint during the prior six months. While incarcerated, complainant did not advise the Commission of his circumstances or address or make any attempt to keep his complaint alive. *Tetzner v. SPD*, 94-0182-PC-ER, 4/29/98

Complainant failed to timely respond to a 20 day letter issued under §111.39(3), where the certified letter was dated January 12th and his response was not received until February 4th. Complainant's argument that he could only complete his legal research on January 31st, a weekend, was rejected and the complaint was dismissed. *Vest v. UW (Green Bay)*, 97-0042-PC-ER, 3/20/98

The complaint was dismissed due to complainant's failure to appear at the hearing. Complainant failed to exchange any exhibits or a witness list in advance of hearing and did not provide advance notice that he would not appear. Complainant's request for postponement of the hearing, filed one week before the hearing was scheduled to commence, had been denied. *Oriedo v. DPI*, 96-0124-PC-ER, 1/14/98; affirmed by Dane County Circuit Court, *Oriedo v. Wis. Pers. Comm. et al.*, 98-CV-0260, 12/11/98

Complainant's charge was dismissed for lack of prosecution where he did not file his response to a letter issued under §111.39(3) until more than 20 days after it was mailed. Complainant's arguments that his father was suffering from cancer and he had a death in the family were not material. *Powell v. DHFS*, 97-0147-PC-ER, 1/14/98

Where complainant had been sent three letters, over the course of a three month period, requesting certain information relating to her complaint, had failed to request additional time or provide the requested information even though she had twice indicated, orally, that she would

respond, her claims of Fair Employment Act discrimination and retaliation for engaging in whistleblower activities were dismissed. The final letter to the complainant had been sent by certified mail and recited §111.39(3), Stats. *Johann v. Office of Milwaukee County District Attorney*, 97-0045-PC-ER, 10/9/97

Respondent's motion to dismiss was granted where only one of complainant's allegations of discrimination was timely filed and that one allegation was precluded by an earlier ruling on sanctions which barred complainant from presenting evidence that was the subject of respondent's discovery request, and where it had been nearly 3 years since complainant's motion to stay proceedings had been granted pending a decision on complainant's claim in state or federal court but complainant never filed in court. It was not inappropriate to revisit the motion to dismiss which respondent had filed as part of its request for discovery sanctions where, in its ruling on that motion, the Commission declined to dismiss the complaint "at this time" which implied possible reconsideration of the question at a later stage in the proceedings. *Germain v. DHSS*, 90-0005-PC-ER, 91-0083-PC-ER, 4/11/97

Complainant's request for a second hearing opportunity was denied and respondent's motion to dismiss granted where complainant did not appear on the noticed date for hearing, respondent moved to dismiss a half-hour after the time the hearing was scheduled to commence, complainant appeared at the appointed hour and location on the day after her scheduled hearing and complainant had no excuse for not appearing one day earlier other than describing it as "an unfortunate error" on her part. Complainant failed to show good cause for her failure to appear under §PC 5.03(8)(a), Wis. Adm. Code. *Finley v. UW-Madison*, 95-0007-PC-ER, 3/26/97

Respondent's motion to dismiss for lack of prosecution was granted where complainant failed to have served on respondent either exhibits or a witness list at any time prior to the hearing. Complainant contended that he understood he could rely on documents already submitted during the course of the investigation without having to satisfy the filing and service requirements of §PC 4.02, Wis. Adm. Code. However, the prehearing conference report explicitly informed the parties of the date for complying with the filing and service requirement. Complainant refused to

explain his conclusory statement that there were mitigating circumstances. *Smith v. DOC*, 95-0134, 0169-PC-ER, 11/14/96

Where the Commission received a written response from complainant's attorney on the last day of the 20 day period for responding to a certified letter, the dismissal penalty provided by §111.39(3), Stats., was inapplicable even though the reply failed to provide the information sought by the Commission and even though counsel unilaterally gave himself a 30 day extension for providing the information. *Jackson v. DOC*, 94-0115-PC-ER, 3/7/96

The purpose behind §111.39(3), Stats., is to provide authority to dismiss claims where a failure to respond is deemed, under the prescribed set of circumstances, as sufficient indication that the complainant does not wish to go forward with the litigation. *Jackson v. DOC*, 94-0115-PC-ER, 3/7/96

Complainant's failure to respond to the Commission's letter which provided him an opportunity to set forth any disagreement he may have had with respondent's answer, either within the period provided by the initial letter or pursuant to subsequent extensions, was not a basis for dismissal of the complaint. Respondent's motion to dismiss was denied. However, the investigator was directed not to give any consideration to any subsequent response that might be filed by complainant. *Berg v. UW-Eau Claire*, 94-0154-PC-ER, 3/31/95

Petition for rehearing was denied with respect to a decision to dismiss for lack of prosecution. The cases had been dismissed when complainant filed his response to a certified letter from the Commission after the specified deadline and had not provided dates for scheduling a prehearing conference for more than 16 months, despite several written requests. Additional information offered by the complainant as to his circumstances and his efforts to retain counsel were an insufficient basis for granting the petition. The cases included claims under the whistleblower law and the FEA. *Behnke v. UW-Madison*, 89-0135-PC-ER, etc., 8/18/94 (Ruling on petition for rehearing)

Where complainant had been informed that his complaint would be dismissed unless, within 20 days, he 1) indicated he wished to pursue the matter and 2) provided dates for

scheduling a prehearing conference, and where his response was not received until one day after it was due and did not provide any dates for scheduling the conference, it was dismissed. The Commission had waited for over 16 months for complainant to provide a date for a prehearing conference. *Behnke v. UW-Madison*, 89-0135-PC-ER, etc., 7/7/94; rehearing denied, 8/18/94

Receipt of response from complainant on 20th day after mailing of request for information was a timely response. Date of mailing was established by postmark on "Receipt for Certified Mail" where that date was inconsistent with date of letter requesting information. *Dutter v. DNR*, 93-0148-PC-ER, 2/3/94

This FMLA complaint was dismissed for lack of prosecution where complainant and her union representative were aware of the 60-day hearing requirement and agreed to the scheduling of the date for hearing, complainant's subsequent request for postponement was denied, complainant and her representative failed to prepare for hearing in reliance on the filing of a second postponement request which had no prospects for being granted and which was denied at the commencement of the hearing, and the hearing could not be completed on the scheduled date because of delays in commencing the proceeding due to complainant's actions and due to complainant's stated intention to depart from the proceedings prior to their completion. *Bush v. UW-Madison*, 93-0069-PC-ER, 9/30/93

In ruling on a motion to dismiss for failure of prosecution, dismissal is discretionary once it has been determined that there has been an egregious failure to comply with an order and there is no showing of a clear and justifiable excuse. Respondent's motion was denied even though a number of deadlines had been missed without a showing of cause or excuse where the cases were essentially in the status of awaiting Commission investigation so it could not be said that the conduct of complainants' counsel caused any processing delays and there was no showing of prejudice to respondents. *Harden et al. v. DRL & DER*, 90-0092-PC-ER, etc., 12/17/92

The 20 day period for responding to a certified letter under §111.39(3) is not tolled by a fear of retaliation that might ensue. *Allison v. Wis. Lottery*, 90-0158-PC-ER, 7/11/91

Where the complainant's response to the Commission's certified letter was received 21 days after the date the Commission mailed its letter, the complaint was dismissed for lack of prosecution. *King v. DHSS*, 88-0007-PC-ER, 5/29/91

Complaint was dismissed for lack of prosecution where complainant left during the hearing after having disagreed with the examiner's decision to admit an exhibit over the complainant's objection and after having been advised that, by leaving, complainant was waiving her right to proceed with the matter. *Acharya v. DOA*, 88-0197-PC-ER, 10/3/89

The Commission is not required to actually serve a complainant with notice before a complaint can be dismissed for lack of prosecution. The 20 day time period commences on the date the letter is sent rather than on the date of receipt by the complainant. *Block v. UW-Madison Extension*, 88-0052-PC-ER, 7/14/89

Complaint was dismissed where complainant telephoned the Commission on the 21st day after a certified letter was sent to her and filed a response with the Commission on the 22nd day. *Billingsley v. DOR*, 87-0132-PC-ER, 7/13/88

The 20 day time period for responding to a certified letter commences when the letter is sent to the person's last known address rather than when the letter is received by that person. The complainant's petition for rehearing, which arose from the Commission's decision to dismiss the complaint for lack of prosecution, was denied. *Jackson v. DHSS*, 87-0149-PC-ER, 3/10/88

Complainant's case was properly dismissed on December 3rd for lack of prosecution where the Commission never received a response to an October 6th letter requesting certain additional information and the Commission's November 9th certified letter to complainant was returned unclaimed and, as a consequence, complainant failed to respond within the 20 day statutory time period. Petition for rehearing was denied. *Moss v. DNR*, 87-0028-PC-ER, 1/13/88

Complaint was dismissed for failure to respond within the 20 day period provided by statute where complainant did not respond until six days after the end of the period. Complainant argued that she was unaware the 20 day period

included all days rather than just work days.
***Wells-Patterson v. Sec. of State*, 83-0049-PC-ER, 5/3/84**

736.5 Withdrawal of claim

Where complainant asserted that her failure to submit a notarized version of her complaint of discrimination was due to circumstances beyond her control, i.e. her psychiatric situation, complainant's petition for rehearing was granted and the order dismissing her case, because she had failed to respond to correspondence stating that her failure to respond would be construed as an indication that she did not wish to pursue the matter, was withdrawn.
***Siewert v. DOT*, 98-0220-PC-ER, 3/12/99**

Complainant's request to withdraw her complaints was denied where the request was received after the examiner had issued a proposed decision and order and after the Commission had denied the complainant's request for an indefinite stay. It was apparent that the complainant was forum-shopping. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 2/21/95

The complainant was ordered to provide a copy of the settlement agreement so that the Commission could properly exercise its discretion in determining what will eliminate the discrimination alleged in her complaint because the Commission has the power to proceed against the employer even where parties to the complaint have withdrawn. The review also allows the Commission to consider whether the agreement contravenes public policy.
***Vande Zande v. UW-Extension*, 89-0119-PC-ER, 9/30/93**

Pursuant to §PC 1.11, Wis. Adm. Code, the Commission has the authority to exercise its discretion to grant or deny a request for voluntary dismissal. It was appropriate for the Commission to grant voluntary dismissal of certain claims after a hearing but before the issuance of a proposed decision and order. Respondent's petition for rehearing in regard to the Commission's order of dismissal was denied.
***Ames v. UW-Milwaukee*, 86-0123, 0124-PC-ER, 6/7/88**

Where complainant asserted that her failure to submit a notarized version of her complaint of discrimination was due to circumstances beyond her control, i.e. her psychiatric situation, complainant's petition for rehearing was granted and the order dismissing her case, because she had failed to respond to correspondence stating that her failure to respond would be construed as an indication that she did not wish to pursue the matter, was withdrawn. *Siewert v. DOT*, 98-0220-PC-ER, 3/12/99

Complainant's request for a second hearing opportunity was denied and respondent's motion to dismiss granted where complainant did not appear on the noticed date for hearing, respondent moved to dismiss a half-hour after the time the hearing was scheduled to commence, complainant appeared at the appointed hour and location on the day after her scheduled hearing and complainant had no excuse for not appearing one day earlier other than describing it as "an unfortunate error" on her part. Complainant failed to show good cause for hear failure to appear under §PC 5.03(8)(a), Wis. Adm. Code. *Finley v. UW-Madison*, 95-0007-PC-ER, 3/26/97

The Commission lacks the authority, under either the Fair Employment Act or the whistleblower law, to enforce the terms of settlement agreements. Where complainant's charge was clearly focused on the terms of, and the enforcement of, a settlement agreement reached in three previously filed complaints which had been dismissed pursuant to the settlement agreement, the respondent's motion to dismiss was granted. The Commission also lacked the authority to reopen the previously closed cases, citing *Haule v. UW*, 85-0166-PC-ER, 8/26/87. *Jordan v. DNR*, 96-0078-PC-ER, 1/30/97

The Commission denied complainant's request to reopen the hearing for further evidence because she had a full opportunity to offer evidence of her allegations of discrimination at the hearing but did not make use of the opportunity provided her. *Smith v. UW-Madison*, 90-0033-PC-ER, 7/30/93

The Commission lacks authority to toll, due to mental illness, the limitation on the time period for filing a petition for rehearing. *DePagter v. UW-Madison*, 93-0003-PC-ER,

7/22/93

The complainant's petition for rehearing was denied where the Commission had affidavits of mailing reflecting that the complainant's Initial Determination and dismissal order were mailed to his address even though he alleged he did not receive them. The Commission is not required to establish service through the use of certified mail. *Stewart v. DOR*, 92-0062-PC-ER, 3/10/93

A misunderstanding by a party as to the scope of proceedings is not a sufficient basis upon which to grant a petition for rehearing. *Beaverson v. DOT*, 88-0109-PC-ER, 11/19/90; affirmed by Dane County Circuit Court, *Wis. DOT v. Wis. Pers. Comm.*, 90-CV-4982, 6/4/91; affirmed by Court of Appeals, 169 Wis. 2d 629, 486 N.W.2d 545, 6/4/92; reversed on other grounds by Supreme Court, 176 Wis. 2d 731, 500 N.W.2d 664, 6/9/93

The Department of Employment Relations was a "person aggrieved" under §227.49(1), Stats., for the purpose of filing a petition for rehearing of the Commission's legal conclusions regarding the family leave/medical leave law where those legal conclusions directly caused injury to DER's interests in the bargaining and administration of the state's leave benefit provisions and where DER's interests were recognized by the family leave and medical leave act. *Lawless v. UW-Madison*, 90-0023-PC-ER, 6/1/90; precedential value qualified, 1/11/91

DER's petition for rehearing was granted where the Commission's implicit conclusion in its previous decision that the leave granted by the respondent for the birth of an employe's natural child was no more restrictive than the leave available under §103.10(3)(b)1., Stats., constituted a material error of law or material error of mixed fact and law. *Lawless v. UW-Madison*, 90-0023-PC-ER, 6/1/90; precedential value qualified, 1/11/91

Petition was denied where the complainant failed to point to any evidence of record which would show that the Commission's factual conclusion was erroneous or to any reason why complainant did not make a record or did not have an opportunity to make a record to sustain his position with respect to the factual dispute. *Morkin v. UW-Madison*, 85-0137-PC-ER, 12/29/88; affirmed by Dane County Circuit Court, *Morkin v. Wis. Pers. Comm.*, 89-CV-0423,

9/27/89

Where, in its December 3rd Order, the Commission had properly concluded that the complainant did not wish to prosecute his claim, there was neither a material error of factor of law, nor did appellant allege the discovery of new evidence, and the petition for rehearing was denied. *Jones v. UW-System*, 87-0102-PC, 1/14/88

Complainant's case was properly dismissed on December 3rd for lack of prosecution where the Commission never received a response to an October 6th letter requesting certain additional information and the Commission's November 9th certified letter to complainant was returned unclaimed and, as a consequence, complainant failed to respond within the 20 day statutory time period. Petition for rehearing was denied. *Moss v. DNR*, 87-0028-PC-ER, 1/13/88

Where complainant had conducted substantial prehearing discovery and had devoted much of probable cause hearing to presentation of evidence intended to contradict or impeach respondent's evidence, the Commission declined to permit complainant to reopen or augment the record after the issuance of a proposed decision. Complainant's request was premised on the argument that she was surprised by the probable cause standard applied in the proposed decision. *Boyle v. DHSS*, 84-0090, 0195-PC-ER, 9/22/87, modified 10/27/87

738.4 Reopen where allegation of failure to fulfill settlement agreement

Complainant's request to reinstate his original charge of discrimination over a year after the charge was dismissed at the complainant's written request, was denied. The complainant's request for enforcement of a settlement agreement was also denied. *Haule v. UW-Milwaukee*, 85-0166-PC-ER, 8/26/87

The Commission dismissed complainant's petition to reopen 5 cases which had been dismissed two years earlier. Complainant contended the respondents had breached the terms of the settlement agreements that served as the basis for the dismissal orders and sought a form of damages for the breach. The Commission found it lacked the authority to

invoke its remedial authority and award the requested relief because there had been no finding of discrimination. However, the complainant was permitted to file a new complaint of discrimination arising out of respondent's conduct after the 1985 settlement agreement where complainant alleged that the employment references provided by respondents constituted discrimination. *Rogers v. DOA*, 81-PC-ER-111, 82-PC-ER-31, 134, 135, *Rogers v. DOA and Ethics Board*, 83-0076-PC-ER, *Rogers v. DOA and Ethics Board*, 87-0010-PC-ER, 6/11/87

The Commission lacks the authority to enforce a settlement agreement entered into in two Fair Employment cases. *Janowski & Conrady v. DER*, 86-0125, 0126-PC, 10/29/86

The Commission denied complainant's petition to reopen filed fifteen months after the complaint was ordered dismissed based upon a settlement agreement, and held that a petition to reopen was not one of the two procedures available for enforcing an order of the Commission provided in §111.39, Stats. Complainant contended that respondent had failed to comply with the terms of the agreement. *Alwin v. DHSS*, 83-0122-PC-ER, 7/12/85

Where nine months after a complaint of discrimination had been dismissed on the basis of a settlement agreement the complainant petitioned to vacate the dismissal and to reopen the case, the Commission held that it lacked such authority, citing *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W. 2d 529 (1971), and noting that there was at least a reasonable doubt as to the existence of such authority, and that the complainant had the option of seeking enforcement of the stipulation pursuant to §111.36(3)(d), Stats. *Elder v. DHSS*, 79-PC-ER-89, 3/19/82

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 792 through 792.04

[Previous material] [Next material]

---

792 Whistleblower (subch. III, ch. 230, Stats.) retaliation

792.01 Generally

A disclosure need not be made to a first-line supervisor, but may be made instead to a second-line supervisor, third-line supervisor, or higher level supervisor in the employe's supervisory chain of command in order to qualify as a disclosure to a supervisor within the meaning of §230.81(1)(a), Stats. However, merely because an individual processed grievances originating in the UW-Hospital did not qualify him as a supervisor of complainant, who worked for the hospital, and complainant did not make a protected disclosure. *Williams v. UW-Madison*, 93-0213-PC-ER, 9/17/96; affirmed by Dane County Circuit Court, *Williams v. Wis. Pers. Comm.*, 96 CV 2353, 11/19/97

A union grievance filed by complainant qualified as a protected whistleblower disclosure to her collective bargaining representative within the meaning of §230.81(3). *Williams v. UW-Madison*, 93-0213-PC-ER, 9/17/96; affirmed by Dane County Circuit Court, *Williams v. Wis. Pers. Comm.*, 96 CV 2353, 11/19/97

Where the protected disclosure consisted of a union grievance relating to the presence of cockroaches in campus buildings and where respondent processed the grievance as it was required to do under the applicable collective

bargaining agreement, there was no showing that respondent concluded that investigation of the health and safety issue presented in the grievance was merited or that such an investigation occurred. Therefore, complainant failed to establish the prerequisite for presuming, under §230.85(6), that a subsequent suspension constituted whistleblower retaliation. *Williams v. UW-Madison*, 93-0213-PC-ER, 9/17/96; affirmed by Dane County Circuit Court, *Williams v. Wis. Pers. Comm.*, 96 CV 2353, 11/19/97

The statutory presumption of retaliation established in §230.85(6), Stats., was inapplicable to that component of a written disclosure by complainant to the department secretary relating to an allegation that a co-worker of complainant was violating respondent's fraternization policy where complainant had raised the fraternization issue once before, it had been investigated and resolved by a previous secretary and, as a result, respondent did not feel this part of complainant's more recent disclosure merited further investigation. However, where the second component of complainant's written disclosure, that an employe used work phones for personal calls, was the subject of individual meetings with employes in complainant's work unit after the date of the disclosure, it appeared as though respondent felt that this part of the disclosure merited further investigation and, as a result, the statutory presumption of retaliation would apply. *King v. DOC*, 94-0057-PC-ER, 3/22/96

In ruling on a motion for failure to state a claim, appellant's memo, which referred to the absence of a maintenance agreement for the equipment in two offices, could be said to satisfy the requirements for a written disclosure of "mismanagement." *Duran v. DOC*, 94-0005-PC-ER, 10/4/94

Complainant's testimony in federal court was not a disclosure protected by the whistleblower law because it did not fit within any of the communications enumerated in §230.81, Stats. *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant made a protected disclosure to her legislator when she sent him a copy of a letter she sent to her employer concerning her request for reassignment to her previous route as a handicap accommodation. While the

letter did not explicitly allege a violation of state laws, considered in the context of other communications with the legislator and using a liberal construction of the statute, the communication met the requirement of "information gained by the employe which the employe reasonably believes demonstrates a violation of any state . . . law." *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant's consultations with her attorney concerning her request for accommodation also constitute a covered disclosure pursuant to §§230.80(5)(a), 230.81(1) and (3). *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Where respondent DER received a letter from complainant (who was not a DER employe) regarding the reclassification of his position and protection under the whistleblower law, and, in response, referred complainant to the Personnel Commission as the agency specified in the whistleblower law as having responsibility for receiving and deciding complaints of whistleblower retaliation, respondent DER met its obligation under the whistleblower law and would not be liable for retaliation if complainant had been the victim of retaliation by his employing agency. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

DER was properly a party to a whistleblower claim where it was alleged that it violated the whistleblower law with respect to the determination of complainant's protective occupation status. *Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER, 9/17/93

In deciding a motion to dismiss for failure to state a claim, the Commission was unable to determine on the limited record before it whether a conversation with a co-employe concerning a statement made by the agency head would be considered a verbal disclosure to "any other person" that was not preceded by a disclosure under either §230.81(1)(a), Stats. (in writing to the supervisor) or §230.81(1)(b) (in writing to a governmental unit designated by the Commission), and hence not a disclosure covered by the whistleblower law, or whether the conversation with the co-employe was part of assisting "in any action or proceeding relating to the lawful disclosure of information under §230.81 by another employe," within the meaning of

§230.80(8)(b). *Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER, 9/17/93

The whistleblower law covers disclosures to legislators and the legislature, and thus includes a disclosure to a private sector auditor providing services for the legislature. *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 10/16/92

Complainant's disclosure was not protected under the whistleblower law, because it fell within the exception set forth in §230.83(2), Stats., for disclosures for personal benefit. Complainants' disclosure was that their positions lacked the appropriate arrest authority notwithstanding that their position descriptions called for law enforcement certification, and the lack of such authority jeopardized their continued law enforcement certification and protective occupation status. The provision in §230.83(2), that the law does not apply to an employe whose disclosure is made to receive something of value, clearly applies to an employe who makes a disclosure in order to perpetuate the receipt of benefits to which the employe is not entitled. Here, complainants appear to contend that once the disclosure was made, their employer should have proceeded to assign them the enforcement authority that was described on their inaccurate position descriptions. This would result in the receipt of something of value--i.e., their retirement benefits would be greater in protective occupation status. *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 10/16/92

Complainants alleged that respondent's settlement offer constituted a threat to terminate their protective occupation status and constituted a threat of retaliation under the whistleblower law. Respondent contended in support of their motion to dismiss for failure to state a claim that its action was not prohibited by the whistleblower law. The Commission held that since the offer presented two options (depending on whether or not the offer was accepted), both of which were penalties, the offer can be seen as a vehicle for retaliation, and covered by the whistleblower law. *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 10/16/92

792.02(2) Finding of *no* probable cause

No probable cause was found as to complainant's FEA retaliation, occupational safety and whistleblower claims arising from the decision not to reclassify his position where respondent contended that the request was denied because complainant's position did not meet the requirements of the higher classification and complainant did not show respondent's decision was unreasonable or that respondent applied the specification's requirements more stringently for him than for employes who had not engaged in protected activities. *Holubowicz v. DOC,* 96-0136-PC-ER, 4/24/97

No probable cause was found as to complainant's occupational safety and whistleblower claims arising from the decision to require him to undergo an interview for a vacant position along with other names on the certification list, rather than to transfer into the position without an interview, where the record did not indicate that the alleged retaliator knew the position's classification had been lowered prior to the date the certification list was generated, respondent had posted the position for transfer prior to accepting applications for competition and the record did not indicate that respondent would have had an obligation to post the position for transfer a second time, and complainant waited until minutes before his interview started before requesting an opportunity to transfer without an interview. *Holubowicz v. DOC,* 96-0136-PC-ER, 4/24/97

No probable cause was found with respect to a decision to reorganize the complainant's work unit where the reorganization did not result in any change in the complainant's classification or his position description and there was no evidence that the reorganization plan was promulgated so as to retaliate against the complainant. *Holubowicz v. DHSS,* 88-0097-PC-ER, 9/5/91

No probable cause was found with respect to the respondent's decision to bar entry of complainant into a correctional institution where such action was standard procedure when there was an investigation pending which directly affected institution security. In addition, the respondent's action was taken by persons who were unaware that complainant had engaged in a protected activity. *Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91

No probable cause was found with respect to the respondent's scheduling the complainant for a pre-disciplinary hearing where respondent's practice was to schedule such hearings whenever an investigation had identified a work rule violation and the person who had conducted the investigation was unaware that complainant had engaged in a protected activity. *Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91

792.03(2) Finding of *no* retaliation

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to assign complainant additional job duties where complainant was the logical staff member to assume the duties and complainant indicated she would "be happy" to do so. *King v. DOC*, 94-0057-PC-ER, 11/18/98

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to move complainant to another work station where complainant was the lowest classified/least senior employe in the work unit and the other options would not have accomplished the same goals. *King v. DOC*, 94-0057-PC-ER, 11/18/98

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to deny complainant's request for leave on a specific date where complainant was already scheduled to participate in a meeting on the day in question. Respondent's subsequent decision not to permit complainant to use accrued leave after she walked out of the meeting was also justified and not discriminatory where it is respondent's practice not to approve leave when an employe walks off the job without authorization. *King v. DOC*, 94-0057-PC-ER, 11/18/98

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to reprimand complainant for walking off the job without authorization. Complainant had been warned at the time that walking off the job would have a consequence, and complainant had violated several earlier directives. *King v. DOC*, 94-0057-PC-ER, 11/18/98

Respondent successfully rebutted the presumption of

causation arising from a finding that complainant's disclosure merited further investigation and from complainant's discharge within two years thereafter. Complainant was employed as a food service worker in a correctional institution. Shortly after she successfully completed her probationary period, respondent learned that she had, on several occasions, violated the policy prohibiting fraternization with the inmates. Complainant's actions violating the fraternization policy provided a legitimate, non-retaliatory reason for terminating her employment. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

No whistleblower retaliation was established regarding the decision to terminate the complainant's probationary employment where questions about the adequacy of complainant's work performance had existed for months and extensive documentation of the problems with his performance had been prepared before respondent received notice of the complainant's protected activity. *Stark v. DILHR*, 90-0143-PC-ER, 9/9/94

An employer will not be held accountable for acts of alleged retaliation when the complainant was given the opportunity to provide information relating to the allegations to representatives of the employer but generally declined to do so. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

The following allegedly retaliatory acts did not rise to the level of "verbal or physical harassment" within the meaning of §230.80(2), Stats.: complainant was forced off the road when a co-worker (with whom he had a personality conflict) cut him off sharply in traffic and this same co-worker would not allow complainant to park in the garage with other trucks. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

Respondent's decision not to allow inclusion of the union steward or attorney requested by the complainant to represent the complainant at an investigative meeting was not retaliatory where there was nothing in the department-wide policy which indicated that the represented employe had the choice to select either a personal attorney

or a local union grievance representative who was unavailable at the time of the hearing and there was no evidence that on other occasions, delays in the hearings had been permitted to allow for representation by either a personal attorney or by a union representative who was unavailable at that time. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

Respondent's decision to suspend the complainant for ten days for unauthorized distribution of literature on the grounds of a correctional institution was upheld where management had previously indicated a strong opposition to the practice of distribution union newsletters in the institution, antagonism between the complainant and management preceded the complainant's protected activities, those protected activities were not significant departures from complainant's previous conduct, the person who made the final decision to suspend the complainant was unaware that complainant had engaged in any of the specific protected activities and within the previous 10 months, the complainant had received a written reprimand, and two three-day suspensions. Respondent's decision not to modify the suspension after another employe admitted to distributing some of the literature was upheld where the policy violated by the complainant did not differentiate the degree of malfeasance based on the amount of information found to have been distributed. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

The following actions by the respondent were not found to be retaliatory: 1) the refusal to provide assistance when the complainant called for help where testimony indicated assistance was not required, 2) the decision to investigate a report which raised serious questions about complainant's conduct, 3) the decision to substitute a day of suspension for a previously scheduled day of vacation where the person who made the change was unaware that the change was not desired by the complainant, 4) the decision to deny complainant admittance to the correctional institution grounds during the period of his suspension where respondent's action was consistent with existing policy. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

No retaliation was found with respect to respondent's decision to suspend the complainant for 10 days where the complainant had disrupted the work and morale at the worksite, co-workers made unsolicited complaints about

complainant to management and complainant had been disciplined several times before, most recently for violent and threatening behavior toward 2 superiors. *Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88; rehearing denied, 12/29/88; affirmed by Dane County Circuit Court, *Morkin v. Wis. Pers. Comm.*, 89-CV-0423, 9/27/89

792.04 Prima facie case

Complainant failed to establish a prima facie case of whistleblower retaliation where he failed to present any evidence of having made a protected whistleblower disclosure. *Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98

Filing a complaint of whistleblower retaliation is itself a protected activity under the whistleblower law. Therefore, a disciplinary action threatened or imposed after respondent learned of complainant's charge of whistleblower retaliation could constitute illegal retaliation under the whistleblower law. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Even though complainant had not submitted copies of the written disclosures that served as the basis for his complaints of retaliation, he described the disclosures in a manner that was sufficiently specific to withstand respondent's motion to dismiss for failure to specify the "information " he had disclosed. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Qualifying disclosures under the whistleblower law need not be made to a first-line supervisor in order to qualify as a disclosure to a supervisor within the meaning of §230.81(1)(a), Stats. Qualifying disclosures may be made instead to a second-line supervisor, third-line supervisor, or higher level supervisor in the employe's supervisory chain of command. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

When a faculty member is the "employe" making a whistleblower disclosure, it is reasonable to interpret "supervisor" to include the campus chancellor, the college dean and the department chair of the department containing the employe's position. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant, a faculty member, alleged that respondent had removed his secretary, i.e. denied him all secretarial services, respondent's alleged conduct qualified as a disciplinary action. Respondent's motion to dismiss was denied as to this allegation. However, complainant's allegation that respondent removed a particular photocopy machine, but continued to provide him with photocopying options, was not considered a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged conduct of removing complainant from his role as a faculty advisor to a student organization related to the "removal of any duty" under §230.80(2), Stats., and fell within the scope of a disciplinary action. Respondent's motion to dismiss was denied as to that allegation. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant, a faculty member, alleged respondent refused to pay him for working with a visiting professor, it was comparable to an allegation that complainant's pay had been reduced, thus having the effect of a penalty within the scope of a disciplinary action. Respondent's motion to dismiss was denied as to that allegation. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant was a faculty member, his whistleblower allegation that respondent had threatened to remove his endowed chair fit within the scope of a disciplinary action. Respondent's motion to dismiss was denied as to that allegation. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant, a faculty member, alleged that respondent did not promptly respond to his proposal that an artist serve as "artist in residence for a few days," the allegation did not rise to the level of a disciplinary action because it resulted in no loss of pay, position, upgrade or transfer or in any other consequences commonly associated with job discipline. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant, a faculty member, alleged that respondent did not adequately respond to efforts to have several students from a foreign university attend UW-Whitewater, the alleged conduct did not rise to the level of a disciplinary action because it resulted in no loss

of pay, position, upgrade or transfer or in any other consequences commonly associated with job discipline. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Complainant's whistleblower allegation that campus administrators tried to convince a third party to commence a civil action against complainant was not a consequence commonly associated with job discipline, so it did not satisfy the requirement of disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of reminding complainant that all guest editorials had to be coordinated through the administration did not rise to the level of a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Alleged actions taken by complainant's superiors (or at their direction) to steal a fax sent to complainant, flatten the tires on complainant's car, steal his cell phone from his office, leave anonymous and derogatory notes in complainant's office, vandalize his car, prevent complainant from retrieving his personal belongings, and to take a bottle of copy machine toner that complainant had purchased, all allegedly in response to his protected activities, constituted "physical harassment" under §230.80(2)(a), Stats. Respondent's motion to dismiss was denied as to those allegations. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of responding inadequately to complainant's request relating to a public expenditure was not a disciplinary action where complainant's request was made "as a taxpayer." The allegation did not involve the employment relationship. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged statement that personnel files and records of individual faculty members were public documents and were available for inspection upon demand was not a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of making a notation on a document did not rise to the level of a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of completely barring

complainant from using the university's mail system rose to the level of a disciplinary action, assuming the complainant alleged it had a drastic effect on his ability to perform his responsibilities as a member of the faculty and that it was taken in response to complainant's protected activities. Respondent's motion to dismiss was denied as to that allegation. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged action of asking complainant to clarify whether complainant's activities in Cuba were undertaken as a private citizen or as a representative of the respondent was not a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's alleged activity in the nature of a public criticism by an employer of an employe's or group of employes' approach to a controversial issue is outside the scope of verbal or physical harassment, citing *Kuri v. UW (Stevens Point)*, 91-0141-PC-ER, 4/30/93. Administration officials were quoted in two newspaper articles relating to the complainant, a faculty member. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant was a member of the faculty, respondent's alleged action of temporarily suspending complainant's photocopying privileges at the campus library until respondent reviewed complainant's justification for his copying requests was not a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant was a faculty member, respondent's alleged action of failing to support or approve complainant's request for a one year sabbatical rose to the level of a disciplinary action. Respondent's motion to dismiss was denied as to this allegation. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Where complainant was a faculty member, respondent's alleged action of removing complainant's printing and labeling privileges rose to the level of a disciplinary action, assuming complainant alleged it had a drastic effect on his ability to perform his responsibilities and assuming it was taken in response to complainant's protected activities. Respondent's motion to dismiss was denied as to this allegation. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

A memo informing complainant that he was still required to obtain approval from the administration for any expenditure request was not a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Respondent's action of merely preventing complainant from using the employer's mail service for 2 specific memos did not rise to the level of a penalty or disciplinary action as listed in §230.80(2), Stats. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

The action of the dean of the college not to include complainant in a list of 8 individuals who were congratulated in a memo for receiving grants or donations was not a disciplinary action. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

The possibility that respondent might forward the name of a candidate for complainant, a faculty member, to consider for hire as a LTE was neither a disciplinary action nor a threat thereof. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Filing a complaint with an agency's EEO office and initiating an investigation of that complaint are not disciplinary actions. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Complainant's memo reciting discrepancies of "almost 1%" and "almost 2%" between certain affirmative action report figures and certain veteran report figures were not major differences and his memo did not satisfy the requirements of a disclosure of "information." *Sheskey v. DER*, 98-0063-PC-ER, 8/26/98

The filing of a Fair Employment Act complaint with the Personnel Commission is not a protected activity under the whistleblower law that entitles a complainant to protection under §230.80(8)(a), Stats., citing *Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92. Where the only protected activity identified by complainant was having filed previous Fair Employment Act complaints against respondents, respondents' motion to dismiss for failure to state a claim was granted. *Oriedo v. DPI et al.*, 98-0042-PC-ER, 8/12/98

The decision to investigate and to hold an investigatory meeting does not qualify as a disciplinary action under the

whistleblower law. Questions asked of complainant during that meeting did not go beyond the simply uncomfortable or inconvenient and, therefore, did not constitute language or conduct egregious enough to have a substantial, negative impact on complainant's conditions of employment. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Where the only actual change in duties or responsibilities that could reasonably be implied related to complainant having less independence in setting the schedule for his audits of fire departments, it was not a sufficiently significant change to qualify as a "removal of duties" or a "reassignment" within the meaning of §230.80(2). *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Complainant stated that all employes in his work unit had been granted home stations in 1994, but that he did not make the move to his home area of Hayward at that time for personal reasons. Approximately two years later, complainant requested relocation to Hayward. Complainant's allegation that respondent denied his request to change the geographic location from which he performed his job was sufficiently akin to a transfer or reassignment (or to their denial) to qualify as a disciplinary action within the meaning of §230.80(2). *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

A delay in processing a travel voucher does not have the permanence or the long-term impact of penalties cited in §230.80(2), as disciplinary actions. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Where it was undisputed that a decision had been made to change the duties and responsibilities of complainant's position, such an action could be equivalent to removing a duty from a position or reassignment so as to constitute a disciplinary action within the meaning of §230.80(2). *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

A decision to investigate an incident or to conduct a predisciplinary or investigatory meeting, is not a disciplinary action within the meaning of 230.80(2), since it has no inherent negative impact on an employe. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Two alleged comments by a program manager during a meeting with complainant, even if offered as a criticism of complainant's work performance, were too tenuous and

conjectural to support a conclusion that they rose to the level of a penalty on a par with those disciplinary actions enumerated in §230.80(2). Complainant alleged that the manager asked, "How long are we going to keep choking this chicken, Dave?" and then repeated the question, using hand gestures to mimic masturbation. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

Two alleged statements, standing alone, were not sufficiently severe or pervasive to support a conclusion that the conditions of complainant's employment were affected to the extent required for a finding of verbal harassment within the meaning of §230.80(2)(a). Complainant alleged that the manager asked, "How long are we going to keep choking this chicken, Dave?" and then repeated the question, using hand gestures to mimic masturbation. Even when considered with complainant's remaining allegations of verbal harassment, the cumulative effect of the allegations was insufficient to support a finding that the requirements of §230.80(2)(a), had been met. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

A written disclosure that faulted the conduct of an inmate rather than an employe was insufficient to meet the definition of "information." *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

A written report made at the request of the employer and made to individuals designated by the employer to handle the matter met the whistleblower disclosure requirements, even though it was not made to complainant's immediate supervisor. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

The whistleblower law does not include protection against retaliation by co-workers. A correctional officer's attempt to persuade an inmate to submit a concocted report against complainant, a food service worker, and other actions by correctional officers were not carried out by the appointing authority or agent of the appointing authority as required in §230.83(1). There was no persuasive evidence from which it would be reasonable to conclude that respondent fostered or condoned the officers' actions to such a degree that the officers should be considered as agents of the appointing authority. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

A statement to complainant, a food service worker, by a supervisor of officers in a correctional institution, that it

was not a good idea to "tick off" correctional officers, did not have a substantial or potentially substantial negative impact on the employe, so it was not a "disciplinary action" within the meaning of the whistleblower law. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

Where complainant's disclosure was investigated and respondent ultimately disciplined an employe because of it, the Commission concluded that the employer determined the protected disclosure merited further investigation. Therefore, the complainant was entitled to the presumption of retaliation with respect to respondent's decision to discharge her, where the discharge was within two years of when she made her protected disclosure. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

Only those personnel actions which have a substantial or potentially substantial negative impact on an employe fall within the definition of "disciplinary action" found in §230.80(2), Stats. The common understanding of a penalty in connection with a job related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform one's job efficiently. Complainant was not retaliated against where his disclosure resulted in no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline. *Vander Zanden v. DILHR*, Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 89-1355, 1/10/90

An increased workload due to a vacancy in a subordinate position does not rise to the level of a "penalty" under the whistleblower law. *Perrien v. DOC*, 95-0031-PC-ER, 7/2/97

In ruling on respondent's motion, filed after the initial determination was issued but before any hearing on the merits of the complaint, to dismiss certain issues relating to whistleblower retaliation for failure to satisfy the statutory definition of "disciplinary action" within the meaning of §230.80(2), Stats., the available information was viewed in the light most favorable to complainant. The motion was denied with respect to issues relating to: 1) the assignment of additional duties to complainant's position; 2) respondent's directive for complainant to move to a different workstation five feet away where the new workstation was equivalent in all significant respects to

complainant's current workstation but where complainant felt and communicated to respondent that the association of the workstation with an employe to whom she had developed an aversion could significantly affect her health and her ability to function in her job; and 3) respondent's action to deny complainant the use of leave time for a day of absence resulting in the loss of a day's pay. *King v. DOC*, 94-0057-PC-ER, 3/22/96

Where complainant filed a written disclosure with an employe of respondent's affirmative action office and contended it was with complainant's understanding that the employe would provide a copy of the writing to someone in complainant's supervisory chain of command, respondent's motion to dismiss was denied. *Kortman v. UW-Madison*, 94-0038-PC-ER, 11/17/95

Complainant failed to establish a prima face case of retaliation where the person who decided not to rescind the complainant's resignation was not aware of the complainant's protected activity. *Radtke v. UW-Madison*, 92-0214-PC-ER, 11/22/94

Respondent's action temporarily placing complainant on leave with pay while it sought clarification of her medical restrictions was not an adverse employment action, where she was not required to use any leave time and there was no demonstrable negative impact on her employment. *Rentmeester v. Wis. Lottery*, 91-0243-PC, etc., 5/27/94

Complainant failed to establish a prima facie case of whistleblower retaliation as to events occurring before his alleged retaliators were aware of his protected disclosures. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

In determining whether a series of incidents constituted "verbal or physical harassment" within the definition of disciplinary action, the Commission considered the possible cumulative impact of the incidents on the employe. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

In deciding a motion to dismiss for failure to state a claim,

the Commission was unable to determine on the limited record before it whether a conversation with a co-employe concerning a statement made by the agency head would be considered a verbal disclosure to "any other person" that was not preceded by a disclosure under either §230.81(1)(a), Stats. (in writing to the supervisor) or §230.81(1)(b) (in writing to a governmental unit designated by the Commission), and hence not a disclosure covered by the whistleblower law, or whether the conversation with the co-employe was part of assisting "in any action or proceeding relating to the lawful disclosure of information under §230.81 by another employe," within the meaning of §230.80(8)(b). *Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER, 9/17/93

A prima facie case involving alleged assistance "in any action or proceeding relating to the lawful disclosure of information under §230.81 by another employe," §230.80(8)(b), Stats., does not require that complainant disclose information as provided in §230.81 (e.g., in writing to the supervisor, in writing to an agency designated by the Commission.). *Pierce v. Wis. Lottery & DER*, 91-0136-PC-ER, 9/17/93

The filing of a FEA complaint with the Personnel Commission is not a protected activity under the whistleblower law that entitles a complainant to protection under §230.80(8)(a), Stats. The court system and, by necessary implication, the system of administrative law, are excluded from the category of "law enforcement agency" in §230.81(2). *Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92

The methods used by the respondent in carrying out an investigation of the complainant's work performance and the decision to permit a union official to carry out an investigation of the complainant's conduct were not "disciplinary actions" as that term is used in the whistleblower law. However, an oral reprimand, the denial of a wage increase and the denial of a promotion fall within the definition. *Flannery v. DOC*, 90-0157-PC-ER, 91-0047-PC, 7/25/91

The statute does not require that a disclosure made under the whistleblower law and made in the form of a grievance, indicate on its face that it is a whistleblower disclosure. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

A grievance did not constitute a disclosure of alleged "mismanagement" where the grievance related only to one action by the superintendent of the correctional institution rather than to a "pattern" of conduct. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

The following actions did not constitute "disciplinary actions" within §230.80(2), Stats: 1) the denial of a request to publish a thank you note in a correctional institution's daily bulletin; 2) the denial of pay status for 1/4 of an hour during an investigative meeting where the denial was subsequently reversed; and 3) a decision to investigate an incident which could have lead to the imposition of discipline against the complainant. Seven other actions were found to fall within the definition of disciplinary actions. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

The presumption of retaliation does not apply to all discipline occurring within certain time periods. It only applies to that discipline specifically listed in §230.80(2)(a), (b), (c) and (d), Stats., rather than disciplinary actions falling within §230.80(2)(intro), Stats. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

The complainant was entitled to the presumption of retaliation even though the respondent did not investigate the disclosure before issuing the complainant a letter stating that the information "merits further investigation." The Commission is only to look at whether the agency found the information merited further investigation rather than to carry out a substantive review of the adequacy of that finding. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

A requirement that complainant undergo a psychiatric evaluation was not a disciplinary action within the meaning of §230.80(2), Stats., where the evaluation could have been completed within the period of a 10 day suspension imposed against the complainant and the requirement did not create a stigma for the complainant because it was a matter of record that complainant had previously been given a leave of absence to enable him to undergo psychiatric treatment. The 10 day suspension and the involuntary leave without pay which resulted from respondent's failure to return complainant to work status after the expiration of the suspension were found to be disciplinary actions. *Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88; rehearing denied, 12/29/88; affirmed by Dane County Circuit Court, *Morkin*

***v. Wis. Pers. Comm.*, 89-CV-0423, 9/27/89**

A newspaper advertisement seeking information from other persons regarding the actions of complainant's employer is not a protected disclosure. *Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88; rehearing denied, 12/29/88; affirmed by Dane County Circuit Court, *Morkin v. Wis. Pers. Comm.*, 89-CV-0423, 9/27/89

A disclosure made to three individuals, all of whom were in the supervisory chain above the complainant, constituted a protected disclosure even though it was not made to the complainant's first-line supervisor. *Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88; rehearing denied, 12/29/88; affirmed by Dane County Circuit Court, *Morkin v. Wis. Pers. Comm.*, 89-CV-0423, 9/27/89

It would be contrary to the policy behind the protections of the whistleblower law for information exchanged in informal discussions to render subsequent formal written disclosures unprotected. *Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88; rehearing denied, 12/29/88; affirmed by Dane County Circuit Court, *Morkin v. Wis. Pers. Comm.*, 89-CV-0423, 9/27/89

Only those personnel actions which have a substantial or potentially substantial negative impact on an employe fall within the definition of "disciplinary action" found in §230.80(2), Stats. Limitations placed on complainant's contacts with a certain office did not constitute a disciplinary action where the duties and responsibilities of complainant's position did not necessitate frequent contacts with that office and the limitations rerouted but did not prevent those contacts. *Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88; affirmed by Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 89-1355, 1/10/90

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 740 through760.9

[Previous material] [Next material]

---

740 Findings, conclusions, order

The proposed decision erred where it addressed matters outside the scope of the notice of hearing. Complainant claimed he was discriminated against based on arrest and conviction record. The statement of the issue was phrased in terms of whether respondent discriminated on the basis of arrest or conviction record in connection with the last paragraph of a letter it issued to complainant. The letter stated that it served as a last chance warning to complainant that "any subsequent driving while intoxicated or similar charges" would result in termination of his employment. The statement of the issue did not provide adequate notice to the parties that the Commission would consider whether respondent's conduct violated §111.322(2), Stats, which prohibits circulating any statement which implies or expresses any limitation, specification or discrimination; or an intent to make such limitation, specification or discrimination because of any prohibited basis. The original charge of discrimination did not mention the circulation issue. The initial determination also did not mention that issue, nor had either party addressed that issue prior to the issuance of the proposed decision and order. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

Where the hearing examiner erred in deciding, in a proposed decision and order, an issue that was not properly noticed, circumstances were consistent with a remand for further proceedings before the hearing examiner. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

Adjudicative bodies should decide cases on the basis of the result the law requires, regardless of whether the particular legal theory is brought to bear by the parties or, *sua sponte*, by the adjudicative body, so long as the parties have sufficient notice and an adequate opportunity to be heard on the issue in question. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

742 Remedy

An award of attorneys fees, based upon hours spent, per hour dollar amount and multiplier to compensate for the contingent nature of the case, was an abuse of discretion in an action brought under the whistleblower statute, because the purpose of the attorneys fees provision of the statute is to make the complainant whole and not to create a windfall for the victim or the attorney. *Board of Regents v. Wis. Pers. Comm. (Hollinger)*, 147 Wis. 2d 406, 433 N.W. 2d 273, (Court of Appeals, 1988)

Although, in his post-hearing brief, complainant had cited certain testimony for a number of propositions that the testimony did not support, there were no meaningful sanctions available. Respondent's request for sanctions against complainant was denied. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Judicial appellate procedure can not fairly be applied to a *de novo* administrative hearing. Complainant's motion for a "judgment on admitted claim" was rejected. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Complainant failed to sustain his burden to prove that he was entitled to receive reimbursement for lost overtime pay as an appropriate remedy to illegal discrimination/retaliation for not accommodating complainant's disability within a reasonable period of time. Complainant did not present any evidence connecting his lost overtime pay, while off work recovering from surgery to respondent's delay in providing him a chair with a headrest. The appropriate remedy was a cease and desist order. *Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98

In a case in which respondent discriminated against complainant on the basis of age with respect to its decision

to appoint someone else on an acting basis to the position in question, the goal was to replicate, to the extent possible, where complainant would be in terms of his employment status, including salary and benefits, as if the discriminatory act had not occurred. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

The general rule is that the burden of proof in the area of remedy is upon the complainant to show the fact and extent of the injury and to show the amount and value of his damages, citing 22 Am Jur 2d *Damages* §902, p. 923. The Commission must determine the positions the employe would have held, the period complainant would have occupied each position, and the remuneration complainant would have received absent the discrimination, and may take into account various factors including the qualifications and seniority of the claimant and other employes, and the layoffs, transfers, resignations and promotions that would have impacted on the complainant's employment, citing C. Sullivan, M. Zimmer & R. Richards, *Employment discrimination (Second Edition)*, §14.4.2 (1988). *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

If, after a finding of discrimination as to a non-selection decision, complainant can show by a preponderance of the evidence that a subsequent personnel transaction—e.g., a change in classification, a step increase on the completion of probation—would have inured to his benefit, he is entitled to have that figured into his remedy. There is no requirement that the employe also show that there was an additional act of discrimination with respect to the subsequent personnel transaction. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

Where complainant had always had very good performance evaluations and was substantially better qualified than the successful candidate for the position in question, an acting appointment, and where a permanent appointment (i.e. a change from acting to permanent status) was made without a formal selection process and the person in the acting position was given the permanent appointment on the basis of his good performance in an acting capacity, complainant met his burden of showing that if no discrimination had

occurred and had he received the acting appointment, he also would have received the permanent appointment. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

Where it was undisputed that complainant had a history of significant coronary disease, that he went to the hospital complaining of chest pain and an extreme reaction to having heard that he was not selected for a vacant position (a decision subsequently found to have been discriminatory) and that his physician was of the opinion that it was inadvisable for him to return to work at that time because of the possibility that the job-connected stress could cause another heart attack, the record supported a finding that for medical reasons directly caused by the personnel transaction in question, complainant became unable to work upon his hospitalization and the condition continued for approximately 1 year. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

The question of whether complainant could have returned to work earlier from a medical leave which commenced when he was hospitalized for chest pains two days after he was informed that he was not selected for a vacant position (a decision subsequently found to have been discriminatory) and lasted approximately one year ran to mitigation of damages, and the burden of proof with respect thereto was on respondent. It was a matter of mitigation because during this period, complainant was neither working nor attempting to work in the position he had previously held, so his remuneration was less than it otherwise would have been and he arguably failed to have done what he could have done to mitigate his damages. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

Respondent did not sustain its burden of proof that complainant could have returned to work earlier than he did after being placed on medical leave following his hospitalization for chest pains two days after he was informed that he was not selected for a vacant position (a decision subsequently found to have been discriminatory) in light of the absence of any contravening evidence, such as another expert opinion, to testimony by complainant's physician that complainant could return to work at

UW-Stout approximately one year after complainant commenced his leave. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

A back pay award should not be reduced because an employe is unable to work because of a medical disability caused by the employer's discriminatory misconduct, even though the Fair Employment Act does not provide for the recovery of compensatory damages for emotional distress or similar injuries. The employe's "make whole" back pay award will not be diminished by a disability that has been proximately caused by the act of discrimination. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 7/2/97; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

The Commission lacks the authority, under either the Fair Employment Act or the whistleblower law, to enforce the terms of settlement agreements. Where complainant's charge was clearly focused on the terms of, and the enforcement of, a settlement agreement reached in three previously filed complaints which had been dismissed pursuant to the settlement agreement, the respondent's motion to dismiss was granted. The Commission also lacked the authority to reopen the previously closed cases, citing *Haule v. UW*, 85-0166-PC-ER, 8/26/87. *Jordan v. DNR*, 96-0078-PC-ER, 1/30/97

The primary inquiry centered on the degree of success attained by petitioner. One method for separating the successful and unsuccessful contentions advanced by a petitioner is to separate the litigation into its primary stages, relate each item in the application for fees to one of these stages, determine the degree (often in terms of a percentage) of success the petitioner achieved in each stage, and then apply the percentage or other measuring tool for each stage to the number of hours in the application related to that stage. *Warren v. DHSS [DHFS]*, 92-0750-PC, 92-0234-PC-ER, 10/2/96

Where petitioner achieved full success at the liability stage of the proceeding, and respondent did not challenge the hourly rate, she was entitled to all of her fees requested for that stage. However, where petitioner did not prevail as to any of the three contentions she advanced at the remedy stage, she was not awarded any claimed fees attributable to

that phase. Finally, where petitioner failed to clearly specify which hours in the application were expended working on the issue of fees and costs, except in three instances where the application was merely mentioned, complainant was awarded fees representing one-half of the time identified for those three instances, reduced by another one-half because petitioner was not totally successful in regard to the contentions she advanced in regard to her application for fees and costs. *Warren v. DHSS [DHFS]*, 92-0750-PC, 92-0234-PC-ER, 10/2/96

Where there was no basis on the record to conclude that petitioner's refusal to settle the case during the liability stage was unreasonable and where the Commission had already concluded that the fee award should not include fees incurred during the remedy stage, there was no useful purpose in determining whether it was reasonable for petitioner to refuse settlement offers during the remedy stage so as to place an upper limit on the payment of fees. *Warren v. DHSS [DHFS]*, 92-0750-PC, 92-0234-PC-ER, 10/2/96

The general rule in crafting remedies under the Fair Employment Act is that a successful complainant should be made whole to the extent it is consistent with the purposes of the FEA. Where a successful complainant has been improperly denied appointment to a position or has been improperly removed from a position, the appropriate remedy is appointment to the same position or a substantially equivalent position and back pay. However, given the length of time that had passed since the subject personnel action and the fact that the incumbent of the relevant position had not benefited from the personnel action rejected by the Commission, removal of the incumbent and appointment of the successful to the position with the same position number from which complainant had been removed would not be an appropriate remedy where the duties of that position had, in many respects, changed from the time that complainant had been demoted and where there was a second "substantially equivalent position" to which complainant could be appointed. *Warren v. DHSS*, 92-0750-PC, 92-0234-PC-ER, 5/14/96

A valid offer of reinstatement terminates an employer's back pay obligation as of the date the offer is rejected. To constitute a valid offer of reinstatement, the offer must be for the same position or a substantially equivalent position,

must be unconditional, must provide the employe a reasonable time to respond, and should come directly from the employer or an agent of the employer authorized to make and effect such offers, citing *Anderson v. LIRC,* 111 Wis. 2d 245, 330 N.W.2d 594 (1983). The burden of showing that an offer of reinstatement is unconditional rests with the employer and an offer of reinstatement is not considered unconditional if it requires relinquishment of a discrimination claim, including relinquishment of the right to pursue remedies. *Warren v. DHSS*, 92-0750-PC, 92-0234-PC-ER, 5/14/96

Where the record showed that the parties were involved in settlement discussions, it was respondent's burden to show that the offer of an equivalent position was unconditional, i.e. was not contingent on complainant's relinquishment of her claim of discrimination. Therefore, respondent's back pay liability was not tolled by an admission of liability and respondent failed to show that complainant failed to mitigate damages by rejecting respondent's offer of appointment. *Warren v. DHSS*, 92-0750-PC, 92-0234-PC-ER, 5/14/96

Aggrieved persons are not entitled to recover damages for the period beyond which they would have been terminated for a nondiscriminatory reason. Where respondent showed that it carried out a reorganization designed to facilitate case processing and maximize the utility of a new computer system and one of the results of the reorganization was that complainant's position was eliminated and its duties and responsibilities were assigned to another position and where complainant failed to show that she would have continued in the surviving position instead of the incumbent, who had greater seniority than complainant, respondent's back pay liability in a case arising from an earlier removal from a position terminated when respondent received final approval for the reorganization plan. *Warren v. DHSS*, 92-0750-PC, 92-0234-PC-ER, 5/14/96

After-acquired evidence is not a bar to relief, citing *McKennon v. Nashville Banner Pub. Co.*, 130 L. Ed. 2d 852 (1995). *Dorf v. DOC*, 93-0121-PC-ER, 6/9/95

While there is no per se barrier to removing an incumbent as part of a remedy under the Fair Employment Act, where nearly 13 years had elapsed since the hiring in question and where the current incumbent did not benefit from the respondent's illegal conduct, displacement of the current

incumbent was inappropriate. *Paul v. DHSS & DMRS*, 82-PC-ER-69, 1/25/95; reversed by Dane County Circuit Court, *Paul v. Wis. Pers. Comm.*, 95-CV-0478, 10/11/95; reversed by Court of Appeals, *Paul v. Wis. Pers. Comm. & DHSS*, 95-3308, 12/12/96 (Note: the effect of the decision of the Court of Appeals was to affirm the Commission's decision in all respects)

Complainant's award of back pay arising from the failure to hire him for a vacancy in 1982 was limited to the difference between pay actually received and the pay he would have received, plus interest, from 1982 until 1987 when the complainant became "unqualified" for appointment to the position in question or similar position due to his discharge for a reason that was directly related to the type of responsibilities he would have been required to perform in the position in question. The circumstances surrounding complainant's discharge provided a basis for removing him from any certification from the position in question. He was not entitled to an appointment as part of the remedy. *Paul v. DHSS & DMRS*, 82-PC-ER-69, 1/25/95; reversed by Dane County Circuit Court, *Paul v. Wis. Pers. Comm.*, 95-CV-0478, 10/11/95; reversed by Court of Appeals, *Paul v. Wis. Pers. Comm. & DHSS*, 95-3308, 12/12/96 (Note: the effect of the decision of the Court of Appeals was to affirm the Commission's decision in all respects)

Complainant has the burden of persuasion with respect to establishing that which is necessary to recover the remedy he is seeking. *Paul v. DHSS & DMRS*, 82-PC-ER-69, 1/25/95; reversed by Dane County Circuit Court, *Paul v. Wis. Pers. Comm.*, 95-CV-0478, 10/11/95; reversed by Court of Appeals, *Paul v. Wis. Pers. Comm. & DHSS*, 95-3308, 12/12/96 (Note: the effect of the decision of the Court of Appeals was to affirm the Commission's decision in all respects)

Respondent's motion for a hearing to determine the appropriate remedy was granted where the hearing on the merits found employer liability but the issue of remedy was not fully litigated. The parties were permitted to supplement the record, where necessary, with respect to the remedy issue. *Keul v. DHSS*, 87-0052-PC-ER, 2/3/94

The Commission has authority to award attorney's fees against respondent state agencies after finding liability under the Fair Employment Act and to award fees under the

Equal Access to Justice Act, irrespective of the decision in *Wis. Dept. of Trans. v. Wis. Pers. Comm.*, 176 Wis.2d 731, 500 NW2d 664 (1993). *Keul v. DHSS*, 87-0052-PC-ER, 2/3/94

Complainant's petition for rehearing was denied where he requested relief which was based at least in part on speculation about what would occur in the future. *Balele v. DHSS & DMRS*, 91-0118-PC-ER, 6/17/93

Complainant is not entitled to attorneys fees where respondent fulfilled its burden in a mixed motive discrimination case and complainant neither established a violation of the FEA nor was he granted any relief. *Thomas v. DOC*, 91-0161-PC-ER, 4/30/93

The Commission has no authority under the FEA to award compensatory damages other than to the extent §111.39(4)(c), Stats., authorizes awards for back pay. *Miller v. DOT*, 91-0117-PC-ER, 1/8/93

Complainant's motion for costs incurred in successfully rebutting respondent's motions for summary judgment was premature where it was filed before the hearing on the merits of complainant's charge of discrimination. *Balele v. UW-Madison*, 91-0002-PC-ER, 10/29/92

In a consolidated case including an appeal of a discharge decision and a discrimination complaint in which the employe prevailed, the Equal Access to Justice Act (§227.485, Stats.) does not preempt the Commission's authority to award fees under *Watkins v. Labor and Industry Review Commission*, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984) for a FEA violation. Fees were assessed against respondent under *Watkins* so it was unnecessary to make an EAJA analysis. *Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 10/1/92

The Commission was precluded from awarding attorneys fees and costs to complainant where those expenses arose from a proceeding before respondent's Committee on Faculty Rights and Responsibilities (CFRR) pursuant to § UWS 3.08, Wis. Adm. Code, which in turn resulted in a decision by the UW-Madison Chancellor, where the CFRR concluded there was no discrimination based on sex and the Chancellor's decision did not reach the issue of gender discrimination. The Commission lacks authority to award fees under §227.485, Stats., arising from a proceeding

before another agency. The complainant was not required by the Fair Employment Act to pursue the appeal before the CFRR review under a system of referral and deferral to state agencies as is established under Title VII. The attorney work product from the CFRR appeal was not "both useful and of a type necessary to advance" the fee reimbursement proceeding before the Commission. Also, the complainant was not successful in establishing to CFRR that she had been discriminated against as alleged. *Duello v. UW-Madison*, 87-0044-PC-ER, 3/9/90

The Commission lacks the authority to issue a preliminary injunction with respect to a complaint filed under the Fair Employment Act. *Van Rooy v. DILHR & DER*, 87-0117-PC, 87-0134-PC-ER, 10/1/87

Complainant's motion for attorney's fees and costs upon the issuance of an interim decision finding probable cause was premature. *Snow v. DHSS*, 86-0051-PC-ER, 6/20/88

Where the respondent's decision in not appointing the complainant to a vacancy was ruled to constitute illegal discrimination under the Fair Employment Act, based on a faulty affirmative action plan, the complainant was entitled, inter alia, to retirement and fringe roll-up benefits and to back-pay computed on a quarterly basis from the first date complainant could have begun employment until the date he accepted a valid job offer. However, front pay was not awarded, even though placement in a position could not occur immediately because of the lack of availability of a position or the undesirability of "bumping" other employes 1) where an award of front pay would not further the goal of ending illegal discrimination because there was no indication that respondent continued to use a faulty affirmative action plan and 2) where front pay would not rectify the harm caused the complainant because complainant's interim earnings exceeded the total back pay liability. Complainant's requests for relocation costs and for damages due to emotional trauma, stress, humiliation, impaired reputation and the break up of a marriage followed by divorce were rejected. *Kesterson v. DILHR & DER*, 85-0081-PC, 85-0105-PC-ER, 4/4/88

The Commission ordered the respondent to cease and desist from discriminating and declined to award the complainant front or back pay where the only direct harm suffered by the complainant as a result of the discrimination was that he

was ranked third rather than second in filling a vacant position. Any conclusions by the Commission as to potential harm suffered by the complainant in terms of fewer promotional opportunities in the future, would be speculative. *Holmes v. DILHR*, 85-0049-PC-ER, 4/15/87

The Commission applied a 12% annual interest rate as prejudgment interest on a back pay award. *Kesterson v. DILHR & DER*, 85-0081-PC & 85-0105-PC-ER, 12/29/86

In a successful claim arising from a non-selection decision, the Commission ordered respondent to offer the complainant the next available equivalent position and to give her all rights, benefits and privileges to which she would have been entitled from the first date on which she could have begun employment with respondent, until the time she is offered an equivalent position by respondent, until she indicates she is no longer interested in a position, or until the time she becomes unavailable to accept a position, whichever occurs first. Back pay was subject to specified offsets and complainant was provided an opportunity to file a motion for attorney fees. *Wolfe v. UW-Stevens Point*, 84-0021-PC-ER, 10/22/86

The Commission set $110 as a reasonable hourly rate, based on the affidavits in the record for awarding attorneys fees, in a whistleblower case. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Board of Regents v. Pers. Comm.* 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note: the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

The Commission set the attorney fee multiplier at 1.2 for a complaint brought without benefit of any precedent under the whistleblower law, where there were two similar cases filed by complainant's co-workers, and by the time a contingent fee agreement was signed, intervening events had further diminished the complainant's prospects of nonrecovery. No adjustment was made for the quality of the attorney's services. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Board of Regents v. Pers. Comm.* 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note:

the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

Complainant's request for reimbursement of accommodation and meal costs in a whistleblower case was denied where the costs were associated with the hearing in Madison commencing at 9:30 a.m. and complainant's counsel was from Milwaukee. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Board of Regents v. Pers. Comm.* 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note: the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

In exercising its discretion to award attorney's fees under the whistleblower law, the Commission recognizes that the goal is to facilitate meritorious suits brought by state employes. Fee awards should be sufficient to attract competent counsel without producing a windfall. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Board of Regents v. Pers. Comm.* 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note: the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

In computing attorney fees, the Commission reduced the attorney's time estimates by 25% in order to encourage counsel to maintain contemporaneous time and charge records. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Board of Regents v. Pers. Comm.* 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note: the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

In computing attorney fees, the Commission reduced the fee by the time associated with filing a motion that was clearly without merit. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit

Court, *Board of Regents v. Pers. Comm.* 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note: the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

The awarding of benefits other than salary and the provision of prejudgment interest fall within the general remedial authority granted to the Commission under §230.85(3)(a), Stats., in whistleblower cases. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Board of Regents v. Pers. Comm.* 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note: the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

The Commission applied a 12% annual rate for computing prejudgment interest on a back pay award in a whistleblower case. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Board of Regents v. Pers. Comm.* 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note: the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

The Commission used the method of computing back pay (and interest thereon) on a quarterly basis in a whistleblower case. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Board of Regents v. Pers. Comm.* 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note: the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

Respondent's unconditional offer to reinstate the complainant terminated the accrual of any back pay obligation as of the date the offer was accepted, citing Anderson v. LIRC, 111 W. 2d 245 (1983). At the time of the offer, the complainant was employed under a teaching contract with a parochial school. However, the complainant

had been willing, one month earlier, to accept employment elsewhere and "break" the contract. Respondent was not aware of the contract provisions at the time of its reinstatement offer. In addition, teachers regularly failed to provide the 30 day notice required to terminate the contract and the parishes never sought to invoke a liquidated damages provision against those teachers. *Hollinger v. UW-Milwaukee*, 84-0061-PC-ER, 7/11/86; affirmed by Dane County Circuit Court, *Board of Regents v. Pers. Comm*. 86-CV-4056, 9/29/87; affirmed in part, reversed in part by Court of Appeals, 147 Wis.2d 406; 433 Wis.2d 273, 11/3/88 (Note: the effect of the decision was to reverse the Commission's award of attorney's fees based on a multiplier to compensate for the contingent nature of the case.)

The Commission has the authority to grant reasonable attorney's fees as a remedy upon a finding of illegal discrimination under the Wisconsin Fair Employment Act, citing *Watkins v. LIRC*, 117 Wis 2d 753 (1984). *Ray & Gray v. UW-La Crosse*, 84-0073, 0086-PC-ER, 5/9/85

Training for those persons who had supervised the complainant was ordered where discrimination based on creed had been established and where complainant was no longer employed by the respondent. *Laber v. UW-Milwaukee*, 81-PC-ER-143, 11/28/84

If appellant would be able to establish that respondent discriminated against him by delaying his return to his former position after he suffered a back injury, appropriate remedies might include returning his used sick leave hours and awarding vacation days that he would have earned absent the discrimination. However, appellant would not be entitled to a cash payment in lieu of any sick days lost as such an award would go beyond making the complainant whole. *Ray v. UW-La Crosse*, 82-PC-ER-13, 7/7/83

Where discrimination was found on the basis of unequal treatment of the complainant, who had been guilty of misconduct which would have supported some discipline, and some of the discipline imposed had been reduced through the contract grievance procedure, the first suspension would be rescinded to comport with the discipline the respondent imposed on a white employe with a similar record, the second suspension would be reduced in length on the theory that there would have been a less

severe penalty on a first offense, and the third suspension (reduced from a discharge in the grievance procedure) would not be reduced because it could not be said that that suspension would have been unlikely to have occurred if it had been handled nondiscriminatorily. *McGhie v. DHSS*, 80-PC-ER-67, 3/19/82

760.2 Mixed motive

Respondent showed that it would have made the same decision to terminate complainant's probationary employment absent his arrest where complainant failed to report his arrest, in violation of work rules, and respondent has a policy to terminate probationary employes who have a work rule violation. *Thomas v. DOC*, 91-0161-PC-ER, 4/30/93

Complainant is not entitled to attorneys fees where respondent fulfilled its burden in a mixed motive discrimination case and complainant neither established a violation of the FEA nor was he granted any relief. *Thomas v. DOC*, 91-0161-PC-ER, 4/30/93

Respondent satisfied its burden of proof under the *Price Waterhouse* affirmative defense by showing that it would have selected the successful candidate even if complainant had not been eliminated from the running by his conviction record. *Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93

While an employe's exclusive remedy for the failure to rehire where the employe has suffered a compensable injury is under the Worker's Compensation law, exclusivity comes into play only when the refusal to rehire has a causal relationship to the work-related injury. An employe who suffers a work-related injury and subsequently is denied rehiring because of national origin is not be precluded from pursuing a charge of discrimination based on national origin. Also, if the employer found out that the same employe also has an arm condition and refused to rehire him on that basis, the employe is not be precluded from pursuing a claim of handicap discrimination with respect to the failure to rehire because of the arm condition. If the employe established that the arm condition played a role in the decision not to rehire, the employer would have to prove by a preponderance of the evidence that it would have

reached the same decision relative to non-reappointment even if the arm condition had not figured into the decision. *Elmer v. UW-Madison*, 88-0184-PC-ER, 8/24/89

Where the employer acted contrary to the statute by considering gender, it can avoid liability by proving, as an affirmative defense and by a preponderance of the evidence, that it would have reached the same employment decision in the absence of consideration of gender. The Commission abandoned the "in-part" test it originally espoused in *Smith v. UW*, 79-PC-ER-95, 6/25/82, and adopted the causation test set forth in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989). *Jenkins v. DHSS*, 86-0056-PC-ER, 6/14/89

There is a violation of the Fair Employment Act if illegal motives played any part in the employment decision; the complainant does not have to establish that "but for" the discrimination the personnel action would not have been taken. Furthermore, even if the Commission were not to apply this standard, since there was direct and believable evidence of discriminatory intent, the burden would shift to the respondent to prove by a preponderance of the evidence that the adverse action would have been taken even in the absence of a discriminatory motive, which the respondent here failed to do. *Conklin v. DNR*, 81-PC-ER-29, 7/21/83

Retaliatory motives need only have played some part in the adverse employment action to support a finding of discrimination, and the Commission rejects the "but for" test (i.e., the decision would not have been reached "but for" discrimination) for determining whether retaliation played a legally sufficient part in the decision. *Smith v. UW*, 79-PC-ER-95, 6/25/82

760.4 Voluntary resignation/constructive discharge

Complainant would have to prove the existence of intolerable working conditions to sustain a showing of constructive discharge *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

Constructive discharge was established where complainant's superior intended to force the complainant to resign, where he told complainant that if she did not sign a previously prepared letter of resignation he would fire her and where a

reasonable person would resign rather than have an affair with a co-worker disclosed in a letter of discharge as had been threatened. *Winterhack v. DHSS*, 82-PC-ER-89, 8/31/84

760.6 Proof of general atmosphere of discrimination

Proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual. Such evidence may be considered with other evidence to ascertain whether racial discrimination existed. *Stonewall v. DILHR*, 79-PC-ER-19, 5/30/80

760.9 Other

The Commission has the jurisdiction to hear an allegation that the utilization of a rule promulgated by DER, which established minimum and maximum rates of pay upon reinstatement and required the appointing authority to exercise discretion in setting a particular rate within the available spectrum, has a disparate impact on reinstated employes based upon their protected status. However, where the complainant did not advance at least some theory as to how the rule resulted in a disproportionate effect on one or more protected groups with respect to which the complainant had standing, the disparate impact claim was dismissed. The policy of making discretion available cannot be discriminatory under a disparate impact analysis unless and until there is evidence establishing that the discretion has been exercised in a discriminatory manner. *Butzlaff v. DER*, 91-0043-PC-ER, 8/8/91

In a discharge case, there are two primary ways of establishing a prima facie case. The complainant may attempt to establish that he or she was a member of a protected class and was discharged, and either that he or she did not commit the misconduct or substandard performance as alleged by management, or that other non-minority employes who engaged in apparently similar misconduct or poor performance were not similarly disciplined. In many cases the complainant will pursue both avenues in the alternative. *Berryman v. DHSS*,

---

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 796 through 796.15

[Previous material] [Next material]

796.05 Examination procedure

Requiring an applicant to certify that his answers to an exam are true does not constitute the administration of an honesty testing device as defined by the FEA. *McCoic v. Wis. Lottery*, 88-0157-PC-ER, 12/17/92

Respondent did not discriminate against the complainant, who has uncorrected vision acuity of 20/400, in deciding not to consider him further as a candidate for a State Patrol Trooper I position, where respondent had a standard for uncorrected vision of 20/100. *Wood v. DOT*, 86-0037-PC-ER, 5/5/88; affirmed by Milwaukee County Circuit Court, *Wood v. Wis. Pers. Comm.*, 88-CV-09-178, 5/10/89; affirmed by Court of Appeals, 009-178, 11/22/89

No unlawful discrimination was found where the complainant, whose hand was in a cast, never clearly communicated to the respondent that he had had difficulty taking a written exam until several months later, and the respondent then offered him the opportunity to retake the exam. *Goldberg v. DP*, 78-PC-ER-66, 74, 10/17/80

796.10 Certification

The granting of veterans preference points does not violate §111.32(8), Stats., relating to handicap discrimination. *Nettleton v. State Personnel Board*, Dane County Circuit Court, 159-201, 8/13/79

No discrimination was shown where DER followed the statutory procedure for awarding veteran's points for all individuals eligible for the points, regardless of their age, sex or race/color. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

Respondent's request to DMRS to remove complainant's name from the certification list was consistent with §ER-Pers 11.04(1), Wis. Adm. Code, and did not support a finding of discrimination. The author of the letter was unaware of complainant's handicap. *Smith v. UW-Madison*, 90-0033-PC-ER, 7/30/93

Complainant, a non-minority, was certified for a position. The person who ultimately was appointed was a minority who became eligible on the basis of an expanded certification that concededly was illegal because a valid workforce analysis had not been conducted in accordance with §230.03(4m), Stats. The illegal use of expanded certification in this manner violated complainant's right, under the FEA, to have been considered for this position without consideration of race except in the context of valid affirmative action considerations, and the latter were not present here. That respondents may have been acting in good faith reliance on existing policies and did not have a specific intent to discriminate against complainant on the basis of his race is not a recognized defense in cases involving selection decisions made pursuant to illegal affirmative action plans. *Paul v. DHSS & DMRS*, 82-PC-ER-69, 3/30/93

No probable cause based on handicap was found where complainant, who has uncorrected vision of 20/500 for both eyes, was ranked 36th following the written exam for Conservation Warden I which was too low a ranking to be considered for appointment under respondent's normal procedures. Complainant could only have been considered further if he had been certified under the Handicapped Expanded Certification (HEC) program but respondent rejected complainant for this program because it was determined he was not handicapped. Respondent could not be considered to have discriminated against the complainant because of his handicap when respondent had determined he was not handicapped under the HEC program. *Wood v. DNR*, 86-0002-PC-ER, 2/19/88

There was probable cause to believe that respondent

discriminated against the complainant, who was white, in utilizing expanded certification pursuant to an affirmative action plan which was not legitimate because it was based on statewide minority population and did not meet statistical standards developed for proving disparate impact and because it was inconsistent with applicable statutory requirements. *Paul v. DHSS & DMRS*, 82-156-PC & 82-PC-ER-69, 6/19/86

796.15 Selection decisions (including reinstatement, promotion and reappointment)

Discrimination was found where complainant, who had a history of mental depression, was not selected for a typist position at a state correctional camp and where handicap was found to have "made a difference" in the decision to hire a woman. *DHSS v. Pers. Comm. (Busch)*, Dane County Circuit Court, 81-CV-2997, 3/9/82; affirming with respect to handicap discrimination the Commission's decision in *Busch v. DHSS*, 78-PC-ER-8, 3/15/81

No discrimination was found to exist where complainant, a male, was not selected for a typist position at a state correctional camp where question by member of selection panel asking complainant how he would handle "razzing" by 55 male camp residents for being in a "typically female position" was asked because complainant, who had a history of mental depression, might have difficulty handling verbal harassment. Commission's finding of discrimination based on sex was reversed, although finding of handicap discrimination was upheld. *DHSS v. Pers. Comm. (Busch)*, Dane County Circuit Court, 81-CV-2997, 3/9/82; affirming with respect to handicap discrimination the Commission's decision in *Busch v. DHSS*, 78-PC-ER-8, 3/15/81

Complainant failed to establish that he was qualified for a supervisory position where respondent was seeking applicants with experience exercising authority to hire, fire and evaluate subordinate employes, and complainant's supervisory experience occurred about 10 years prior to the interviews and did not include such authority. No sex discrimination was found. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

Where testimony of complainant and of respondent's witness, who interviewed the applicants for the vacancy in question, did not differ in a substantive way, it would be inappropriate to apply a jury instruction, requested by complainant, that the failure to produce a document within a party's control raised an inference that the document contained evidence unfavorable to that party's case. Complainant had contended the jury instruction should be applied because respondent had lost complainant's application materials. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

Complainant failed to establish a prima facie case of retaliation with respect to a decision not to hire complainant for a vacant supervisory position where the person who made the decision that complainant was insufficiently qualified to merit a second interview was unaware that complainant had participated in any activity protected under the Fair Employment Act. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99

There was no basis for concluding there was anything questionable about the rating panel's evaluation of complainant's Achievement History Questionnaire materials where the complainant had been instructed to submit a two page AHQ addressing four factors, complainant, alone among the applicants, submitted four pages, and the specialist administering the selection process removed two pages after deciding it would be inappropriate and unfair to evaluate complainant on the basis of all four pages. The rating panel evaluated the two pages of complainant's materials and appropriately assigned him a score below the passing level. Complainant's race discrimination and retaliation claims failed. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

It was in keeping with the civil service code and other evidence of record that existing career executives would be certified for consideration in filling a vacant career executive position, without having to go through an examination process. The selection process for the position was conducted on an "Option IV" basis under the career executive program. Applicants who were not career executives were evaluated on the basis of an Achievement History Questionnaire. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

An employer's failure to follow its own policies can be probative of pretext. Where the staffing manual called for the use of "blind" scoring procedures whenever possible, and there was no apparent reason why applicants' names were not deleted from the resumes they submitted as part of their Achievement History Questionnaire, this could constitute some evidence of pretext. However, in light of the other evidence of record, complainant failed to show that respondent's explanation for rejecting complainant for the position in question was a pretext for race discrimination or retaliation. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Where the record established that a balanced panel was desirable under relevant civil service policies but was not mandatory, and where respondents did not provide an explicit explanation as to why they did not have a balanced panel, the absence of a balanced panel could be considered to be probative of pretext. However, in light of the other evidence of record, complainant failed to show that respondent's explanation for rejecting complainant for the position in question was a pretext for race discrimination or retaliation. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Where the only bases for a factual conclusion that the employing agency had pre-selected a white candidate were that the successful candidate was white and was known to the appointing authority, complainant failed to establish his theory of pre-selection. *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98

Where the persons making the hiring decision in question were unaware that the selected candidate was a racial minority member until after the recommendation had been made to hire him, the prima facie case of race discrimination with respect to complainant, an unsuccessful White candidate, was rebutted. *Lundquist v. UW*, 95-0081-PC-ER, 9/23/98

Where there was no showing that the use of expanded certification had been improper, its use was insufficient to show that race discrimination occurred. *Lundquist v. UW*, 95-0081-PC-ER, 9/23/98

Complainant, 56, failed to establish age discrimination with respect to the hire of a 24 year old candidate, where the hiring decision turned on factors such as ability to listen and

being a team player, rather than on training and experience. The Commission rejected complainant's contentions that pretext was demonstrated by developing the position description in a way as to favor younger candidates, by the "tone" of complainant's interview, by a comment to complainant (and not to any of the other interviewees) that she had 10 to 15 minutes to make a presentation in response to a question, by the failure of the interviewers to solicit additional information about one of complainant's responses and by the action of the interviewers to accept the successful candidate's answer to one question as correct. *Lundquist v. UW*, 95-0081-PC-ER, 9/23/98

Complainant, 48, failed to establish age discrimination with respect to hiring decisions for four positions of LTE Security Officer, even though he had extensive experience performing somewhat similar duties for the respondent for a period of approximately 10 years that ended approximately 5 years before the hiring transactions in question, where there had been an intervening and fundamental change in the orientation of the work unit from a police department to a security department and complainant did not have a good interview with regard to the newly stressed criteria of communication and interpersonal capabilities. There was no evidence to contradict the interviewer's testimony that she requested the ages of the interviewees in order to conduct a criminal record inquiry. The fact that two of the chosen candidates were over 40, and within 6 years of complainant's age, supported respondent's position that age was not a motivating factor in its hiring decision. *Ruport v. UW (Superior)*, 96-0137-PC-ER, 9/23/98

Complainant failed to establish a prima facie case of disability discrimination relating to a Program Assistant 1 non-selection decision where the disability status of the successful candidate was not contained in the record. *Ledwidge v. UW-Madison & UWHCB*, 96-0066-PC-ER, 5/20/98

Respondent did not discriminate against complainant based on age with respect to a Program Assistant 1 selection decision where computer skills were a key selection factor, complainant's resume did not mention computer skills or knowledge, his interview notes did not mention computer skills or knowledge, and the successful candidate's resume and interview notes emphasized that knowledge. *Ledwidge v. UW-Madison & UWHCB*, 96-0066-PC-ER, 5/20/98

Complainant failed to establish a prima facie case of age discrimination relating to two Building and Grounds Superintendent 4 non-selection decisions where the ages of the successful candidates were not contained in the record. *Ledwidge v. UW-Madison & UWHCB*, 96-0066-PC-ER, 5/20/98

No probable cause was found on the basis of sex or age as to respondent's decision to use promotion rather than reallocation as a method for moving employes to a higher classification level in light of management's understanding that the union opposed reallocation and the absence of any indication that the lengthy promotional procedure, which resulted in decisions to hire 1 of 2 female candidates and 7 of 8 candidates older than 40, was undertaken because of the complainant's age or sex. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No probable cause was found on the basis of sex or age as to respondent's decision not to select complainant, a female over the age of 40, where information beyond the raw scores from interviews was relied upon in making the final decisions whether to promote a particular candidate, this information related to a large extent to the performance or work record of the candidate, complainant's performance was marginal and other employes who were promoted did not have similar performance problems as complainant. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No probable cause was found as to complainant's FEA retaliation claim arising from the decision to require him to undergo an interview for a vacant position along with other names on the certification list rather than to transfer into the position without an interview, where the record was insufficient to establish that the decision-maker was aware of complainant's participation in activities protected under the FEA. *Holubowicz v. DOC*, 96-0136-PC-ER, 4/24/97

No probable cause was found as to complainant's occupational safety and whistleblower claims arising from the decision to require him to undergo an interview for a vacant position along with other names on the certification

list rather than to transfer into the position without an interview where the record did not indicate that the alleged retaliator knew the position's classification had been lowered prior to the date the certification list was generated, respondent had posted the position for transfer prior to accepting applications for competition and the record did not indicate that respondent would have had an obligation to post the position for transfer a second time, and complainant waited until minutes before his interview started before requesting an opportunity to transfer without an interview. *Holubowicz v. DOC*, 96-0136-PC-ER, 4/24/97

Complainant failed to sustain his burden of establishing that the decision not to select him for a temporary position constituted discrimination based on national origin or ancestry or retaliation for engaging in FEA activities where the successful candidate was better qualified and complainant's work history included a five-day suspension. Even though the successful candidate also had received a five-day suspension, the nature of the misconduct was not as serious as complainant's in the context of the vacancy. *Zeicu v. DHSS [DHFS]*, 96-0043-PC-ER, 1/16/97

Respondent discriminated against complainant, 56, in not selecting him for the position of acting director of administrative computing, where complainant's credentials in computer science were far superior to those of the person selected, who was 37 years old, had very little formal training or education in computer science and had far less extensive supervisory experience than complainant. Complainant's job performance with respondent had been exemplary. Respondent contended that the person hired was a better communicator and had better interpersonal skills, but complainant established that his skills in these areas were at least on a par. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 6/25/96; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

Petitioner failed to establish race or sex discrimination regarding a selection decision where the person selected possessed a greater amount of non-technical skills, such skills were related to the supervisory position and respondent determined to seek a candidate with these non-technical skills prior to knowing who the candidates were. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler*

v. Wis. Pers. Comm., et al, **95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98**

While it is the better practice to retain records created as part of a hiring process, no legal mandate for retention exists. There was no basis to infer that discarded interview notes contained information favorable to petitioner's case where the explanations for the missing notes were credible and the record did not otherwise support a finding of discrimination. *Postler v. DOT*, 94-0016-PC, 94-0024-PC-ER, 10/16/95; affirmed by Dane County Circuit Court, *Postler v. Wis. Pers. Comm., et al,* 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98

The decision not to select the complainant was based upon his responses to the interview questions, rather than upon his sex. The successful candidate, a female, was selected because she was the top-rated candidate during the interviews and her references maintained that ranking. Complainant was ranked number 4, behind two other males. While complainant identified two selection criteria upon which he felt he should have been ranked higher than the successful candidate, it was not complainant's prerogative to choose the selection criteria for the position. The interview questions were used to fill a variety of vacancies, rather than just the one in question. Benchmark responses were developed well in advance of the interviews, all the interviewers participated in all of the interviews, all the interviews followed the same procedure, the panelists' notes and scores were reasonably consistent, questions were graded individually and each panelist denied that sex played a role in the analysis or was discussed. Although the supervisor of the vacant position told complainant that the sex of the successful candidate was the basis for the decision not to select complainant, this statement was false and was a misguided effort to avoid telling complainant, in a very public setting, the true reasons for the decision. *Dorf v. DOC*, 93-0121-PC-ER, 6/9/95

In a case arising from a selection decision, complainant failed to establish a prima facie case of sex discrimination where the sole evidence he presented was that 3.6% of Program Assistant 2 positions are held by males. *Durfee v. DATCP*, 94-0042-PC-ER, 12/22/94

In a case arising from a selection decision, complainant failed to establish a prima facie case of sex discrimination where the main evidence he presented to raise an inference of discrimination was the fact that the positions at that classification level in respondent agency were filled almost exclusively by females. The makeup of respondent's workforce without comparison to the available labor force is insufficient to establish a prima facie case. *Durfee v. DOJ*, 94-0047-PC-ER, 12/14/94

No discrimination was shown with respect to the employing agency's letter directing the interview panelists to contact the affirmative action officer before making a hiring decision where the panelists understood there was no requirement to hire women, only a requirement, in the event a male was recommended, to explain why a woman was not recommended for hire. The affirmative action officer had approved the hire of non-targeted groups in other selection decisions when justified, for example, by the interviewers' opinion that another person was the best candidate for the particular vacancy. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

No discrimination was shown with respect to the employing agency's decision not to take written exam scores into account when making the hiring decision. The civil service code does not require that the written exam score be a factor considered in the post-certification hiring process, and respondent did not consider the exam score of any candidate, regardless of their age, sex or race/color. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

No discrimination was shown with respect to the employing agency's decision to use interview questions which were other than purely objective, where benchmarks were developed as the "correct answer" for grading purposes, the questions and the benchmarks were related to the duties of the vacant positions and were developed before the interviews when specifics of each candidate's background were unknown to the employing agency. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

In filling three Property Assessment Technician positions, no discrimination was shown with respect to the employing agency's decision to structure the interview questions in such a way as to emphasize repetitive and mundane tasks,

rather than a professional real estate background where the questions reflected the job duties of the positions and the questions and benchmarks were developed before the employing agency was aware of the complainant's professional background. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

Discrimination does not automatically occur where a member of an underutilized group identified in an approved affirmative action plan is hired even through the successful candidate has a post-interview rank below other candidates who are not a member of the underutilized group, citing *Byrne v. DOT & DMRS*, 92-0672-PC, 92-0152-PC-ER, 9/8/93, affirmed by Dane County Circuit Court, *Byrne v. State Pers. Comm.*, 93-CV-003874, 8/15/94. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

No discrimination occurred when the female successful candidate was a member of a group identified in an approved affirmative action plan as an underutilized group for the particular job category, where the employing agency clearly showed she was qualified for the job and where the interview process otherwise was free of discrimination. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94

No discrimination occurred when respondent did not hire complainant, who is black and had previously filed a race discrimination claim against respondent, for a limited term carpenter job where no authorization to hire had been received as of the date the complainant reported for work. A second applicant, who was white, was also not hired on that date, although the second applicant did get hired on a later dated. *Weaver v. UW-Madison*, 93-0022-PC-ER, 11/3/94

No handicap discrimination was shown where the complainant did not argue that he was more qualified for the position than the successful candidate. Complainant's belief that he would have been hired if written justification for not hiring had to be provided to respondent's Affirmative Action officer was unsupported by the evidence. *Bertram v. DILHR*, 92-0241-PC-ER, 9/21/94

Complainant failed to show sex discrimination regarding respondent's decision to reinstate a male employe rather than to hire complainant, where complainant failed to establish general underutilization of women, complainant

was less qualified than the person appointed and respondent followed its normal practice of reinstating employes. *Pennybacker v. DHSS*, 91-0139-PC-ER, 7/7/94

Respondent did not discriminate against complainant, a Native American, based on his race, color, and national origin or ancestry when it failed to hire him for one of eleven vacancies where, even though complainant produced statistical evidence that respondent underutilized minorities, there was no evidence of irregularities in the hiring procedure, the same interview questions were asked of all candidates, the exams were designed to measure job-related criteria, all candidates were evaluated against the same rating guidelines and complainant received a score lower than the successful candidates. *Thunder v. DNR*, 93-0035-PC-ER, 5/2/94

Simply establishing that a particular job group is underutilized for ethnic/racial minorities is insufficient to show that the hiring process utilized to fill positions within this job group has a disparate impact on these minorities. The use of an all-white, all-male screening panel is not sufficient in and of itself to demonstrate that the screening process had a disparate impact on minority candidates. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

Complainant failed to establish that his impressions of certain work-related incidents involving individuals who had input into the subject hiring decision demonstrated racial animus on their part, but instead the record showed that complainant perceived any differences about work-related matters with his white supervisors and other whites with authority as based on racial animus. The complainant also failed to show that his relevant qualifications were superior to those of the successful candidate. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

Complainant failed to establish that respondent's decision not to select the complainant for a Regulation Compliance Investigator position was based on age or sex where the successful candidate 1) had more persuasive and conciliatory communication and conflict resolution skills, 2) had superior interest in the position, regulatory program

experience and initiative, and where complainant had not shown good judgment in comments he had made relating to his prospects for obtaining a position prior to the interviews. *Hinze v. DATCP*, 91-0085-PC-ER, 12/28/93

If the civil service process required that only criteria susceptible to an objective grade or score be used when selecting a candidate, the process would not incorporate an opportunity for the appointing authority to conduct personal interviews. One purpose of such interviews is to subjectively assess each candidates' communication skills and enthusiasm. *Hinze v. DATCP*, 91-0085-PC-ER, 12/28/93

It is routine for employers to solicit and rely on information relating to a candidate's work history, including personal characteristics observed by an employer during the performance of work responsibilities, as a primary indicator of likely success in a position. Complainant's statement, made while employed in a position located at respondent's headquarters building, that he presumed he would be hired for a vacancy and that his interview would be just a formality, was relevant to considerations of his judgment and objectivity and listening skills. Respondent was justified in considering this information just as it considered information relating to other candidates gleaned from their employment histories. *Hinze v. DATCP*, 91-0085-PC-ER, 12/28/93

Respondent did not discriminate against complainant on the basis of his age when it failed to promote him to one of four vacancies and the following did not present evidence of pretext: respondent's reliance on work experience criteria, respondent's consideration of complainant's past work performance problems, respondent's failure to solicit references from complainant's supervisors, respondent's failure to consult complainant's personnel file, respondent's failure to promote complainant on five prior occasions, and respondent's request for additional candidates for consideration after promotional offers were declined by two individuals. A statement by a member of one of the interview panels to the effect that the complainant had a few more gray hairs than the last time they met was construed as an attempt at initiating casual conversation rather than as direct evidence of discrimination. *Trimble v. UW-Madison*, 92-0160-PC-ER, 11/29/93

Complainant failed to establish a prima facie case of sex discrimination with respect to a hiring decision where the appointing authority who made the decision was of the same gender as complainant and her question about complainant's pregnancy was not part of the interview but was asked to show interest in complainant as a person, and the percentages of men and women hired for these kinds of positions were about the same. Even if a prima facie case had been present, complainant failed to show that management's rationale for its decision was pretextual. *Rosenbauer v. UW-Milwaukee*, 91-0086-PC, 91-0071-PC-ER, 9/24/93

No discrimination was found where complainant, a non-handicapped individual, presented no evidence to substantiate his claim that respondent hired a handicapped individual instead of him to meet an affirmative action quota. Complainant's interview score was only third highest among five finalists. The successful candidate was rated highest and had a very strong reference. *Sagady v. ECB*, 92-0101-PC-ER, 9/24/93

Respondent's failure to interview complainant for a vacancy was solely because of its keypunch error when entering complainant's application information. Complainant's handicap discrimination claim was dismissed. *Schimmel v. DOD*, 91-0070-PC-ER, 9/24/93

No sex discrimination was found as to respondent's decision to hire a female rather than complainant, a male, for a costume technology faculty position where the successful candidate was selected by a male committee, had more relevant qualifications than complainant, and was the only candidate who initiated contact with members of the selection committee. There was insufficient evidence to show that there is systemic discrimination against men in filling faculty level costume technology positions. *Schmitt v. UW-Milwaukee*, 90-0047-PC-ER, 9/24/93

Complainant failed to establish a prima facie case of failure to hire because of age, national origin or ancestry and/or race where complainant offered no evidence that a vacant position existed, that he applied for it, that he was certified and considered, that he was rejected, or that there were circumstances which gave rise to an inference of discrimination. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

Complainant's dyslexia was held not to "limit the capacity to work" but to impose "a substantial limitation on a particular life activity" and, as a result, to constitute a handicap. It was held that it did not constitute handicap discrimination per se for the appointing authority not to select complainant even though he was the interview panel's top-ranked candidate; but it was appropriate for the appointing authority to consider this as one of several selection factors, including the candidates' level and type of education, level and type of experience with the State Patrol, and the goals of the applicable affirmative action plan. Complainant's argument that, once respondent requested handicapped expanded certification, it was required to hire a handicapped candidate, would lead to an absurd result. *Byrne v. DOT & DMRS*, 92-0672-PC, 92-0152-PC-ER 9/8/93; affirmed by Dane County Circuit Court, *Byrne v. State Pers. Comm.*, 93-CV-3874, 8/15/94

In differentiating among well-qualified candidates for a position, it is not evidence of discrimination to consider the goals of a proper affirmative action plan as a selection criterion. *Byrne v. DOT & DMRS*, 92-0672-PC, 92-0152-PC-ER 9/8/93; affirmed by Dane County Circuit Court, *Byrne v. State Pers. Comm.*, 93-CV-3874, 8/15/94

No discrimination was found in hiring three positions where, as to two of the decisions, the decisionmakers were unaware of complainant's handicapping condition and the decisions not to select complainant were based on reasons other than her handicap, including her attitude and friendliness expressed during the interviews and her references' comments. *Smith v. UW-Madison*, 90-0033-PC-ER, 7/30/93

Even though respondent stipulated that the limitation of recruitment for two positions to only those applicants with Career Executive status had a disparate impact upon minorities including complainant, complainant failed to establish that he would have been hired for either of the positions if he had been allowed to compete for them. *Balele v. DHSS & DMRS*, 91-0118-PC-ER, 4/30/93

Respondent did not discriminate against complainant on the basis of arrest/conviction record when it failed to hire him for a food service worker position at a juvenile correctional institution where appellant was currently serving a sentence for arson and the personal qualities associated with the

crime are incompatible with the desirable traits needed for a position that has responsibilities for the safety, direction and discipline of juvenile offenders in an institution. *Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93

Complainant, a non-minority, was certified for a position. The person who ultimately was appointed was a minority who became eligible on the basis of an expanded certification that concededly was illegal because a valid workforce analysis had not been conducted in accordance with §230.03(4m), Stats. The illegal use of expanded certification in this manner violated complainant's right, under the FEA, to have been considered for this position without consideration of race except in the context of valid affirmative action considerations, and the latter were not present here. That respondents may have been acting in good faith reliance on existing policies and did not have a specific intent to discriminate against complainant on the basis of his race is not a recognized defense in cases involving selection decisions made pursuant to illegal affirmative action plans. *Paul v. DHSS & DMRS*, 82-PC-ER-69, 3/30/93

Complainant failed to establish a prima facie case of age discrimination regarding a selection decision where the successful candidate was also in the protected age group, there was no indication the employer was aware of the age of either candidate, and there was no basis to conclude there was a significant difference between the two in terms of youthfulness of appearance. *Ludeman v. DER*, 90-0108-PC-ER, 12/29/92

Complainant failed to show that respondent's rationale for its hiring decision was a pretext for age discrimination where complainant had a "feeling" during the interview he was being discriminated against, he didn't believe a ten minute interview was sufficient, and he told the interviewer he had a lot of experience, which purportedly would have led the interviewer to conclude complainant was over 40. The interviews were conducted in a uniform manner, the only available information shows that the candidates selected appeared to have been better qualified, and respondent's expert offered unrebutted testimony that respondent's hiring statistics did not show age discrimination. *McCoic v. Wis. Lottery*, 88-0157-PC-ER, 12/17/92

Respondent did not discriminate against the complainant on the basis of age when it failed to hire him for one of fifteen Conservation Warden 1 positions. Complainant established a prima facie case of age discrimination but failed to show respondent's explanation, i.e. that complainant did not score high enough in the interview, was a pretext for discrimination. There was inadequate statistical evidence in the record to show disparate impact, and, with respect to disparate treatment, there was no evidence regarding the qualifications of any of the candidates other than complainant. Respondent's action of identifying those candidates who would move on to the next stage in the selection process was consistent with respondent's usual practice for group referrals. *Wojtalewicz v. DNR*, 90-0153-PC-ER, 12/17/92

Complainant failed to establish pretext with regard to respondent's decision as to promotion. Respondent articulated a legitimate, non-discriminatory rationale for its decision--the selected candidates did better on the oral interview, and management had positive opinions about the selected candidates' past performance and concerns about complainant's past performance. These concerns were not shown to be pretextual, particularly in light of examples of complainant's problem areas in the record. While complainant had more education and experience than the selected candidates, respondent had a reasonable basis for its opinion that the selected candidates had demonstrated greater potential for successful performance in the higher level positions based on performance factors and better performance during their interviews. That complainant had more experience and formal education did not result in a conclusion of pretext because, under all the circumstances, including the aforesaid performance factors, respondent had a reasonable basis for believing the selected candidates had better potential to succeed at the higher level. While complainant's contentions about inadequate accommodation of his handicap were considered as potentially probative of respondent's attitude toward handicapped employes, he did not establish that respondent denied him any accommodations. *Orr v. OCI*, 92-0018-PC, 92-0025-PC-ER, 10/29/92

Where the primary basis utilized by respondent for making hiring decisions pursuant to the contractual transfer process was seniority unless a less senior candidate possessed

clearly and substantially different qualifications, and where the complainant failed to show that her relevant qualifications were clearly and substantially different than those of the more senior candidates, no probable cause was found with respect to complainant's claim of discrimination based on marital status and the decision not to select the complainant was affirmed. *Molitor v. DHSS,* 89-0086-PC, 89-0105-PC-ER, 5/1/92

While complainant showed some variances in her interview for a vacant position with the appointing authority, complainant failed to establish that the variances were motivated by an unfavorable bias toward her marital status and that they resulted in her failure to gain the top ranking for the vacancy. *Bell-White v. DHSS,* 89-0009-PC-ER, 4/30/92

Respondent's imposition of a post-certification screening criterion to reduce the number of candidates to be interviewed was upheld where the application of the criterion was consistent with applicable requirements and practices and where the respondent ultimately concluded that complainant satisfied the criterion. Complainant's claims of race, color and national origin discrimination were rejected. *Balele v. DOA & DMRS,* 88-0190-PC-ER, 1/24/92

The absence of a racial/ethnic minority on the interview panel was not evidence of pretext where there was a female on the panel and females were underutilized in the job group of which the position was a part. *Balele v. DOA & DMRS,* 88-0190-PC-ER, 1/24/92

The failure to employ written benchmarks or to score responses to interview questions did not demonstrate pretext where the interviewers took notes and after the interviews, the interviewers had a clear idea of who the top candidates were and agreed on the ranking. Respondent's failure to locate one of the interviewer's notes did not demonstrate pretext where the interviewer recalled the impressions she formed as a result of the interviews and another candidate was clearly much better qualified for the subject position. Complainant's claims of race, color and national origin discrimination were rejected. *Balele v. DOA & DMRS,* 88-0190-PC-ER, 1/24/92

The Commission rejected the complainant's theory of

disparate impact with regard to the application of a post-certification screening criterion where the ultimate result of the application of the criterion was that none of the ethnic/racial minority candidates were screened out. *Balele v. DOA & DMRS,* 88-0190-PC-ER, 1/24/92

No probable cause based on race, sex or retaliation was found with respect to the decisions not to select the complainant for either of two vacancies where the successful candidates were better qualified for the positions and one of the two persons hired was of the same race and sex as the complainant. Even though there was no showing that one of the interviewers was aware of the complainant's prior protected activities, that interviewer's ranking of the candidates was the same as the other interviewers. *Cozzens-Ellis v. UW-Madison*, 87-0070-PC-ER, 2/26/91

Discrimination was found where complainant, who was visually handicapped, was rejected from employment on a hospital's food tray line as soon as she stated she was unable to read the menu cards on the trays in the existing workplace configuration. At hearing, the respondent failed to offer evidence rebutting the testimony of complainant's expert witness that certain specific accommodations would have allowed the complainant to have performed the job duties. Nothing suggested that, at the time complainant's employment request was rejected, the appointing authority actually considered whether there any reasonable accommodations were available and it appeared that the supervisor who was effectively responsible for the hiring decision was unaware of the duty of accommodating handicapped applicants. *Betlach-Odegaard v. UW-Madison*, 86-0114-PC-ER, 12/17/90

No probable cause based on age, handicap or sex was found with respect to the decision not to select the complainant for a vacant position where the questions used by the interview panel were job-related, the questions were asked of all the candidates, the answers were scored using a pre-established benchmark rating system, the actual scores awarded were based on the candidates' responses, the panel members did their ratings individually and the scores were not altered. *Jahnke v. DHSS*, 89-0094-PC-ER, 89-0098-PC, 12/13/90

No probable cause based on race, sex or retaliation was found with respect to the decision not to promote the complainant, an Unemployment Benefit Specialist 2, for a

vacant UBS 4 position where the appointing authority had, without exception since 1985, only promoted persons to the UBS 4 level who were already UBS 3's. Reclassification from UBS 2 to 3 was premised on passing a review of the quality of work performed while employed as a UBS 2. Others who were not in the same protected category as the complainant were similarly treated. There was insufficient evidence to conclude the the quality review process was itself discriminatory where the record contained no information as to the passing rate for minorities and non-minorities. *Harris v. DILHR*, 86-0021, 0022-PC-ER, 2/22/90

No probable cause based on national origin was found with respect to the decision not to hire the complainant where the successful candidates performed better than complainant on each part of the interview process. *Acharya v. DOR*, 89-0014, 0015-PC-ER, 11/3/89

No probable cause was found with respect to two decisions not to hire complainant, a female. In the first transaction, two of the three interview panelists were female, the successful applicant was also female, the petitioner was not as qualified as other candidates based on the structured interviews conducted of all of the candidates and deficiencies in the selection process affected all of the candidates equally. In the second transaction, two of the three interview panelists were female and there was no evidence that complainant was better qualified than the successful candidates. *Bloedow v. DHSS*, 87-0014-PC-ER, etc., 8/24/89

No probable cause was found with respect to a decision not to hire the complainant, who had previously filed a discrimination complaint, where two of the three interview panelists were unaware, at the time they scored the interviews, of complainant's protected activities and deficiencies in the selection process affected all of the candidates and were not specifically directed at the complainant. *Bloedow v. DHSS*, 87-0014-PC-ER, etc., 8/24/89

No probable cause was found with respect to a decision not to hire the complainant, a 42 year old female, for assistant professorships where the selection process resulted in hiring four out of six females and three of the six successful candidates were in the protected age category. The

successful candidates had more relevant degrees, more recent experience teaching in the field, for the most part more teaching experience, and better recommendations than the complainant. *Chandler v. UW-La Crosse*, 87-0124-PC-ER, 88-0009-PC-ER, 8/24/89

No discrimination was found even though race played a part in the hiring decision where respondent established that the decision would have been the same even if race had not played such a role. The successful candidate was substantially better qualified for the Institution Aide 4 position, which required supervision of staff providing direct care to medically fragile, multiply-handicapped patients. The successful candidate had extensive supervisory experience and background as an LPN while the complainant's sole experience was one year as an Aide 1. *Jenkins v. DHSS*, 86-0056-PC-ER, 6/14/89

No probable cause based on age or retaliation was found with respect to various nonselection decisions where complainant failed to show that her experience, knowledge, interest and motivation or interview performance were actually superior to those of the successful candidates, that the hiring criteria were not properly related to the duties and responsibilities of the subject position, or that the criteria were not properly applied by the individuals with effective hiring authority. Complainant's statistical evidence relating to the age claim presented a mixed picture at best. In addition, there was no evidence that the individuals with hiring authority knew or had any reason to know that complainant had filed a discrimination complaint. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

No discrimination was found with respect to the decision not to hire the complainant, a native of Afghanistan, where the complainant failed to show that the reason offered by the respondent -- that the successful candidate's qualifications were comparable to the complainant's but that the successful candidate provided a better response to the key interview question -- was pretextual. *Wali v. PSC*, 87-0081-PC, 87-0080-PC-ER, 4/7/89

No probable cause based on age or sex was found with respect to a decision not to hire the complainant where there was nothing in the record from which to conclude that the respondent's explanation was not legitimate, the explanation was clearly non-discriminatory on its face and the

complainant failed to show a relationship between respondent's actions and complainant's age or sex. *Ozanne v. DOT*, 87-0107-PC-ER, 1/31/89

No probable cause based on age, sex or marital status was found with respect to a selection decision where there was no basis on which to conclude that the selection criteria were unreasonable, were not uniformly applied, or were not as respondent represented them to be or that the interviewing panelist's assessments of the candidates were not reasonable in view of the presentations of the candidates at the interviews and in view of the selection criteria. *Larson v. DILHR*, 86-0019-PC-ER, 86-0013-PC, 1/12/89

No discrimination was found with respect to a decision not to reinstate the complainant to a vacant FRW 3 position where the decision-maker considered another candidate to be better qualified, the decision-maker had not been overly impressed by complainant's work habits during his prior employment and the decision-maker was concerned about a work rule violation that had occurred when the complainant was smoking and possessing marijuana on the job but was not concerned about the associated arrest. *Ames v. UW-Milwaukee*, 85-0113-PC-ER, 86-0123-PC-ER, 12/23/88

No probable cause was found with respect to a decision not to reinstate the complainant to a BMH 2 position where it was undisputed that the appointing authority was applying a policy that former employes with disciplinary records were not rehired in the absence of extenuating circumstances and the appointing authority was not even aware of the complainant's arrest until complainant himself brought it up during discussions about the record of discipline. *Ames v. UW-Milwaukee*, 85-0113-PC-ER, 86-0123-PC-ER, 12/23/88

It would have been speculative to conclude there was any connection between complainant's sexual preference and his failure to be reinstated to a vacant position where the decision-maker was unaware of complainant's sexual orientation and the person alleged by complainant to have had an animus against complainant because of his homosexuality had an extremely limited role in the selection process. *Ames v. UW-Milwaukee*, 85-0113-PC-ER, 12/23/88

Probable cause based on handicap was established as to a decision not to hire the appellant where there was little evidence supporting the decision of the physician who conducted the physical to set a 15 to 20 pound lifting restriction and a restriction against frequent bending, stooping or twisting. There was no indication on the record that the physician was aware, among other things, that the appellant was currently performing similar duties. Also, appellant's osteopath was of the opinion that no type of lifting restriction was indicated. *Lauri v. DHSS*, 87-0175-PC, 11/3/88

No probable cause based on color, race, retaliation, or sex was found as to the decision not to select the complainant for a vacant permanent position of English teacher, where the successful candidate had a higher score on the questionnaire and complainant, who had been filling the position as a limited term employe, had an inferior job reference based on respondent's first-hand knowledge of complainant's work performance. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

Respondent discriminated against the complainant by placing him third rather than second on the final hiring list where respondent relied on an affirmative action plan which was inconsistent with the statutory definition of "balanced work force" when it moved a minority candidate from third to first on the hiring list. *Holmes v. DILHR*, 85-0049-PC-ER, 4/15/87

No probable cause based on retaliation was found as to the decision not to rehire the complainant to an LTE position where in 1981 and 1982, her supervisors believed her attitude and performance had deteriorated to below the level of a good employe. The complainant's protected activity post-dated this substandard attitude and performance. *Rose v. DNR*, 83-0055-PC-ER, 84-0081-PC-ER, 4/15/87

There was no probable cause based on sex with respect to the decision not to rehire the complainant to an LTE position where her last three supervisors independently believed her attitude and work performance had deteriorated over the last two years below the level of a good employe. *Rose v. DNR*, 83-0055-PC-ER, 84-0081-PC-ER, 4/15/87

No probable cause on the basis of age or sex was found with respect to a decision not to select the complainant, a 41

year old male, for a position of Laboratory Animal Caretaker 2 which included both animal and plant care, where the successful candidate, a 32 year old female, was qualified for the position, had more current work experience, had experience involving both animal and plant care and was formally educated in both animal science and horticulture. Complainant ranked first on the written examination and had extensive work experience in animal care. *Krause v. UW-La Crosse*, 85-0026-PC-ER, 1/22/87

A race-conscious promotion under an affirmative action plan which was part of an effort to reach a balanced work force was not in compliance with §230.03(rm), Stats., because the plan did not determine the rate of representation of minorities in "that part of the state labor force qualified and available for employment in such classification" but rather based the finding of underutilization on a comparison to the minority percentage of the total state population. Because race was the determinative factor in the decision to appoint a candidate certified via expanded certification rather than the complainant, respondent discriminated against the complainant based on race. The Commission did not accept respondent's arguments of harmless error, i.e., that if the proper labor force analysis had been performed, the same result would have occurred. *Kesterson v. DILHR & DER*, 85-0081-PC, 85-0105-PC-ER, 12/29/86

Complainant, a woman, established a prima facie case based on sex in a claim arising from a non-selection decision, even though a woman was ultimately hired for one of the two positions where the top 4 candidates were males, two males were selected for the vacant positions, and no females were in consideration until after one of the males did not report to work. The hiring of the woman was technically a different hiring transaction. *Wolfe v. UW-Stevens Point*, 84-0021-PC-ER, 10/22/86

Respondent lacked a creditable reason for not selecting the complainant, a woman, for one of two Building Maintenance Helper 2 positions. Work experience was the main criterion for filling the positions and complainant's qualifications were better than one selectee and at least as good as the other selectee. In addition, one of the two persons who made the hiring decision was biased against hiring a female for the positions because he felt they could not handle the job. *Wolfe v. UW-Stevens Point*, 84-0021-PC-ER, 10/22/86

Probable cause was found where the overall qualifications of the complainant, who is black, were, at least on paper, far better than those of the ultimate appointee, an Asian, and the respondent's only enunciated reason for the appointment, the successful candidate's background in connection with a particular aspect of the job, was completely undercut by the complainant's strong showing of at least a comparable background in that area. No probable cause was found as to a second selection decision. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

No probable cause based on race was found as to the decision not to select the complainant, who was black, where the person appointed was also black and had been listed as the number two, or back-up candidate when the position had been filled just two months earlier. However, probable cause was found as to the original selection decision. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

No probable cause based on retaliation was found with respect to a selection decision (decision #2) for a vacant position which, when filed two months earlier (decision #1) had caused complainant to file a discrimination complaint. In decision #1, respondent had ranked complainant behind the successful candidate (A) and a back-up candidate (B) at a time before complainant's first charge had been filed and before there was any possible motive for retaliation. When A indicated he would be leaving after only a few months on the job, the respondent had a strong reason to attempt to reactivate the register and to offer the job to the backup candidate.. rather than to have gone through another staffing process that would have resulted in the position being vacant for several more months. *Winters v. DOT*, 84-0003, 0199-PC-ER, 9/4/86

No probable cause based on arrest/conviction record or race was found with respect to a selection decision for an investigator position in the Wausau area where the successful candidate, who did not have a conviction record, had a wider range of and a great deal more relevant experience than complainant who had a conviction record. No pretext was demonstrated where during the complainant's interview, one interviewer stated that complainant's experiences due to his status as an ex-offender were less useful in the Wausau area where most crimes were committed by "white farm boys" and the other

interviewer stated he was not generally impressed with the work of "jailhouse lawyers", and where the interviewers were acquainted with the successful candidates prior to the interview and prior to the certification. *Brownlee v. State Public Defender*, 83-0107-PC-ER, 12/6/85

No probable cause based on arrest/conviction record was found as to the respondents' decision not to select complainant for vacant Building Maintenance Helper 2 positions where each successful applicant had a higher interview score than the complainant and a more stable work record and there was no showing that the selection criteria applied by the respondent were not reasonably job-related, even though complainant may have had more custodial experience than some of the successful candidates. *Brummond v. UW-La Crosse*, 84-0178-PC-ER, 10/10/85

No probable cause was found as to the respondent's decision not to select the complainant for vacant Building Maintenance Helper 2 positions where the interviewers did not know of complainant's handicap at the time they scored the complainant's interview and where each successful applicant had a higher score than the complainant and a more stable work record. *Brummond v. UW-La Crosse*, 84-0178-PC-ER, 10/10/85

No discrimination was found as to respondent's decisions to select four males rather than complainant, a female, for vacant positions, where the candidates were ranked by interview panels and the complainant had not shown by a preponderance of the evidence that respondent's reasons for selecting the successful candidates were not the true reasons. The successful candidates all possessed supervisory or lead work experience, held higher level positions and had more technical experience than complainant, there was nothing irregular about the oral interview process and complainant's statistical evidence was insufficient for a finding that respondents practiced sex discrimination during the period in question. While one witness gave complainant an opinion as to who would be selected prior to the actual decision, there was no evidence of preselection. *Stroud v. DOR*, 82-PC-ER-97, 9/26/85

Complainant failed to establish a prima facie case based on race where evidence showed he did not satisfy the normal performance requirements for the position, where approximately 80% of the unclassified academic staff

employes were rated above the complainant even though complainant's performance was rated "well within" the acceptable range and where complainant's replacement was also black. *Davis v. UW-Stout,* 82-PC-ER-129, 1/17/85

No probable cause based on age was found as to non-selection complaint where complainant's attire at the interview was inappropriately casual, where complainant's work examples were between 25 and 30 years old, some were on brittle newspaper and the examples were musty smelling. The successful applicant was 25 while the appellant was 53. *Raschick v. UW-Eau Claire*, 81-PC-ER-101, 11/21/84 affirmed by Burnett County Circuit Court, *Raschick v. Pers. Comm.*, 85-CV-12, 6/18/86; affirmed by Court of Appeals District III, *Raschick v. DOJ & Pers. Comm.*, 86-1320, 4/21/87

No age discrimination was found where respondent decided not to reinstate complainant, a 56 year old, where the decision was based on respondent's desire to deal with a problem of sick leave abuse and complainant had a record of such abuse. In the companion appeal, the reinstatement decision was found to have been an abuse of discretion. *Seep v. DHSS*, 83-0032-PC & 83-0017-PC-ER, 10/10/84; affirmed in part, reversed in part, by Racine Circuit Court, *Seep v. State Pers. Comm.*, 84-CV-1705, 84-CV01920, 6/20/85; supplemental findings were issued by the Commission on 2/2/87; affirmed in part, reversed in part by Court of Appeals District 11, 140 Wis. 2d 32, 5/6/87; [Note: the effect of the Court of Appeals decision was to affirm the Commission's decision in all respects]

Probable cause was found where respondent deviated from its stated position selection process by incorporating an unsolicited and negative assessment of complainant, who is black, and by initially screening out the complainant because he was "overqualified" but not screening out a white male with a comparable background. *Welch v. UW-Oshkosh*, 82-PC-ER-44 and 82-122-PC, 4/5/84

No probable cause was found where just one of three persons comprising the interview panel for a vacant position was aware of complainant's handicap and where that person, who actually made the hiring decision, based the decision in large part on the rankings and comparisons by the other two panel members. In addition, complainant's answers to questions posed by the panel were inconsistent,

at least in part, with the policies and responsibilities of the employing unit and there was no evidence in the record establishing that complainant was better qualified than the successful applicants. *Bisbee v. DHSS*, 82-PC-ER-54, 6/23/83; affirmed by Dane County Circuit Court, *Bisbee v. State Pers. Comm.*, 617-636, 10/3/84

No probable cause was found where complainant failed to produce any evidence indicating the persons comprising the interview panel or the person making the hiring decision was aware or should have been aware that the complainant was bisexual. *Bisbee v. DHSS*, 82-PC-ER-54, 6/23/83; affirmed by Dane County Circuit Court, *Bisbee v. State Pers. Comm.*, 617-636, 10/3/84

For a complaint arising out of a hiring decision, no probable cause was found based on age, race or sex where the successful candidate and the complainant had generally equivalent work experience and the content of their respective answers during the oral interview were approximately equal but where the successful candidate's manner of presentation was more "dynamic" and indicative of the supervisory traits necessary for the position. A prior designation of the successful candidate to fill the position on an acting basis did not indicate pretext. *Meyett & Rabideaux v. DILHR*, 80-PC-ER-140, 81-PC-ER-2, 4/15/83

In a complaint arising from a hiring decision, no age discrimination was found where respondent reasonably concluded that complainant was not as well qualified as those sixteen applicants ultimately hired for janitorial positions and where the record failed to indicate the ages of those applicants certified and those hired. *Vesperman v. UW-Madison*, 81-232-PC, 81-PC-ER-66, 3/31/83

In a complaint arising from a hiring decision, no discrimination was found where complainant was not as well qualified as those sixteen applicants ultimately hired for janitorial positions, where eight of the thirty two certified applicants were handicapped and three of the eight were hired and where complainant held six different positions during the prior 41-2 year period and had been terminated once for a personality conflict and once for a verbal attack on a nun escorting a group of children who had walked on a floor complainant had just waxed. *Vesperman v. UW-Madison*, 81-232-PC, 81-PC-ER-66, 3/31/83

No probable cause based on race or sex was found where the complainant, a black male, was not appointed to fill a vacant Offset Press Operator 2 position, and although the complainant had not had recent experience with the press used for the performance test, it was the only press on which all 3 applicants had had some experience, and the complainant scored significantly lower on the performance test. *McCrae v. UW-Milwaukee*, 81-PC-ER-99, 2/7/83

While the complainant established a prima facie case, no race discrimination as to an appointment was found where there were strong reasons for the appointment that was made, the complainant's statistical showing of work force composition was inconclusive, and there was no evidence of discrimination with respect to three acting appointments of whites followed by their permanent appointments which allegedly constituted a pattern and practice of discrimination. *Long v. DILHR*, 81-PC-ER-1, 11/24/82

No probable cause was found on the issue of race discrimination with respect to respondent's failure to hire the complainant in the misdemeanor unit of respondent's adult criminal division due to the absence of evidence to show a pattern of racial discrimination, the relevant labor market, or general policies and practices of racial discrimination. *Taylor v. State Public Defender*, 79-PC-ER-136, 8/5/82

No probable cause was found on the issue of retaliatory discrimination with respect to respondent's failure to hire the complainant in the misdemeanor unit of respondent's adult criminal division where, before the complaint was filed, the respondent had consistently refused to hire the complaint in that unit. *Taylor v. State Public Defender*, 79-PC-ER-136, 8/5/82

Respondent's decision not to reinstate complainant was held not to be motivated by racial considerations where complainant failed to introduce specific evidence concerning her qualifications or concerning the identity and actions of decision makers whom she held accountable, and therefore failed to make out a prima facie case. *McKee et al. v. DILHR*, 80-PC-ER-92, etc., 7/26/82

Respondent was found not to have retaliated against complainant in failing to hire him. It was logical to conclude that once the appointing authority learned that it

would be illegal to ignore complainant's application for a vacant position merely because complainant had previously filed a discrimination complaint, the appointing authority did not continue to consider the complaint as a factor in the hiring decision and the appointing authority agreed with the unanimous recommendation of an advisory committee that another applicant was more suitable. *Smith v. UW*, 79-PC-ER-95, 6/25/82

No probable cause was found where the complainant was never certified for the vacancy in question so that the respondent could not have considered her for appointment. *Hagengruber v. DHSS*, 79-PC-ER-131, 4/29/82

The Commission discounted the complainant's argument that once the department had reached "full utilization" for women, it stopped hiring them, since the department would not have had to have hired its third woman under this theory, and the percentage of women in the department compares favorably with other departments around the country. *Rubin v. UW*, 78-PC-ER-32, 2/18/82

The Commission found no probable cause to believe the complainant had been discriminated against on the basis of sex and retaliation with respect to her non-appointment to a faculty position, where she was not placed on the "short list" for further consideration, and the record fully supported the new staff committee's opinion that she was not a historical geographer, the article that she had published was not considered that impressive or that material by the Committee members, and, with respect to alleged "contradictions" in the respondent's position, the Commission stated that it should not be considered unusual that a number of faculty members testifying as to their understanding as to the needs of the department, and their evaluations of candidates for a faculty position, would not speak with one voice, nor should it be considered unusual that the search process was not able to meet its goals at every step of the process. *Rubin v. UW*, 78-PC-ER-32, 2/18/82

No sex discrimination was found in the respondent's failure to reinstate complainant where it was found that during the course of her prior employment with the agency she had caused friction because of her inability to get along with her co-employes, and that she had failed to follow the chain of command. *Austin v. DMA*, 81-PC-ER-30, 2/9/82

No age discrimination was found where the complainant took a multiple choice exam and was certified for a number of program assistant positions but did not receive an appointment. The Commission noted that the hiring decisions were separate and independent and that there were legitimate reasons for each selection. *Markham v. DHSS*, 79-PC-ER-151, 2/9/82; affirmed by Dane County Circuit Court, *Markham v. DHSS & State Pers. Comm.*, 82-CV-1187, 8/20/86

No probable cause based on age was found where there was limited statistical evidence which did not indicate that a hearing on the merits would support a finding of a pattern or practice of discrimination, it was noted that the appointing authority has considerable discretion under the civil service law as to whom to appoint, and the complainant had been encouraged to take the test for the position by one of the supervisors. *Andrews v. UW*, 80-PC-ER-14, 10/21/81

No probable cause based on age or retaliation was found in decision not to hire complainant as an instructor in the geography department of UW-Oshkosh where an initial decision was made before complainant had filed a written application, the process was then reopened and complainant was still not hired. Four members of the department's faculty who were also members of the selection committee all had poor opinions of the complainant based on complainant's earlier experience as a teacher there. In addition, nothing in the materials submitted to the selection committee indicated that complainant had been active in the geography profession during the previous 10 years. *Thalhofer v. UW-Oshkosh*, 79-PC-ER-22, 9/23/81; affirmed by DILHR, 11/7/83; affirmed by LIRC, 2/16/84

No probable cause based on sex was found in decision not to hire complainant as an instructor in the geography department of UW-Oshkosh where an initial decision was made before complainant had filed a written application, the process was then reopened and complainant was still not hired. Four members of the department's faculty who were also members of the selection committee all had poor opinions of the complainant based on an earlier experience as a teacher there. In addition, nothing in the materials submitted to the selection committee indicated that complainant had been active in the geography profession

during the previous 10 years. Evidence that 90% of those qualified to teach geography are men accounted for the absence of any tenured women on the department's faculty. *Thalhofer v. UW-Oshkosh*, 79-PC-ER-22, 9/23/81; affirmed by DILHR, 11/7/83; affirmed by LIRC, 2/16/84

Agency discriminated on the basis of sex by failing to hire the complainant as director of a district Job Service office where complainant had performed the duties as office director under a temporary interchange agreement for one year prior to decision not to hire, had been certified as number one for the position and where there was statistical evidence of under-utilization of females at or above the pay level in question. *Anderson v. DILHR*, 79-PC-ER-173, 79-320-PC, 7/2/81; affirmed and remanded for additional findings on issue of mitigation of damages by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm.*, 81-CV-4078, 6/7/82

Despite the failure to fill the disputed position for a number of years after the hiring decision in question and attempts to raise the position's salary level, the position remained "open" for purposes of the Fair Employment Act where the duties did not change and where the agency continued to look for someone other than the complainant to do a job for which the complainant was qualified. *Anderson v. DILHR*, 79-PC-ER-173, 79-320-PC, 7/2/81; affirmed and remanded for additional findings on issue of mitigation of damages by Dane County Circuit Court, *DILHR v. Wis. Pers. Comm.*, 81-CV-4078, 6/7/82

No probable cause was found with respect to a complaint of retaliation in connection with a failure to appoint where it was noted that the decision was a collegial one participated in by the departmental faculty, and that the complainant had not applied for a current vacancy but rather had asked the department in essence to create a new professorship in an area that the department had already established as a relatively low priority. *Acharya v. UW*, 78-PC-ER-53, 2/13/81; affirmed by DILHR, 11/20/81; affirmed by LIRC, 1/9/82

Where the complainant was denied promotion in 1975 by 9-1 vote of the Psychology Department, with a number of reasons cited for the decision, the department in 1977 changed the promotion review procedure so that an individual could no longer automatically advance his or her

name for promotion review, but instead consideration required preliminary nomination by the tenured faculty, the complainant applied for promotion in 1977 and was not reviewed under the new procedure, and there was evidence of some personal differences between the complainant and some of the departmental faculty, no probable cause based on national origin/ancestry was found. *Dasgupta v. UW-Eau Claire*, 78-PC-ER-22, 2/19/80

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 766 through 766.06

[Previous material] [Next material]

---

766 Age discrimination

766.02(2) Finding of *no* probable cause

No probable cause was found on the basis of sex or age as to respondent's decision to use promotion rather than reallocation as a method for moving employes to a higher classification level in light of management's understanding that the union opposed reallocation and the absence of any indication that the lengthy promotional procedure, which resulted in decisions to hire 1 of 2 female candidates and 7 of 8 candidates older than 40, was undertaken because of the complainant's age or sex. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No probable cause was found on the basis of sex or age as to respondent's decision not to select complainant, a female over the age of 40, where information beyond the raw scores from interviews was relied upon in making the final decisions whether to promote a particular candidate, this information related to a large extent to the performance or work record of the candidate, complainant's performance was marginal and other employes who were promoted did not have similar performance problems as complainant. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v.*

***Pers. Comm.*, 97-CV-0287, 8/28/98**

No probable cause was found on the basis of sex or age as to respondent's decision not to assign complainant, a female over the age of 40, to respond to a herbicide drift that occurred within complainant's region of the state. Complainant lacked basic knowledge about the herbicide involved and the person selected by respondent to respond was the expert in the Division. The person selected was older than complainant, had expressed a desire to work alone and management had a goal of sending only one person in response to a complaint. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

There was no probable cause to believe respondent discriminated against complainant on the basis of his age, national origin or ancestry and/or race with respect to providing him computer training where complainant, who was born in Mexico, was employed as the sole LTE in the office, there were insufficient computer stations for even the permanent employes and complainant had the lowest priority for training behind the permanent employes. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

There was no probable cause to believe respondent discriminated against complainant on the basis of his age, national origin or ancestry and/or race with respect to the decision to terminate his employment where complainant, who was born in Mexico, was employed as the sole LTE in the office, although respondent criticized complainant's work performance, he actually was terminated because there was a reduction in the workload. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

No probable cause was found with respect to the decision not to select the complainant for a vacant position where the questions used by the interview panel were job-related, the questions were asked of all the candidates, the answers were scored using a pre-established benchmark rating system, the actual scores awarded were based on the candidates' responses, the panel members did their ratings individually and the scores were not altered. There was no evidentiary support for complainant's contentions that younger workers had more experience with computers and that an interview question relating to knowledge of

computers would have a disproportionate impact on older workers. *Jahnke v. DHSS*, 89-0094-PC-ER, 89-0098-PC, 12/13/90

No probable cause was found with respect to advice given the complainant regarding the effect of certain legislation on his retirement options where the reasons given by respondent for its statutory interpretation were legitimate and non-discriminatory and the respondent provided the same information to anyone who raised the same issue. *Prill v. DETF & DHSS*, 85-0001-PC-ER, 12/15/89

No probable cause was found with respect to a decision not to hire the complainant, a 42 year old female, for assistant professorships where the selection process resulted in hiring four out of six females and three of the six persons hired were in the protected age category. The successful candidates had more relevant degrees, had more recent experience teaching in the field, for the most part had more teaching experience, and had better recommendations than the complainant. *Chandler v. UW-La Crosse*, 87-0124-PC-ER, 88-0009-PC-ER, 8/24/89

No probable cause was found with respect to a decision setting complainant's pay level where complainant's starting wage was more than his younger predecessor's ending wage and no wage pattern could be discerned indicating age bias. No probable cause was found with respect to complainant's allegation that he was forced to retire where the record indicated he had not been forced to retire. *Schleicher v. DMA*, 87-0019, 0169-PC-ER, 5/18/89

No probable cause was found with respect to various nonselection decisions where complainant failed to show that her experience, knowledge, interest and motivation or interview performance were actually superior to those of the successful candidates, that the hiring criteria were not properly related to the duties and responsibilities of the subject position, or that the criteria were not properly applied by the individuals with effective hiring authority. Complainant's statistical evidence presented a mixed picture at best. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

No probable cause was found with respect to two decisions denying reclassification of the complainant's position where the duties and responsibilities of the position did not appear

to meet the requirements for classification at the higher level and, as to one of the decisions, the complainant acknowledged that her position did not merit reclassification. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

No probable cause was found with respect to the denial of data base training where respondent had provided complainant with micro-computer training even though it was not required. The micro-computer training was also more easily transferable to other positions than the data base training would have been. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

No probable cause was found with respect to a decision not to hire the complainant where there was nothing in the record from which to conclude that the respondent's explanation was not legitimate, the explanation was clearly non-discriminatory on its face and the complainant failed to show a relationship between respondent's actions and complainant's age. *Ozanne v. DOT*, 87-0107-PC-ER, 1/31/89

No probable cause was found with respect to a selection decision where there was no basis on which to conclude that the selection criteria were unreasonable, were not uniformly applied, or were not as respondent represented them to be or that the interviewing panelists' assessments of the candidates were not reasonable in view of the presentations of the candidates at the interviews and in view of the selection criteria. *Larson v. DILHR*, 86-0019-PC-ER, 86-0013-PC, 1/12/89

No probable cause was found with respect to a decision not to select the complainant, a 41 year old male, for a position of Laboratory Animal Caretaker 2 which included both animal and plant care, where the successful candidate, a 32 year old female, was qualified for the position, had more current work experience, had experience involving both animal and plant care and was formally educated in both animal science and horticulture. Complainant ranked first on the written examination and had extensive work experience in animal care. *Krause v. UW-La Crosse*, 85-0026-PC-ER, 1/22/87

No probable cause was found as to respondent's decision to terminate complainant's employment from a Laborer

Special position where complainant's supervisor set high performance standards for all the employes he supervised, complainant's work filed to meet the supervisor's standards and the record failed to show that the complainant was treated differently than any other employe supervised by complainant's supervisor or that complainant's supervisor treated employes over the age of 40 any differently than employes under the age of 40. *Podevels v. UW-Milwaukee*, 84-0204-PC-ER, 3/13/86

No probable cause was found as to non-selection complaint where complainant's attire at the interview was inappropriately casual, where complainant's work examples were between 25 and 30 years old, some were on brittle newspaper and the examples were musty smelling. The successful applicant was 25 while the appellant was 53. *Raschick v. UW-Eau Claire*, 81-PC-ER-101, 11/21/84; affirmed by Burnett Circuit County Court, *Raschick v. Pers. Comm.*, 85-CV-12, 6/18/86; affirmed by Court of Appeals District 1-II, *Raschick v. DOJ & Pers. Comm.*, 86-1320, 4/21/87

No probable cause was found where complainant had argued he was forced into early retirement because of harassment from his supervisors where complainant and his supervisor had disagreed as to the importance of complainant's program, complainant was reluctant to respond to supervision and complainant made no effort to establish the ages of his co-workers. *Hartl v. DILHR*, 82-PC-ER-126, 7/5/84

For a complaint arising out of a hiring decision, no probable cause was found where the successful candidate and the complainant had generally equivalent work experience and the content of their respective answers during the oral interview were approximately equal but where the successful candidate's manner of presentation was more "dynamic" and indicative of the supervisory traits necessary for the position. A prior designation of the successful candidate to fill the position on an acting basis did not indicate pretext. *Meyett & Rabideaux v. DILHR*, 80-PC-ER-140, 81-PC-ER-2, 4/15/83

No probable cause was found in decision not to hire complainant as an instructor in the geography department of UW-Oshkosh where an initial decision was made before complainant had filed a written application, the process was

then reopened and complainant was still not hired. Four members of the department's faculty who were also members of the selection committee all had poor opinions of the complainant based on complainant's earlier experience as a teacher there. In addition, nothing in the materials submitted to the selection committee indicated that complainant had been active in the geography profession during the previous 10 years. *Thalhofer v. UW-Oshkosh*, 79-PC-ER-22, 9/23/81; affirmed by DILHR, 11/7/83; affirmed by LIRC, 2/16/84

No probable cause was found where there was limited statistical evidence which did not indicate that a hearing on the merits would support a finding of a pattern or practice of age discrimination, it was noted that the appointing authority has considerable discretion under the civil service law as to whom to appoint, and the complainant had been encouraged to take the test for the position by one of the supervisors. *Andrews v. UW*, 80-PC-ER-14, 10/21/81

766.03(1) Finding of discrimination

Respondent discriminated against complainant, 56, in not selecting him for the position of acting director of administrative computing, where complainant's credentials in computer science were far superior to those of the person selected, who was 37 years old, had very little formal training or education in computer science and had far less extensive supervisory experience than complainant. Complainant's job performance with respondent had been exemplary. Respondent contended that the person hired was a better communicator and had better interpersonal skills, but complainant established that his skills in these areas were at least on a par. *Chiodo v. UW (Stout)*, 90-0150-PC-ER, 6/25/96; affirmed by Dane County Circuit Court, *UW v. Wis. Pers. Comm.*, 97-CV-3386, 9/24/98

The respondent's decision to send someone other than the appellant to law enforcement school constituted age discrimination, and the agency's stated reasons for sending him were concluded to be pretextual, where the age of the person sent was 32, there was very little evidence offered in support of the respondent's assertion that the younger employe was chosen because he got along better with others

than the complainant, and the complainant's supervisors told him on a number of occasions that age was a factor in their decision, and the explanation that these statements were made to "cushion the blow" to the complainant of the rejection were not convincing. [See also 760.2 for discussion of mixed-motive aspect] *Conklin v. DNR*, 82-PC-ER-29, 7/21/83

766.03(2) Finding of no discrimination

Complainant, 56, failed to establish age discrimination with respect to the hire of a 24 year old candidate, where the hiring decision turned on factors such as ability to listen and being a team player, rather than on training and experience. The Commission rejected complainant's contentions that pretext was demonstrated by developing the position description in a way as to favor younger candidates, by the "tone" of complainant's interview, by a comment to complainant (and not to any of the other interviewees) that she had 10 to 15 minutes to make a presentation in response to a question, by the failure of the interviewers to solicit additional information about one of complainant's responses and by the action of the interviewers to accept the successful candidate's answer to one question as correct. *Lundquist v. UW*, 95-0081-PC-ER, 9/23/98

Complainant, 48, failed to establish age discrimination with respect to hiring decisions for four positions of LTE Security Officer, even though he had extensive experience performing somewhat similar duties for the respondent for a period of approximately 10 years that ended approximately 5 years before the hiring transactions in question, where there had been an intervening and fundamental change in the orientation of the work unit from a police department to a security department and complainant did not have a good interview with regard to the newly stressed criteria of communication and interpersonal capabilities. There was no evidence to contradict the interviewer's testimony that she requested the ages of the interviewees in order to conduct a criminal record inquiry. The fact that two of the chosen candidates were over 40, and within 6 years of complainant's age, supported respondent's position that age was not a motivating factor in its hiring decision. *Ruport v. UW (Superior)*, 96-0137-PC-ER, 9/23/98

Respondent did not discriminate against complainant based on age with respect to a Program Assistant 1 selection decision where computer skills were a key selection factor, complainant's resume did not mention computer skills or knowledge, his interview notes did not mention computer skills or knowledge, and the successful candidate's resume and interview notes emphasized that knowledge. *Ledwidge v. UW-Madison & UWHCB*, 956-0066-PC-ER, 5/20/98

No discrimination was found as to complainant's claim of age discrimination arising from the time it took for her position to be reclassified from Agrichemical Specialist-Entry to the Agrichemical Specialist-Developmental level, where complainant was the first and only person to have been reclassified between these two levels and, on balance, comparison to employes who were reclassified under the prior classification structure was of little value. Even if the 11 other employes reclassified under the previous structure were considered to be similarly situated, there was insufficient support for a finding of discrimination where the median reclass period for all 12 employes was 18.5 months. Four of the 12 employes were over 40 when they were hired and two took longer than the median for their reclassifications and two were reclassified in less than the median of 18.5 months. In addition, at the time of her first evaluation, approximately 21 months after she began working, her supervisor identified performance difficulties and concluded that complainant needed a lot of additional training. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

Respondent did not discriminate against complainant on the basis of age in connection with its refusal to extend his retirement date for approximately 4 months where respondent was unable to extend complainant's retirement date because of budgetary constraints and there was insufficient evidence on which to base a finding that respondent had an opportunity to hire the complainant into one of the other positions in the district that were filled during the same time frame. *Lorscheter v. DILHR*, 94-0110-PC-ER, 4/24/97

No discrimination was found on the bases of age, national origin/ancestry or sex, nor was FEA retaliation found,

relative to the decision not to retain complainant as a faculty member in respondent's Industrial Engineering Department where complainant did not complete her Ph.D. by the date to which she had contractually agreed and where respondent had concerns about complainant's teaching effectiveness, the evidence of which included routine student evaluations as well as a petition filed by a group of students with a dean. *Nowaczyk-Pioro v. UW-Platteville,* 93-0118-PC-ER, 4/16/96

No discrimination based on age or handicap was found regarding respondent's decision to permit three other employes to complete recruit training school before the complainant, where complainant never requested to attend the school on a full-time basis. *Hogle v. UW-Parkside,* 93-0120-PC-ER, 4/28/95

No discrimination based on age or handicap was found regarding respondent's decision to deny complainant's request for refresher training in firearms, where complainant was not eligible for such training. *Hogle v. UW-Parkside,* 93-0120-PC-ER, 4/28/95

No discrimination based on age or handicap was found regarding respondent's decision to terminate the complainant's employment due to negligence in carrying out his duties as a limited term police officer, failure to follow instructions and making false statements. *Hogle v. UW-Parkside,* 93-0120-PC-ER, 4/28/95

Complainant, a correctional officer, failed to sustain her burden of showing age or sex discrimination relating to the decision to terminate her probationary employment, where 8 witnesses testified that complainant's job performance was poor. *Snee v. DHSS,* 92-0030-PC-ER, 4/17/95

Complainant failed to establish that respondent's decision not to select the complainant for a Regulation Compliance Investigator position was based on age or sex where the successful candidate 1) had more persuasive and conciliatory communication and conflict resolution skills, 2) had superior interest in the position, regulatory program experience and initiative, and where complainant had not shown good judgment in comments he had made relating to his prospects for obtaining a position prior to the interviews. *Hinze v. DATCP,* 91-0085-PC-ER, 12/28/93

Respondent did not discriminate against complainant on the

basis of his age when it failed to promote him to one of four vacancies and the following did not present evidence of pretext: respondent's reliance on work experience criteria, respondent's consideration of complainant's past work performance problems, respondent's failure to solicit references from complainant's supervisors, respondent's failure to consult complainant's personnel file, respondent's failure to promote complainant on five prior occasions, and respondent's request for additional candidates for consideration after promotional offers were declined by two individuals. A statement by a member of one of the interview panels to the effect that complainant had a few more gray hairs than the last time they met was construed as an attempt at initiating casual conversation rather than as direct evidence of discrimination. *Trimble v. UW-Madison*, 92-0160-PC-ER, 11/29/93

There was insufficient evidence to find complainant was constructively discharged by respondent on the basis of age where the supervisor's criticisms of complainant were based solely upon work performance. *Betz v. UW-Extension*, 88-0128-PC-ER, 12/17/92

Complainant failed to show that respondent's rationale for its hiring decision was a pretext for age discrimination where complainant had a "feeling" during the interview he was being discriminated against, he didn't believe a ten minute interview was sufficient, and he told the interviewer he had a lot of experience, which purportedly would have led the interviewer to conclude complainant was over 40. The interviews were conducted in a uniform manner, the only available information shows that the candidates selected appeared to have been better qualified, and respondent's expert offered unrebutted testimony that respondent's hiring statistics did not show age discrimination. *McCoic v. Wis. Lottery*, 88-0157-PC-ER, 12/17/92

Respondent did not discriminate against complainant on the basis of age when it failed to hire him for one of fifteen Conservation Warden 1 positions. Complainant established a prima facie case of age discrimination but failed to show respondent's explanation, i.e. that complainant did not score high enough in the interview, was a pretext for discrimination. There was inadequate statistical evidence in the record to show disparate impact, and, with respect to disparate treatment, there was no evidence regarding the

qualifications of any of the candidates other than complainant. Respondent's action of identifying those candidates who would move on to the next stage in the selection process was consistent with respondent's usual practice for group referrals. *Wojtalewicz v. DNR*, 90-0153-PC-ER, 12/17/92

The greater weight of the credible evidence showed complainant was terminated during her probationary period due to her poor work performance and not to her age. Complainant did not establish that her work performance was satisfactory or the age of the employe appointed to replace her. *Engel v. UW-Oshkosh*, 89-0103-PC-ER, 8/26/92

Respondent's decision to lay the complainant off was based on budget and program considerations, not on complainant's age. Respondent's failure to recall the complainant was based on the unavailability of a vacant position in the proper classification, not on complainant's age. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 12/30/86

Respondent's reasons for laying off the complainant and not recalling him were not pretextual where the layoff resulted in a net reduction of one position and a dollar savings as well as a sharing of expertise between two disciplines and there was no position to which complainant could be recalled because his former position was not recreated and complainant was not required to be recalled to those positions which did become available. Respondent's decision to lay off the complainant was based on budget and program decisions. The failure to recall the complainant was based on the unavailability of a vacant position in the proper classification. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 12/30/86

Complainant established a prima facie case with respect to the decision to lay him off and not to recall him, where he was over 40, was adversely affected by the decisions and an inference of discrimination could be drawn since younger persons were hired to perform the duties previously performed by complainant. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 12/30/86

No age discrimination was found with respect to complainant's early retirement from his position as

Assistant Director of Utilities in charge of the power plant and the maintenance mechanics. Respondent informed the complainant that his position was to be eliminated via reorganization and that it wanted someone with more expertise and with an engineering degree. Following complainant's decision to retire rather than to be laid off, respondent hired a younger employe with an engineering degree and with the ability to obtain an engineer's license. Evidence regarding respondent's contention that it was dissatisfied with complainant's performance was somewhat contradictory but there was not a preponderance of evidence that respondent's performance concerns were pretextual. There was also no persuasive evidence that the reasons for reorganizing the power plant or for requiring an engineering degree for the new position were pretextual ***McGrath v. UW-Parkside,*** **83-0090-PC-ER, 9/26/85**

No discrimination was found where respondent decided not to reinstate complainant, a 56 year old, where the decision was based on respondent's desire to deal with a problem of sick leave abuse and complainant had a record of such abuse. In the companion appeal, the reinstatement decision was found to have been an abuse of discretion. ***Seep v. DHSS,*** **83-0032-PC & 83-0017-PC-ER, 10/10/84; affirmed in part, reversed in part, by Racine Circuit Court,** ***Seep v. State Pers. Comm.,*** **84-CV-1705, 84-CV01920, 6/20/85; supplemental findings were issued by the Commission on 2/2/87; affirmed in part, reversed in part by Court of Appeals District 11, 140 Wis. 2d 32, 5/6/87; [Note: the effect of the Court of Appeals decision was to affirm the Commission's decision in all respects]**

In a complaint arising from a hiring decision, no discrimination was found where respondent reasonably concluded that complainant was not as well qualified as those sixteen applicants ultimately hired for janitorial positions and where the record failed to indicate the ages of those applicants certified and those hired. ***Vesperman v. UW-Madison,*** **81-232-PC, 81-PC-ER-66, 3/31/83**

No age discrimination was found where the complainant took a multiple choice exam and was certified for a number of program assistant positions but did not receive an appointment. The Commission noted that the hiring decisions were separate and independent and that there were legitimate reasons for each selection. ***Markham v. DHSS,*** **79-PC-ER-151, 2/9/82; affirmed by Dane County Circuit**

Court, *Markham v. DHSS & State Pers. Comm.*, 82-CV-1187, 8/20/86

766.04 Prima facie case

Complainant established a prima facie case as to a hiring decision where he was 48 years old, he had extensive experience performing somewhat similar duties for the respondent during a period of approximately 10 years, he was one of 12 applicants for four vacancies, he was not selected and all four successful candidates were younger than complainant, including two candidates in their early 20s. *Ruport v. UW (Superior)*, 96-0137-PC-ER, 9/23/98

Complainant failed to establish a prima facie case of age discrimination relating to two Building and Grounds Superintendent 4 non-selection decisions where the ages of the successful candidates were not contained in the record. *Ledwidge v. UW-Madison & UWHCB*, 96-0066-PC-ER, 5/20/98

Complainant, 52, failed to establish a prima facie case of age discrimination with respect to the decision not to select him for a vacancy where the successful candidate was nearly three years older than complainant and where there was no other evidence that would create an inference of age discrimination. Respondent's motion for summary judgment was granted. *Starck v. UW (Oshkosh)*, 97-0057-PC-ER, 11/7/97

A prima facie case of age harassment requires a showing that 1) complainant is a member of the protected class, 2) she was subjected to unwelcome verbal or physical conduct of a nature based on the protected class, 3) but for the complainant's protected class, she would not have been subjected to such conduct, 4) the conduct complained of was sufficiently severe or pervasive that it unreasonably interfered with her work performance or created an intimidating, hostile or offensive work environment and 5) where complainant seeks to hold respondent liable for a hostile work environment created by a supervisor, complainant must show respondent knew or should have known of the harassment yet failed to take prompt, remedial action, citing *Carlson v. The Three Star, Inc.*, (LIRC, 8/27/86). *Smith v. UW-Manitowoc County*,

93-0173-PC-ER, 4/17/95

No age or sex discrimination occurred with respect to the decision to discharge complainant, who worked in a clerical capacity, where she failed to show she performed her job duties satisfactorily and the replacement employes were also in complainant's same protected category. *Smith v. UW-Manitowoc Co.*, 93-0173-PC-ER, 4/17/95

Complainant failed to establish a prima facie case of failure to hire because of age, national origin or ancestry and/or race where complainant offered no evidence that a vacant position existed, that he applied for it, that he was certified and considered, that he was rejected, or that there were circumstances which gave rise to an inference of discrimination. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

Complainant failed to establish a prima facie case of age discrimination regarding a selection decision where the successful candidate was also in the protected age group, there was no indication the employer was aware of the age of either candidate, and there was no basis to conclude there was a significant difference between the two in terms of youthfulness of appearance. *Ludeman v. DER*, 90-0108-PC-ER, 12/29/92

Complainant failed to show that an inference of age discrimination could be drawn from a hire where the age of the successful candidate was not indicated on the record. *Ozanne v. DOT*, 87-0107-PC-ER, 1/31/89

Complainant established a prima facie case with respect to the decision to lay him off and not to recall him, where he was over 40, was adversely affected by the decisions and an inference of discrimination could be drawn since younger persons were hired to perform the duties previously performed by complainant. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 12/30/86

Complainant, who was over 40 years of age at the time of her layoff, failed to establish a prima facie case of age discrimination where there was no evidence as to the ages of the two teachers who were not selected for layoff. *Cowie v. DHSS*, 80-PC-ER-115, 4/15/84

766.06 Statistical analysis

Where application of the Mann-Whitney-Wilcoxson ranked sum test to three sets of data from the employing agency's promotions over a three year period resulted in only one of the three probabilities being statistically significant, i.e. 5% or less, the Commission concluded that there was little evidence to suggest pretext after noting that other candidates for the promotions tended to have more extensive experience than complainant. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

It was impossible to draw conclusions regarding the respondents hiring practice where the complainant failed to provide data showing the age of the individuals who were considered for the positions. *Ozanne v. DOT*, 87-0107-PC-ER, 1/31/89

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 796.25 through 796.37

[Previous material] [Next material]

796.25 Salary

The record established that respondent did not retaliate against complainant for taking FMLA leave, but instead that he was given a negative performance evaluation and merit award reduction as the result of his failure to make up canceled classes or to secure coverage by colleagues, as well as his failure to make satisfactory progress on the requirements of his tenure-review plans, and that he was required to return to a five-day work week because respondent was concerned about recent legislative attention and was seeking to avoid potential conflicts with state work reporting and leave requirements. *Lubitz v. Wis. Pers. Comm. & UW System*, Court of Appeals, 99-0628, 2/24/00, affirming *Lubitz v. UW*, 95-0073-PC-ER, 1/7/98

No discrimination based on creed, sex or sexual orientation was found with respect to respondent's actions of removing complainant from his position as program leader and setting the level of his pay in his backup position of associate professor, where concerns about complainant's managerial abilities were heightened by receipt of an affirmative action complaint against complainant from one of complainant's colleagues, and where respondent concluded that complainant's leadership was not meeting program needs. Complainant's comparisons relating to his salary claim involved circumstances that were distinctly different from those of complainant. *Kinzel v. UW (Extension)*, 92-0218-PC-ER, 8/21/96

Any inference of discrimination or pretext raised elsewhere

in the record was dispelled entirely by complainant's admission that he really did not believe respondents' decision to institute "hiring above the minimum" after complainant had already been hired was based in any part on his handicap. Complainant's handicap was merely coincidental to complainant's status of one of two individuals who were employed by respondent DOJ before the HAM hires. *Thorpe v. DOJ & DER*, 93-0093-PC-ER, 7/25/94

Complainant (female coach of the women's basketball team) failed to establish a prima facie case with respect to an equal pay act type of claim where she failed to establish that she performed substantially the same work as her male predecessor or the male coach of the men's basketball team whose positions had other significant duties in addition to coaching. *Meredith v. UW-La Crosse*, 90-0170-PC-ER, 9/15/93; affirmed, *Meredith v. Wis. Pers. Comm.*, Dane County Circuit Court., 93CV3986, 8/29/94.

Complainant failed to establish a prima facie case where he did not show that different wage-eligibility factors were used for him than were used for all other employes regardless of their race and/or sex and he did not show that the uniform wage-eligibility factors impacted less favorably on the group of employes with the same sex and/or race as complainant. *Christensen v. DOC & DER*, 90-0144-PC-ER, 2/3/94

Respondent's failure to have awarded complainant a .25% additional merit increase did not constitute sex discrimination where respondent's articulated rationale for its decision--that such an award to a male employe was based on a special assignment, while complainant was not assigned equivalent responsibilities and did not meet the other criteria for such an award--was not shown to have been pretextual. Complainant's contention that since she and the male employe were in equivalent positions they should have received equivalent compensation is inconsistent with the legitimate, non-discriminatory criteria of the compensation plan. Complainant's contention that she performed duties at a higher level that were more complex and had more impact than was the case with similar jobs was not supported by the record. *Mosby v. WGC*, 91-0033-PC-ER, 1/11/94

A claim of handicap discrimination was rejected by the

Commission where the employe's reinstatement at a lower pay rate than at the time of his prior termination was the consistent practice of the hiring unit. Pretext was not shown by reference to two other employes who were reinstated without pay loss because differences demonstrated they were not similarly situated to complainant. *Hanke v. DHSS*, 91-0041-PC-ER, 6/25/93

Respondent did not retaliate under the FEA against complainant, who had brought his salary overpayment to respondent's attention through the filing of an appeal, when respondent then attempted to resolve it prior to hearing. *Harris v. DILHR*, 89-0151-PC-ER, 6/23/93

Respondent did not retaliate against complainant by taking action to collect a salary overpayment where complainant failed to show that a situation identical to or similar to his had arisen and been resolved by respondent in a manner different than how complainant's situation was resolved. *Harris v. DILHR*, 89-0151-PC-ER, 6/23/93

There was no probable cause based on marital status, FMLA or retaliation with respect to respondent's exercise of discretion setting complainant's starting rate of pay where the person who made the decision was not aware of the complainant's identity. *Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92

No probable cause was found with respect to a decision setting complainant's pay level where complainant's starting wage was more than his younger predecessor's ending wage and no wage pattern could be discerned indicating age bias. No probable cause was found with respect to complainant's allegation that he was forced to retire where the record indicated he had not been forced to retire. *Schleicher v. DMA*, 87-0019, 0169-PC-ER, 5/18/89

No probable cause based on creed was found with respect to a decision to deny approval, for salary add-on purposes, of the credits earned for a course titled "Fundamental Science of Nature." Complainant, a math teacher in a correctional institution, was entitled to a salary add-on upon the completion of a certain amount of additional relevant course work with the credits subject to approval by respondent. Respondent determined that the course in question was not relevant to complainant's duties as a math teacher and there was no evidence that the respondent's

determination was because of complainant's or anyone else's "system of religious beliefs." *Kircher v.DHSS*, 87-0065-PC-ER, 8/10/88

No probable cause was found where a male was hired at the same rank at a higher salary, did not have a Ph.D. as did the complainant, but had fulfilled his Ph.D. course work and had broader experience than she did. Complainant's salary was in the mid range of the BAVI staff. *Boyce v. UW*, 79-PC-ER-33, 2/17/81

796.30 Employment benefits (including leaves of absence)

Respondent did not discriminate against complainant, a supervisor, based on sex when it permitted him to substitute sick leave for 6 weeks, rather than 12 weeks, of paternity leave. Complainant was permitted to take leave without pay or to substitute vacation or other types of paid leave, except sick leave, for the second 6 week period. The complainant's only entitlement to the use of sick leave after the birth of his child derived from the Wisconsin Family Medical Leave Act which provides a maximum of 6 weeks of family leave. Complainant failed to show that he was similarly situated to comparison females who were granted more than 6 weeks of sick leave where the females underwent pregnancy and childbirth which could have qualified them for medical leave as well as family leave. Therefore, complainant failed to establish a prima facie case of sex discrimination. The different treatment cited by complainant as the basis for his claim resulted from the medical consequences of pregnancy and childbirth, not from gender. In order to prevail, complainant would have had to show that a similarly situated female, e.g., one who had adopted a child, was granted more than 6 weeks of sick leave as family leave in order to care for this child after the adoption. *Enke v. DOT*, 97-0202-PC-ER, 12/16/98

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to deny complainant's request for leave on a specific date where complainant was already scheduled to participate in a meeting on the day in question. Respondent's subsequent decision not to permit complainant to use accrued leave after she walked out of the meeting was also justified and

not discriminatory where it is respondent's practice not to approve leave when an employe walks off the job without authorization. *King v. DOC*, 94-0057-PC-ER, 11/18/98

Complainant failed to show disparate treatment or retaliation in regard to respondent's request for medical information where complainant had been absent on medical leave for a substantial period of time, where complainant had resisted all attempts by respondent to obtain information relating to her medical condition, and where respondent needed to arrange for coverage of complainant's responsibilities as a lead worker. *Dahlberg v. UW-River Falls*, 88-0166-PC-ER, 89-0048-PC-ER, 3/29/94

There was no disparate treatment of a similarly-situated employe where complainant was not allowed to use doctor's excuses signed by her husband because their marital relationship created a facial conflict of interest. While respondent did not have a general policy on the subject of who could sign doctor's excuses, its objection to complainant's husband signing her excuses was not premised on their marital relationship per se, but on the inherent conflict of interest involved. *Earnhart v. DHSS*, 89-0025-PC-ER, 11/19/92

Where all employes, including complainant, were eligible for group insurance coverage that encompassed medical treatment but not any form of non-medical treatment, there was no disparate treatment with respect to complainant, a Christian Scientist who sought coverage for services provided by a Christian Science practitioner. The record did not support a finding that Christian Science treatment either constitutes medical treatment or is generally recognized as medical treatment. *Lazarus v. DETF*, 90-0014-PC-ER, 9/21/92; affirmed by Dane County Circuit Court, *Lazarus v. State Pers. Comm.*, 92 CV 4252, 6/7/93

An employer's failure to grant a religiously-motivated request for a fringe benefit not provided under its standard personnel and management procedures did not create a conflict between the employe's religious practices and the employer's procedures so as to constitute a violation of the employer's duty of accommodation. *Lazarus v. DETF*, 90-0014-PC-ER, 9/21/92; affirmed by Dane County Circuit Court, *Lazarus v. State Pers. Comm.*, 92 CV 4252, 6/7/93

Respondent did not retaliate against the complainant when it

subjected the complainant's leave requests to increased scrutiny where the respondent was justified in concluding that complainant was a leave abuser. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent failed to show the complainant could not adequately undertake his job responsibilities where there were no observations or reports of complainant's actual job performance and where letters from complainant's physicians and from complainant himself, though seemingly inconsistent, were reasonably explained. Therefore, probable cause based on handicap was found as to respondent's decision to place complainant on a leave of absence. The Commission concluded that complainant's subsequent pursuit of a worker's compensation claim of disability and an unemployment compensation claim where he asserted certain medical limitations on his capacity to work, was not inherently inconsistent with his discrimination complaint where he argued that he was capable of doing his job satisfactorily at the time of his leave of absence. *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

Probable cause based on retaliation was found with respect to respondent's decision to place the complainant on a leave of absence where complainant had previously said he might commence legal action to attempt to obtain an accommodation and an employe of the affirmative action office said "We can play hardball too." *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

However, there was no evidence that said complaint was causal with respect to the subsequent decision to place him on a leave of absence where there was strong evidence that that decision was motivated by respondent's perception of complainant's medical condition. *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

Complainant's verbal complaint about "sexist cronyism" falls within the scope of a protected activity under the Fair Employment Act. However, there was no evidence that said complaint was causal with respect to the subsequent decision to place him on a leave of absence where there was strong evidence that that decision was motivated by respondent's perception of complainant's medical condition.

***Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87**

The respondent's action of not permitting a husband and wife, both of whom are state employes to choose "family" health insurance coverage for one spouse and their children and "single" health insurance coverage for the other spouse, was upheld where the decision was made pursuant to express provisions of the administrative code and statutes and the legislature could not have intended to nullify these provisions when it amended the Fair Employment Act to include marital status discrimination. *Ray v. DHSS & Group Insurance Board*, 83-0129-PC-ER, 10/10/84; affirmed by Dane County Circuit Court, *Ray v. Pers. Comm.*, 84-CV-6165, 5/15/85

796.35 Work assignments (including shift assignments and transfers)

The record established that respondent did not retaliate against complainant for taking FMLA leave, but instead that he was given a negative performance evaluation and merit award reduction as the result of his failure to make up canceled classes or to secure coverage by colleagues, as well as his failure to make satisfactory progress on the requirements of his tenure-review plans, and that he was required to return to a five-day work week because respondent was concerned about recent legislative attention and was seeking to avoid potential conflicts with state work reporting and leave requirements. *Lubitz v. Wis. Pers. Comm. & UW System*, Court of Appeals, 99-0628, 2/24/00, affirming *Lubitz v. UW*, 95-0073-PC-ER, 1/7/98

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to assign complainant additional job duties where complainant was the logical staff member to assume the duties and complainant indicated she would "be happy" to do so. *King v. DOC*, 94-0057-PC-ER, 11/18/98

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to move complainant to another work station where complainant was the lowest classified/least senior employe in the work unit and the other options would not have accomplished the same goals. *King v. DOC*, 94-0057-PC-ER, 11/18/98

No probable cause was found on the basis of sex or age as to respondent's decision not to assign complainant, a female over the age of 40, to respond to a herbicide drift that occurred within complainant's region of the state. Complainant lacked basic knowledge about the herbicide involved and the person selected by respondent to respond was the expert in the Division. The person selected was older than complainant, had expressed a desire to work alone and management had a goal of sending only one person in response to a complaint. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No discrimination based on creed, sex or sexual orientation was found with respect to respondent's actions of removing complainant from his position as program leader and setting the level of his pay in his backup position of associate professor, where concerns about complainant's managerial abilities were heightened by receipt of an affirmative action complaint against complainant from one of complainant's colleagues, and where respondent concluded that complainant's leadership was not meeting program needs. Complainant's comparisons relating to his salary claim involved circumstances that were distinctly different from those of complainant. *Kinzel v. UW (Extension)*, 92-0218-PC-ER, 8/21/96

Respondent's motion to dismiss was granted where complainant contended respondent's actions of assigning overtime to the least senior employe constituted discrimination based on creed. The overtime assignments were made pursuant to a provision of the applicable union contract and complainant did not allege that the seniority system was intended to result in the assignment of overtime to the disadvantage of employes who professed the same creed as complainant. *Brackemyer v. UW (River Falls)*, 95-0172-PC-ER, 5/28/96

Complainant failed to establish sex discrimination relative to the failure to provide her with a light-duty position because of a work injury, where, among other reasons, most of the potential light duty assignments did not meet complainant's work restrictions, respondent reasonably believed the remaining potential assignment would have been inconsistent with her restrictions, respondent initially did find a light duty assignment in another facility and two

of the three decision makers were women. *Longdin v. DOC*, 93-0026-PC-ER, 7/27/95

No sex discrimination or FEA retaliation existed as to a variety of conditions of employment, including relocation, removing a sign in complainant's office, discussing an internal complaint, denying complainant's request for an adjusted work schedule, declining to investigate the defacement of articles written by complainant, not including complainant in a meeting, the nature of working relationships with co-workers, disclosing to co-workers that complainant had been disciplined, requiring complainant to attend certain training, assignment of duties, responses to complainant's requests for changing her duties, scheduling meetings, use of a job performance improvement plan and union representation at weekly meetings. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95

Where respondent failed to offer complainant (female coach of the women's basketball team) a full-time appointment her second year of employment, as it had done with respect to her male predecessor and the male coach of the men's basketball team, the complainant failed to mount a successful challenge to respondent's rationale that it was due to budgetary constraints. Therefore, complainant failed to establish that this rationale was pretextual. *Meredith v. UW-La Crosse*, 90-0170-PC-ER, 9/15/93; affirmed, *Meredith v. Wis. Pers. Comm.*, Dane County Circuit Court., 93CV3986, 8/29/94.

Respondent did not violate the FMLA when, on completion of complainant's family leave, respondent temporarily assigned him duties according to the same ratio in effect prior to his leave, and also proposed a new set of duties. It was the proposed duties, which were still being hashed out at the time of complainant's return, that had to be analyzed in terms of whether complainant was being offered a position that was equivalent to his previous one. *Zimmerman v. UW-Madison*, 92-0224-PC-ER, 6/21/94

Complainant failed to show a prima facie case of sex discrimination where the manner in which her supervisor communicated with her was consistent with the style by which he communicated with other male and female employes. *Stricker v. DOC*, 92-0058-PC-ER, 92-0201-PC-ER, 3/31/94

Complainant failed to establish that her work environment was hostile, abusive or offensive where her supervisor's statements were gender neutral, were not sexually offensive or suggestive, were phrased and delivered in a manner consistent with addressing other employes, and were not intended to ridicule, insult or abuse her. *Stricker v. DOC*, 92-0058-PC-ER, 92-0201-PC-ER, 3/31/94

Respondent did not retaliate against the complainant when it proposed a new work schedule where the respondent revised the schedule as recommended by complainant. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

No retaliation was found with respect to the decision to transfer the complainant where the decision was found to have been based on legitimate objectives associated with the functioning of the respondent rather than in retaliation for complainant's prior complaint of discrimination. *Ruff v. Office of the Commissioner of Securities*, 87-0005-PC-ER, 6/25/90; modifying decision issued 5/16/90

No probable cause based on color and race was found with respect to a memo instructing the complainant to complete a certain assignment by a certain date where the assignment was equivalent to those given other employes with similar responsibilities and where the deadline was reasonable. *Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90

Probable cause based on FEA retaliation existed as to a decision to transfer the complainant, as opposed to someone else, to another position within the agency where one of the reasons respondent articulated for its decision was not supported by the record and certain other conduct cast doubt on the other reasons. However, no probable cause was found with respect to a claim of sex discrimination. *Ruff v. Office of the Commissioner of Securities*, 86-0141-PC-ER, 87-0005-PC-ER, 9/26/88

Probable cause based on retaliation and national origin was found with respect to respondent's decision not to assign the complainant to a three day weekend work pattern where the respondent failed to produce a copy of the posting of the vacancy, complainant's interest in that work pattern was well-known and respondent had contended it hired a

non-foreign person from outside the institution because no existing employes had responded to the posting. No probable cause was found as to other reassignment decisions. *Boyle v. DHSS*, 84-0090, 0195-PC-ER, 9/22/87; modified 10/21/87

Respondent was not required to exempt complainant, a handicapped employe, from forced overtime, as long as it was an essential job duty. *Conley v. DHSS*, 84-0067-PC-ER, 6/29/87

No probable cause on the basis of sex was found as to respondent's decision to assign state troopers in response to an inmate disturbance at a correctional facility where the procedure followed by respondent was reasonable in view of the circumstances, was neutral on its face and there was no evidence to demonstrate it was not followed uniformly. *German v. DOT*, 83-0034-PC-ER, 11/8/84

No discrimination was found on the issue of sex discrimination with respect to respondent's refusal to assign complainant to the misdemeanor unit of the adult criminal division rather than the juvenile unit, where the Commission was unconvinced that criminal law is generally considered to be a more worthy pursuit than juvenile law, where evidence indicated that respondent's decision was based on program needs and its evaluation of the complainant, and where respondent had a high percentage of women in its misdemeanor unit as well as in other units. *Taylor v. State Public Defender*, 79-PC-ER-136, 8/5/82

Although there was evidence that certain unspecified transfers had been accomplished by the respondent in an expedited manner, the transfer in question was handled within a normal or average time range and the fact that it had not been processed more expeditiously was not found to have been retaliatory. *McGhie v. DHSS*, 80-PC-ER-67, 3/19/82

No probable cause was found where the transfer of a handicapped employed was preceded by a reasonable good faith inquiry into his medical condition and physical capabilities. *Kleiner v. DOT*, 80-PC-ER-46, 1/28/82

Unlawful discrimination was found where employe's immediate supervisor failed to carry out instructions from upper-level management to structure employe's duties and responsibilities so as to comply with agency's obligations

under §230.37(2), Stats, relating to employes who are unable to perform their duties. *Kleiner v. DOT*, 80-PC-ER-46, 1/28/82

796.37 Training

Respondent reasonably accommodated complainant's disability when it responded to complainant's request for an ergonomic class and an E-mail class by conducting an ergonomic evaluation of complainant's workstation, had its safety officer instruct complainant on ergonomic correctness and gave complainant individual instruction on the use of E-mail. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

No discrimination based on age or handicap was found regarding respondent's decision to permit three other employes to complete recruit training school before the complainant, where complainant never requested to attend the school on a full-time basis. *Hogle v. UW-Parkside*, 93-0120-PC-ER, 4/28/95

No discrimination based on age or handicap was found regarding respondent's decision to deny complainant's request for refresher training in firearms, where complainant was not eligible for such training. *Hogle v. UW-Parkside*, 93-0120-PC-ER, 4/28/95

There was no probable cause to believe that respondent discriminated against complainant on the basis of his age, national origin or ancestry and/or race with respect to providing him computer training where complainant, who was born in Mexico, was employed as the sole LTE in the office, there were insufficient computer stations for even the permanent employes and complainant had the lowest priority for training behind the permanent employes. *Villalpando v. DOT*, 91-0046-PC-ER, 9/24/93

Respondent did not retaliate against the complainant when it denied her leave/tuition reimbursement request for three college courses where the courses were not job-related. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent did not retaliate against the complainant when it refused to reimburse her for a course where the person who processed the complainant's request was unaware of the complainant's FMLA leave request. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

No probable cause based on age was found with respect to the denial of data base training where respondent had provided complainant with micro-computer training even though it was not required. The micro-computer training was also more easily transferrable to other positions than data base training would have been. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

Complainant, an asthmatic, established the causality element for purposes of a probable cause determination arising from his separation from employment. The complainant's asthmatic condition was exacerbated by complainant's exposure to mace and a further adverse reaction to other gases could be expected if he were to be exposed to them as was required by the training procedure. *Hebert v. DHSS*, 84-0233-PC, 84-0193-PC-ER, 10/1/86

The respondent's decision to send someone other than the appellant to law enforcement school constituted age discrimination, and the agency's stated reasons for sending him were concluded to be pretextual, where the age of the person sent was 32, there was very little evidence offered in support of the respondent's assertion that the younger employe was chosen because he got along better with others than the complainant, and the complainant's supervisors told him on a number of occasions that age was a factor in their decision, and the explanation that these statements were made to "cushion the blow" to the complainant of the rejection were not convincing. [See also 760.2 for discussion of mixed-motive aspect] *Conklin v. DNR*, 82-PC-ER-29, 7/21/83

[Personnel Commission homepage] [PC Digest Introduction]

Sections 768 through 768.04

[Previous material] [Next material]

---

768 Arrest record/conviction record discrimination

768.01 Generally

While there might be a substantial relationship, pursuant to §111.335(1)(c), Stats., between complainant's attempted first degree murder conviction and the duties of an investigator/paralegal for respondent, the relationship was not so ineluctable that it could be concluded to be present as a matter of law. Respondent's motion to dismiss, made at the close of the complainant's case in chief arising from the decision not to hire him nearly 20 years after the conviction, was denied. *Staples v. SPD*, 95-0189-PC-ER, 8/11/98 (ruling by examiner)

A conclusion that there was no just cause for a discharge does not equate to a conclusion that respondent was illegally motivated. An employer's mistaken belief or inability to prevail at a hearing or arbitration is not necessarily inconsistent with a good faith belief, independent of complainant's arrest record, that discipline was warranted. However, the less support there is for the charges, the more likelihood there is of pretext. *Russell v. DOC*, 95-0175-PC-ER, 4/24/97

While the FEA prohibits the discharge of an employe because of his or her arrest record, it is clear that this prohibition does not extend to prohibiting an employer from discharging an employe because the employer determines

that the employe engaged in conduct which is inconsistent with continued employment, merely because the conduct happened to result in an arrest. The employer does no violate the FEA so long as the disciplinary action is taken because of the underlying conduct and not because of the arrest and accompanying criminal charge. *Russell v. DOC*, 95-0175-PC-ER, 4/24/97

A respondent does not discriminate on the basis of arrest record merely because in its investigation into the employe's conduct it relies to some extent on information from the police department that had been developed in connection with complainant's arrest. *Whitley v. DOC*, 92-0080-PC-ER, 9/9/94

Even in a job where the circumstances are not especially conducive to committing the particular crime of which the employe has been convicted, the employer can consider the incompatibility between the personal traits important for a particular job and the personal traits exhibited in connection with the criminal activity in question. The personal qualities associated with the crime of arson, for which appellant had been convicted and was still serving his sentence, are incompatible with the qualities needed for a job that has responsibilities for the safety, direction and discipline of juvenile offenders. *Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93

Commission of the crime of arson indicates a disregard for the welfare of people who may be unable to protect themselves, which is inconsistent with the expectations of responsibility associated with the position in question and its connection with the welfare of juvenile offenders confined in a juvenile correctional institution. *Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93

Respondent's consideration of the elements of the crime, the requirements and responsibilities of the position in question, and factors related to the likelihood of recidivism, like length of time that the applicant remained crime free following the most recent conviction, were all acceptable factors to consider in the hiring decision. *Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93

Where respondent relied on complainant's conviction record to make its hiring decision, its consideration of other information related to his status in the correctional system

was related to an assessment of the risks that would be associated with his employment at a juvenile institution and was not a separate form of conviction record discrimination. *Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93

Only an understanding of the statutory elements of the conviction is required in an "elements only" analysis. Those facts found in a criminal indictment or information would usually be required only when the conviction is for an unspecific offense such as that of disorderly conduct. Retail theft falls within the category of convictions where the type of offensive circumstances is explicit and consideration of the criminal information is not required. *Perry v. UW-Madison*, 87-0036-PC-ER, 5/18/89

768.02(1) Finding of probable cause

Probable cause was found with respect to an allegation arising from a constructive discharge where complainant, who had been convicted of second degree sexual assault, was employed as an institution aide at Winnebago Mental Health Institute, he had been employed with respondent for nearly three years, had not been asked as part of his employment application whether he had a conviction record, the institution had no written policy regarding employment of persons with conviction records and did not screen job applicants or employes on the basis of conviction records, one of his supervisors at the institution had been aware of complainant's criminal record for some time but took no action, and where there was no dispute that the discharge was because of his criminal record. *Snow v. DHSS*, 86-0051-PC-ER, 6/20/88

768.02(2) Finding of *no* probable cause

Respondent did not discriminate against complainant on the basis of his conviction record when his supervisor and lead worker contacted complainant's probation agent in relation to complainant's extended unauthorized absences from work. Complainant filled a position which required the employment of an ex-offender and the position had a significant rehabilitation component in addition to the

traditional components of an employment relationship. *Perrien v. DOC*, 95-0031-PC-ER, 7/2/97

Respondent did not discriminate against complainant on the basis of arrest record when it terminated his employment as a correctional officer as a result of an altercation with his daughter's estranged husband. Respondent's investigation included perusal of the police report of the incident which led to complainant's arrest and other documents related to the criminal proceeding, including statements by witnesses. The investigation resulted in the conclusion that complainant, while in uniform, assaulted his son-in-law and failed to report his arrest to his supervisor. *Russell v. DOC*, 95-0175-PC-ER, 4/24/97

Complainant failed to sustain his burden of proof as to his claim of discrimination based on conviction record arising from a decision to terminate his employment where evidence showed that the decision to terminate complainant's LTE employment was based on his misconduct during his prior employment with the agency and that respondent would have reached the same decision to terminate his employment regardless of whether he had been criminally convicted with regard to that underlying misconduct. *Rohland v. DATCP*, 96-0080-PC-ER, 3/26/97

In dictum, the Commission noted that even if the complainant had established that respondent terminated his employment due to his conviction record, respondent would have been able to avail itself of the exception to the prohibition against conviction record discrimination given the relationship between the kind of criminal activity for which the complainant was convicted, which involved falsifying work reports, and the potential for such activity in the LTE moth trapper position. Complainant's conviction indicated a lack of honesty and responsibility which was inconsistent with the need to function relatively independently in the new moth trapper position. *Rohland v. DATCP*, 96-0080-PC-ER, 3/26/97

No probable cause was found with respect to a decision not to reinstate complainant to a BMH 2 position where it was undisputed that the appointing authority was applying a policy that former employes with disciplinary records were not rehired in the absence of extenuating circumstances and the appointing authority was not even aware of the complainant's arrest until complainant himself brought it up

during discussions about the record of discipline. *Ames v. UW-Milwaukee*, 85-0113-PC-ER, 12/23/88

No probable cause was found with respect to a decision to terminate the complainant's employment as an LTE where the respondent had concluded, based on a reasonable though not foolproof procedure for checking on the complainant's presence at various times during the work day, that the complainant had been falsifying his hours. The fact that complainant returned to work after a first arrest undermined complainant's contention that the termination decision, made after a second arrest, was motivated by that arrest or by an earlier conviction. *Pugh v. DNR*, 86-0059-PC-ER, 9/26/88

No probable cause was found with respect to the termination of complainant's employment, where complainant, a probationary employe who was handicapped, missed four consecutive days of work after he was arrested, where complainant could not say when he would be released from jail and return to work and where there was an immediate need to have someone perform the complainant's duties. No evidence was presented showing that complainant was treated differently than other probationary employes who missed several work days. *Brummond v. UW-Parkside*, 83-0045-PC-ER, 5/30/86

The complainant, who had an arrest record of which the respondent was aware, and who was discharged, failed to establish his job performance was satisfactory, where he did not complete his assigned work, was verbally abusive and threatening to both coworkers and supervisors, was threatening toward and made off-color remarks about members of the public with whom he came into contact and had unexcused absences/tardiness. Even if he had established a prima facie case, complainant failed to establish that the unsatisfactory work record was pretextual. *Brummond v. UW-Parkside*, 83-0045-PC-ER, 5/30/86

No probable cause was found with respect to a selection decision for an investigator position in the Wausau area where the successful candidate, who did not have a conviction record, had a wider range of and a great deal more relevant experience than complainant who had a conviction record. No pretext was demonstrated where during the complainant's interview, one interviewer stated that complainant's experiences due to his status as an

ex-offender were less useful in the Wausau area where most crimes were committed by 11white farm boys" and the other interviewer stated he was not generally impressed with the work of "jailhouse lawyers", and where the interviewers were acquainted with the successful candidates prior to the interview and prior to the certification. *Brownlee v. State Public Defender*, 83-0107-PC-ER, 12/6/85

No probable cause was found as to the respondents' decision not to select complainant for vacant Building Maintenance Helper 2 positions where each successful applicant had a higher interview score than the complainant and a more stable work record and there was no showing that the selection criteria applied by the respondent were not reasonably job-related, even though complainant may have had more custodial experience than some of the successful candidates. *Brummond v. UW-La Crosse*, 84-0178-PC-ER, 10/10/85

768.03(1) Finding of discrimination

Respondent's decision to terminate the complainant's employment as an Institution Aide at a mental health institution was illegal where management knew when complainant was hired about his criminal conviction in 1980 and after more than two years of employment, complainant was arrested and while this charge was pending, the respondent decided to terminate him. The respondent's professed reliance on the 1980 sexual assault conviction as a basis for the discharge was pretextual where the employer had no policy in place concerning conviction records, including no practice of screening job applicants with respect to conviction records. *Snow v. DHSS*, 86-0051-PC-ER, 4/11/89

768.03(2) Finding of *no* discrimination

Respondent did not discriminate on the basis of arrest/conviction record or retaliate against complainant for FEA activities regarding its decision to reprimand him, even though other employes similarly situated were not

reprimanded, where at the time the reprimand was imposed, the supervisor did not have knowledge of the actions of the other employes and management revoked the reprimand thereafter. *Erickson v. WGC*, 92-0207-PC-ER, 92-0799-PC, 5/15/95

Where respondent conducted its own investigation of complainant's conduct (which served as the basis for complainant's arrest and charge) and reached its own decision that complainant had been involved in an altercation with a female neighbor, had threatened the neighbor when she was in her car, had blocked her car and had kicked her car, respondent's decision to discharge the complainant was not motivated by complainant's arrest record but was motivated by his conduct. *Whitley v. DOC*, 92-0080-PC-ER, 9/9/94

Respondent showed it would have made the same decision to terminate complainant's probationary employment absent his arrest where complainant failed to report his arrest, in violation of work rules, and respondent has a policy to terminate probationary employes who have a work rule violation. *Thomas v. DOC*, 91-0161-PC-ER, 4/30/93

Respondent did not discriminate against complainant on the basis of arrest/conviction record when it failed to hire him for a food service worker position at a juvenile correctional institution where appellant was currently serving a sentence for arson and the personal qualities associated with the crime are incompatible with the desirable traits needed for a position that has responsibilities for the safety, direction and discipline of juvenile offenders in an institution. *Thomas v. DHSS*, 91-0013-PC-ER, 4/30/93

No discrimination was found where the complainant, who had a conviction record for retail theft, was not hired for a relief security position. The single conviction for intentionally taking merchandise from a merchant evidenced a disregard for the property rights of others and indicated personal qualities contrary to the security responsibilities assigned to the position which had the prevention of theft as its primary goal. The employe in the position effectively had total access to 22 campus buildings, including 19 dormitories and worked independently and without supervisory contact for 90% of the time. The fact that the conviction occurred a year before the non-selection did not make the offense "old news." *Perry v. UW-Madison*,

87-0036-PC-ER, 5/18/89

Respondent's concern expressed over potential litigation if complainant, who had a conviction record for retail theft, would be hired for a relief security position was a recognition of one of the two competing interests in the FEA's prohibition against discrimination based on conviction record and was not an illegal motive. *Perry v. UW-Madison*, 87-00360PC-ER, 5/18/89

No discrimination was found with respect to a decision not to reinstate the complainant to a vacant FRW 3 position where the decision-maker considered another candidate to be better qualified, the decision-maker had not been overly impressed by complainant's work habits during his prior employment and the decision-maker was concerned about a work rule violation that had occurred when the complainant was smoking and possessing marijuana on the job but was not concerned about the associated arrest. *Ames v. UW-Milwaukee*, 85-0113-PC-ER, 12/23/88

Where the complainant did not have a past arrest record, it was not discrimination on the basis of arrest record for the respondent to have discharged him in part for possession of a concealed weapon while at work, where such conduct also was the basis for his arrest. *Buller v. UW*, 80-PC-ER-49, 10/14/82; factual findings modified by order on 12/2/82; appeal dismissed by Dane County Circuit Court, *Buller v. Pers. Comm.*, 83-CV-8, 12/14/89

Assuming that the complainant established a prima facie case in a hearing on a complaint of discrimination on the basis of arrest/conviction record, it could not be found that the reasons for termination of probationary employment were pretextual, where the complainant was caught playing checkers on the job and drinking in the dormitory at the Corrections Academy at Oshkosh, had failed to prepare written assignments, and had been the subject of reports of inadequate performance by co-workers. The complainant was unable to show that he had been treated unequally, as while it was established that drinking at the academy was a "tradition", this was an unusual situation as it was the only known case where trainees had been caught and reported back to the employing institution, and all of the involved WCI-GB employes were counseled after their return to the institution. *Peters v. DHSS*, 80-PC-ER-122, 3/19/82

768.04 Prima facie case

Complainant failed to establish a prima facie case with respect to the information provided him by his employer relating to the filling of a vacant position, where one of the two people that complainant claimed he was treated differently than in this regard, also had a conviction record. *Perrien v. DOC*, 95-0031-PC-ER, 7/2/97

The complainant, who had an arrest record of which the respondent was aware, and who was discharged, failed to establish his job performance was satisfactory, where he did not complete his assigned work, was verbally abusive and threatening to both co-workers and supervisors, was threatening toward and made off-color remarks about members of the public with whom he came into contact and had unexcused absences/tardiness. Even if he had established a prima facie case, complainant failed to establish that the unsatisfactory work record was pretextual. *Brummond v. UW-Parkside*, 83-0045-PC-ER, 5/30/86

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 796.39 through 796.55

[Previous material] [Next material]

796.39 Conduct of co-workers

Summary judgment was granted with respect to a claim of sexual harassment based on two events occurring in the workplace, a correctional institution, on the same day. In one, a male supervising officer touched complainant's hair and asked, "Are you tight?" Complainant did not dispute that it was an ongoing joke at the institution that the tightness of her hair bun was an indicator of her mood for the day, that other co-workers had touched her hair and numerous co-workers asked about the "tightness" of her hair, and that complainant did not believe her co-workers' actions were sexually harassing. In the second incident, the same supervising officer asked, "Are you sure you want to go through with it?" in reference to complainant's upcoming marriage. Complainant did not show, or allege, that the two events interfered substantially with her work performance, nor were the events sufficiently pervasive, severe, threatening or humiliating that a reasonable person under the same circumstances would feel the working environment was intimidating, hostile or offensive. *Winter v. DOC*, 97-0149-PC-ER, 5/6/98

Complainant, a female food service worker at a correctional facility, did not establish that a reasonable person under the same circumstances would have considered two incidents of sex harassment, both occurring within her first 3 months of employment, as sufficiently severe or pervasive to interfere substantially with her work performance or to create an intimidating, hostile or offensive work environment. In one

incident, a male correctional officer told complainant that a prison was not a place for a woman to work. In the second, another officer referred to complainant as a "bitch" and/or a "slut." Complainant did not report the first incident and failed to establish that the comment made in the second incident reflected an attitude that was pervasive at the institution. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

Complainant failed to show an objectively hostile environment where complainant was only assigned "from time to time" to the work location where she was subject to supervision by the alleged harasser, she "generally avoided" the supervisor at work and she listed only 6 statements, an unquantified number of requests to visit complainant at home and one invitation to attend a convention together as having occurred over a period of six months. In *dicta*, the Commission also found that complainant failed to demonstrate the existence of a subjectively hostile environment where she never complained about the supervisor's actions until management explicitly encouraged her to do so and where complainant was interested in moving from her utility position, where she only had periodic contact with the supervisor in question, into a permanent assignment that would have been directly subordinate to that supervisor. Also in *dicta*, the Commission found that respondent would not be liable for the acts of the supervisor because: 1) the complainant did not establish *quid pro quo* harassment, 2) respondent acted immediately after complainant and three other employes told management about the supervisor's actions, suspended the supervisor and then demoted him to a non-supervisory position, 3) the supervisor's conduct was clearly outside the scope of his employment and respondent was not negligent in supervising the supervisor, and 4) the supervisor did not have any significant, independent authority relating to complainant's termination, promotion, rate of pay or discipline. *Butler v. DHSS*, 95-0160-PC-ER, 1/14/98

No sex discrimination or FEA retaliation existed as to a variety of conditions of employment, including relocation, removing a sign in complainant's office, discussing an internal complaint, denying complainant's request for an adjusted work schedule, declining to investigate the defacement of articles written by complainant, not including complainant in a meeting, the nature of working relationships with co-workers, disclosing to co-workers that

complainant had been disciplined, requiring complainant to attend certain training, assignment of duties, responses to complainant's requests for changing her duties, scheduling meetings, use of a job performance improvement plan and union representation at weekly meetings. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95

Complainant failed to establish a hostile work environment based on his handicap where another newly arrived employe who was treated differently on a social basis already had 5 years of social relationships built up with some members of the work unit, where complainant was not invited to staff meetings because they were specifically called to deal with the ongoing training of the complainant, where there was nothing to suggest that a comment ("We take care of our own.") was in any way directed at the complainant, where a comment by complainant's supervisor which referred to the complainant as being on a different wavelength was made in the context of the supervisor's concerns relating to complainant's aptitude for the duties he had been assigned to perform, and where other actions by complainant's co-workers reflected inevitable frustration arising from the level of complainant's work performance. *Stark v. DILHR*, 90-0143-PC-ER, 9/9/94

The following allegedly retaliatory acts did not rise to the level of "verbal or physical harassment" within the meaning of §230.80(2), Stats.: complainant was forced off the road when a co-worker (with whom he had a personality conflict) cut him off sharply in traffic and this same co-worker would not allow complainant to park in the garage with other trucks. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96

Where respondent responded to alleged incidents of racial harassment wherever it had a basis on which to respond, there was no basis for a conclusion that there was probable cause to believe management failed to take reasonable steps to prevent workplace harassment by complainant's co-workers. *Sheridan v. UW-Madison*, 86-0103-PC-ER, 87-0141-PC-ER, 2/22/89

Discrimination as to conditions of employment was found where religious comments by complainant's co-workers were numerous, they were continuous over complainant's

period of employment as a Facilities Repair Worker 3, they were directed at the complainant, they were sufficiently derogatory to be considered non-trivial and at times opprobrious, the respondent was aware that complainant was being harassed due to his religion and failed to take reasonable steps to prevent the harassment. However, no discrimination was found as to complainant's subsequent discharge. For relief, the Commission required respondent to provide training for those employes who supervised complainant during his probationary employment. *Laber v. UW-Milwaukee*, 81-PC-ER-143, 11/28/84

An employer has a duty, when it knows or should know of sexual harassment between fellow employes, to take appropriate action to deal with the problem, and acquiescence to such conduct by its employes constitutes discrimination on the basis of sex with respect to conditions of employment. *Glaser v. DHSS*, 79-PC-ER-63, 79-66-PC, 7/27/81

No sex discrimination was found where the respondent investigated complainant's allegation of sexual harassment against a co-employe and took certain steps to reduce the possibility of a re-occurrence, but took no disciplinary action against the co-employe because the investigation had not revealed objective evidence upon which to base disciplinary action. *Glaser v. DHSS*, 79-PC-ER-63, 79-66-PC, 7/27/81

796.40 Classification matters

No probable cause was found on the basis of sex or age as to respondent’s decision to use promotion rather than reallocation as a method for moving employes to a higher classification level in light of management’s understanding that the union opposed reallocation and the absence of any indication that the lengthy promotional procedure, which resulted in decisions to hire 1 of 2 female candidates and 7 of 8 candidates older than 40, was undertaken because of the complainant’s age or sex. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No discrimination was found as to complainant’s claims of

age and sex discrimination arising from the time it took for her position to be reclassified from Agrichemical Specialist-Entry to the Agrichemical Specialist-Developmental level, where complainant was the first and only person to have been reclassified between these two levels and, on balance, comparison to employes who were reclassified under the prior classification structure was of little value. Even if the 11 other employes reclassified under the previous structure were considered to be similarly situated, there was insufficient support for a finding of discrimination where the median reclass period for all 12 employes would be 18.5 months, appellant was reclassified in 23 months which was the same as one male and shorter than two other males and the only other female was reclassified after 18 months. Four of the 12 employes were over 40 when they were hired and two took longer than the median for their reclassifications and two were reclassified in less than 18.5 months. In addition, at the time of her first evaluation, approximately 21 months after she began working, her supervisor identified performance difficulties and concluded that complainant needed a lot of additional training. *Volovsek v. DATCP & DER*, 93-0098-PC-ER, 6/19/97; affirmed by Washington County Circuit Court, *Volovsek v. Pers. Comm.*, 97-CV-0287, 8/28/98

No probable cause was found as to complainant's FEA retaliation, occupational safety and whistleblower claims arising from the decision not to reclassify his position where respondent contended that the request was denied because complainant's position did not meet the requirements of the higher classification and complainant did not show respondent's decision was unreasonable or that respondent applied the specification's requirements more stringently for him than for employes who had not engaged in protected activities. *Holubowicz v. DOC*, 96-0136-PC-ER, 4/24/97

No probable cause based on age or retaliation was found with respect to two decisions denying reclassification of the complainant's position where the duties and responsibilities of the position did not appear to need the requirements for classification at the higher level and as to one of the decisions, the complainant acknowledged that her position did not merit reclassification. *Jones v. DATCP & DER*, 86-0067, 0151-PC-ER, 4/28/89

No probable cause based on retaliation or sex was found as

to respondent's decision to deny complainant's reclassification request. *Schultz v. DER*, 83-0119-PC, 84-0252-PC, 85-0029-PC-ER, *Schultz v. DER & DILHR*, 84-0015-PC-ER, 8/5/87

No probable cause was found as to respondent's decision to reallocate the position filled by complainant, a female, where the statistical records showed that of all positions covered by the classification survey, a greater percentage of women went up one or more pay ranges than men and a smaller percentage of women went down one or more pay ranges than men. *Schultz v. DER*, 83-0119-PC, 84-0252-PC, 85-0029-PC-ER, *Schultz v. DER & DILHR*, 84-0015-PC-ER, 8/5/87

In analyzing whether there is probable cause as to respondent's decision to reallocate the complaint's position in order to determine if there is some pattern probative of gender bias, one should look at the statistics reflecting how the employer treated all the employes affected by the survey (in the absence of some showing that this would not produce an accurate picture of the employer's attitude) rather than the statistics relating to the particular classification series. *Schultz v. DER*, 83-0119-PC, 84-0252-PC, 85-0029-PC-ER, *Schultz v. DER & DILHR*, 84-0015-PC-ER, 8/5/87

The Commission found no probable cause as to complainant's claim of discrimination based upon respondent's decision not to reclassify his position from Engineering Technician 3 to Engineering Technician 4, where appellant, who is black, failed to meet the requirements for reclassification and presented little evidence on disparate treatment. *Ellis v. DOT*, 83-0137-PC-ER, 4/30/86

Probable cause was found where 12 of 13 intake and processing supervisors classified at the Job Service Supervisor 2 level were women and while the position standard also identified hearing office manager positions at that level, 3 of 4 hearing office manager positions were classified at the Job Service Supervisor 3 level and 2 of those 3 positions were filled by men. *Conrady & Janowski v. DILHR & DP*, 81-PC-ER-9, 81-PC-ER-19, 11/9/83

The Commission held that the denial of a reclassification request, even though it was overturned in a companion

§230.44(l)(b), Stats., personnel appeal, did not constitute racial discrimination, where the reclassification denial was based on an interpretation of the position standards with which the Commission disagreed but did not feel was unreasonable *per se*, the complainant testified that his supervisor made remarks that he considered discriminatory and stereotypical, but he did not offer any evidence that the supervisor ever discriminated against him, the supervisor had given the complainant good performance evaluations and merit wage increase recommendations, and the supervisor had no role in the reclassification denial decision, and the allegation that the personnel analyst involved did not maintain eye contact with the complainant was of little if any probative value. *Moy v. DPI & DP*, 79-PC-ER-167, 8/21/81

796.45 Evaluation (including discretionary performance award)

The record established that respondent did not retaliate against complainant for taking FMLA leave, but instead that he was given a negative performance evaluation and merit award reduction as the result of his failure to make up canceled classes or to secure coverage by colleagues, as well as his failure to make satisfactory progress on the requirements of his tenure-review plans, and that he was required to return to a five-day work week because respondent was concerned about recent legislative attention and was seeking to avoid potential conflicts with state work reporting and leave requirements. *Lubitz v. Wis. Pers. Comm. & UW System*, Court of Appeals, 99-0628, 2/24/00, affirming *Lubitz v. UW*, 95-0073-PC-ER, 1/7/98

Respondent was justified in maintaining complainant on a Performance Improvement Program due to her failure to meet performance expectations where the record showed that complainant's performance did not improve in any significant manner during the period of time she was on PIP, despite continuing feedback and training, and complainant failed to show that her productivity was reasonable in view of the classification level of her position or her experience, or consistently met numerical standards once such standards were established. Complainant failed to establish retaliation under the Family Medical Leave Act. *Rufener v. DNR*, 93-0074-PC-ER, etc., 8/4/95

No discrimination based on race or sex was shown in regard to complainant's performance evaluation where complainant, a Building Maintenance Helper, had failed to notify her supervisors of health and safety violations in her building, had failed to communicate effectively with her supervisors on various occasions, had failed to carry out a work assignment and had failed to wear proper safety equipment. *McKibbins v. UW-Milwaukee*, 94-0099-PC-ER, 4/4/95

Complainant failed to demonstrate sex discrimination or fair employment retaliation with respect to her performance evaluation where the statements in her evaluation were an accurate reflection of her failure to meet clearly established performance expectations. *Stricker v. DOC*, 92-0058-PC-ER, 92-0201-PC-ER, 3/31/94

Respondent's decision to place complainant on a concentrated review program was not discriminatory where respondent verified that complainant was backlogged in her work and performance standards were established for all staff, not just complainant. *Iheukumere v. UW-Madison*, 90-0185-PC-ER, 2/3/94

No probable cause was found with respect to a decision to deny the complainant, a male, a discretionary performance award where the agency head, also a male, had received reports that the complainant had improperly divulged confidential information and perceived two other incidents of poor judgment. *Ruff v. Office of the Commissioner of Securities*, 86-0141-PC-ER, 87-0005-PC-ER, 9/26/88

796.50 Reprimand, suspension, demotion

No race discrimination or whistleblower retaliation was found with respect to respondent's decision to reprimand complainant for walking off the job without authorization. Complainant had been warned at the time that walking off the job would have a consequence, and complainant had violated several earlier directives. *King v. DOC*, 94-0057-PC-ER, 11/18/98

Respondent did not retaliate against complainant when it issued her a written reprimand. Complainant admitted she had violated her supervisor's directive, the reprimand was

consistent with respondent's disciplinary policy and complainant had been given a verbal warning on the same topic. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Complainant failed to show pretext with respect to various disciplinary actions where there was no evidence to rebut the testimony of his immediate supervisor 1) that he was unaware of complainant's protected activities and 2) that he had not been directed by anyone else in management to impose the discipline, and where complainant had not demonstrated that there were other employes who were actually similarly situated to him who did not receive similar discipline because 1) those employes were under a different supervisor and 2) complainant failed to establish the reasons for the other employe's absences in light of respondent's attendance policy which called for consideration of mitigating circumstances before the imposition of discipline. *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97

Complainant failed to sustain his burden of establishing that a 10 day suspension constituted discrimination based on national origin or ancestry or retaliation for engaging in FEA activities where respondent believed that a coworker was genuinely upset by complainant's comments, and where complainant had a disciplinary history which included a letter of reprimand and a one-day suspension which also involved allegations of harassing or threatening conduct, even though the coworker's reaction to complainant's conduct was unreasonable. *Zeicu v. DHSS [DHFS]*, 96-0043-PC-ER, 1/16/97

Respondent's action of removing the complainant from his supervisory position for failure to meet probationary standards was not discrimination based on handicap where complainant, who had taken two lengthy medical leaves, the second of which ended two months prior to the removal, failed to show that he continued to suffer from his impairment after returning from the second leave. *Rose v. DOC*, 93-0200-PC-ER, 8/4/95

Respondent did not discriminate on the basis of arrest/conviction record or retaliate against complainant for FEA activities regarding its decision to reprimand him, even though other employes similarly situated were not reprimanded, where at the time the reprimand was imposed, the supervisor did not have knowledge of the actions of the

other employes and management revoked the reprimand thereafter. *Erickson v. WGC,* 92-0207-PC-ER, 92-0799-PC, 5/15/95

The respondent did not retaliate against the complainant when it suspended her for one day for unauthorized leave where there was no showing that the leave was authorized by the respondent or by the FMLA. *Sieger v. DHSS,* 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

No probable cause based on race and color was found with respect to the issuance of a written reprimand which was later withdrawn where the complainant failed to introduce any evidence relating to whether the actions for which he was reprimanded merited a reprimand. *Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90

Respondent's decision to suspend the complainant for ten days for unauthorized distribution of literature on the grounds of a correctional institution was upheld upon review for claims of whistleblower and public employe safety and health retaliation where management had previously indicated a strong opposition to the practice of distribution union newsletters in the institution, antagonism between the complainant and management preceded the complainant's protected activities, those protected activities were not significant departures from complainant's previous conduct, the person who made the final decision to suspend the complainant was unaware that complainant had engaged in any of the specific protected activities and within the previous 10 months, the complainant had received a written reprimand and two three-day suspensions. Respondent's decision not to modify the suspension after another employe admitted to distributing some of the literature was upheld where the policy violated by the complainant did not differentiate the degree of malfeasance based on the amount of information found to have been distributed. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

No probable cause based on race, FEA retaliation or OSHA retaliation was found with respect to various disciplinary actions where the complainant admitted most of the charges against him, complainant's disciplinary problems started substantially before he filed his first discrimination complaint and respondent could have discharged him earlier

when it found he had falsified a medical excuse but instead allowed him to continue working. *Sheridan v. UW-Madison*, 86-0103-PC-ER, 87-0141-PC-ER, 2/22/89

No probable cause was found with respect to the decisions to issue complainant a written reprimand, suspend him and discharge him, as well as to certain conditions of employment where complainant repeatedly called in sick, left work and ultimately failed to appear at work. *Rose v. DOA*, 85-0169-PC-ER, 7/27/88

No probable cause based on retaliation was found with respect to a suspensions and conditions of employment where complainant did not accept management's consistently applied limitations as to the type of assistance to be provided by persons employed in the Disabled Veteran Outreach Program (as was the complainant) and where complainant failed to establish that he was treated any differently than his co-workers. *Poole v. DILHR*, 83-0064-PC-ER, 12/6/85

No handicap discrimination was found with respect to a refusal to allow the employe/complainant to rescind a request for voluntary demotion, where the complainant failed to show that he was handicapped or that the employer perceived him as such, where there was ample evidence that the employer based its decision on the complainant's inadequate job performance, and where another case was factually

distinguishable. *Rasmussen v. DHSS*, 81-PC-ER-139, 12/29/82

796.55 Layoff (including failure to recall and retirement in lieu of layoff)

The respondent did not retaliate against the complainant when it cut back her position to 70% where the essence of the decision had been made prior to complainant's request for FMLA leave. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent's reasons for laying off the complainant and not recalling him were not pretextual where the layoff resulted

in a net reduction of one position and a dollar savings as well as a sharing of expertise between two disciplines and there was no position to which complainant could be recalled because his former position was not recreated and complainant was not required to be recalled to those positions which did become available. Respondent's decision to lay off the complainant was based on budget and program decisions, not on age. The failure to recall the complainant was based on the unavailability of a vacant position in the proper classification. *Sprenger v. UW-Green Bay*, 85-0089-PC-ER, 12/30/86

The complainant failed to establish a prima facie case based on race regarding her claim that respondent discriminated against her by not recalling her after layoff where none of the laid off employes was recalled and no vacancy occurred for which complainant was entitled to recall. *Mitchell v. UW-Milwaukee*, 84-0170-PC-ER, 4/4/86

The complainant failed to establish a causal connection between the filing of her initial complaint in 1979 and her layoff in 1983 where, in the interim 4 year period, she was subjected to no disciplinary action, received satisfactory performance evaluations, and had no employment problems and where the layoff was clearly based on budget considerations and a change in computer operations from a "batch" system to an "on-line" system. *Mitchell v. UW-Milwaukee*, 84-0170-PC-ER, 4/4/86

No age discrimination was found with respect to complainant's early retirement from his position as Assistant Director of Utilities in charge of the power plant and the maintenance mechanics. Respondent informed the complainant that his position was to be eliminated via reorganization and that it wanted someone with more expertise and with an engineering degree. Following complainant's decision to retire rather than to be laid off, respondent hired a younger employe with an engineering degree and with the ability to obtain an engineer's license. Evidence regarding respondent's contention that it was dissatisfied with complainant's performance was somewhat contradictory but there was not a preponderance of evidence that respondent's performance concerns were pretextual. There was also no persuasive evidence that the reasons for reorganizing the power plant or for requiring an engineering degree for the new position were pretextual. *McGrath v. UW-Parkside*, 83-0090-PC-ER, 9/26/85

Complainant, who was over 40 years of age at the time of her layoff, failed to establish a prima facie case of age discrimination where there was no evidence as to the ages of the two teachers who were not selected for layoff. *Cowie v. DHSS*, 80-PC-ER-115, 4/15/84

Discrimination was found where complainant, a female math teacher, was bumped (laid off) from her position by a male guidance counselor who was not certified to teach math nor was he eligible for provisional certification in math and where the same male guidance counselor who was also not certified to teach art was not allowed to bump a male art teacher. Respondent was found not to have followed the clear language of the applicable bargaining agreement requiring subject matter certification by the bumping employe and to have misrepresented the male guidance counselor's certification, resulting in the retention of two male teachers and the layoff of a female teacher. *Cowie v. DHSS*, 80-PC-ER-115, 4/15/83

Respondent's decision to lay off complainants (five black LTE's) from a work force of five white and seven black LTE's was held not to be motivated by racial considerations where complainants were not as qualified as the employes who were retained, whether because of attendance, nature of jobs performed, length of time since they were hired, or length of time otherwise left in the term of employment. *McKee et al. v. DILHR*, 80-PC-ER-92, etc., 7/26/82

Probable cause to believe discrimination occurred was found where complainant, a 63 year old woman, was laid off from her teaching job, and where the institution had an underutilization of professional women, where her layoff contributed to that underutilization as well as to the institution's failure to meet established affirmative action goals, and where the male employe who was permitted to bump the appellant was essentially admittedly unqualified under the labor contract. *Cowie & Decker v. DHSS*, 80-PC-ER-115,114, 5/28/82

Probable cause to believe discrimination occurred was not found where complainant, a 57 year old woman, was laid off from her teaching job, where, although the institution had an underutilization of professional women, and her layoff contributed to that underutilization as well as to the institution's failure to meet established affirmative action

goals, the respondent relied on a plausible contract interpretation in determining that there was only one available exemption from layoff, and that was utilized for another older woman teacher. With respect to the argument that the institution failed to give the complainant as much information about alternative certification as a male teacher, this was consistent with the fact that institutional records showed that the complainant was only certified in one area and the male teacher in several. *Cowie & Decker v. DHSS*, 80-PC-ER-115,114, 5/28/82

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 770 through 770.04

[Previous material] [Next material]

---

770 Discrimination based on color

770.02(1) Finding of probable cause

Probable cause was found where complainant, who is black, was discharged for receiving and possessing marijuana during work time where complainant was arrested but no charges were pursued, and where respondent took no disciplinary action against a white male co-worker despite having no doubts that the co-worker had been smoking marijuana on the job. *Massenberg v. UW-Madison*, 81-PC-ER-44, 9/14/84

770.02(2) Finding of *no* probable cause

Respondent's imposition of a post-certification screening criterion to reduce the number of candidates to be interviewed was upheld where the application of the criterion was consistent with applicable requirements and practices and where the respondent ultimately concluded that complainant satisfied the criterion. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

The absence of a racial/ethnic minority on the interview panel was not evidence of pretext where there was a female on the panel and females were underutilized in the job

group of which the position was a part. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

The failure to employ written benchmarks or to score responses to interview questions did not demonstrate pretext where the interviewers took notes and after the interviews, the interviewers had a clear idea of who the top candidates were and agreed on the ranking. Respondent's failure to locate one of the interviewer's notes did not demonstrate pretext where the interviewer recalled the impressions she formed as a result of the interviews and another candidate was clearly much better qualified for the subject position. *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92

No probable cause was found with respect to an allegation of an abusive work environment allegedly resulting in the complainant's constructive discharge in 1988 where the allegation rested on two incidents, one occurring in 1979 and the other in 1986. The Commission found that the 1986 incident was arguably related to complainant's race and, although offensive, was isolated in time and the respondent took reasonable steps in responding to the incident. Complainant failed to show that the incidents were pervasive, sustained or numerous. *Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90

No probable cause was found with respect to the issuance of a written reprimand which was later withdrawn where the complainant failed to introduce any evidence relating to whether the actions for which he was reprimanded merited a reprimand. *Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90

No probable cause was found with respect to a memo instructing the complainant to complete a certain assignment by a certain date where the assignment was equivalent to those given other employes with similar responsibilities and the deadline was reasonable. *Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90

No probable cause was found as to the decision not to select the complainant for a vacant permanent position of English teacher, where the successful candidate had a higher score on the questionnaire and complainant, who had been filling the position as an limited term employe, had an inferior job reference based on respondent's first-hand knowledge of complainant's work performance. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

No probable cause was found as to claims relating to discharge and providing negative job references where complainant's employment as a limited term employe ended when complainant used compensatory time to finish the 1044 hour maximum of his LTE appointment and respondent's references were based on complainant's poor work record. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

No probable cause was found as to allegations of discrimination based on color, handicap and race, where complainant's employment was terminated based on his unsatisfactory work performance due to consistent failures to meet deadlines for the completion of assignments. *Johnson v. DHSS*, 83-0032-PC-ER, 1/30/85

770.03(1) Finding of discrimination

Respondent's action of discharging the complainant, a black female, from her position as a correctional officer for engaging in disorderly or illegal conduct and failing to provide accurate or complete information when requested constituted discrimination where complainant worked in a sexually and racially hostile environment, respondent decided to discharge the complainant before it had conducted its fact-finding investigation and white male employes, disciplined under the same personnel policy, were treated less harshly than complainant. *Bridges v. DHSS*, 85-0170-PC-ER, 3/30/89

770.03(2) Finding of *no* discrimination

No discrimination occurred when respondent did not hire complainant, who is black and had previously filed a race discrimination claim against respondent, for a limited term carpenter job where no authorization to hire had been received as of the date complainant reported for work. A second applicant, who was white, was also not hired on that date, although the second applicant did get hired on a later date. *Weaver v. UW-Madison*, 93-0022-PC-ER, 11/3/94

Respondent did not discriminate against complainant, a Native American, based on his race, color, and national

origin or ancestry when it failed to hire him for one of eleven vacancies where, even though complainant produced statistical evidence that respondent underutilized minorities, there was no evidence of irregularities in the hiring procedure, the same interview questions were asked of all candidates, the exams were designed to measure job-related criteria, all candidates were evaluated against the same rating guidelines and complainant received a score lower than the successful candidates. *Thunder v. DNR*, 93-0035-PC-ER, 5/2/94

Complainant failed to establish that his impressions of certain work-related incidents involving individuals who had input into the subject hiring decision demonstrated racial animus on their part, but instead the record showed complainant perceived any differences about work-related matters with his white supervisors and other whites with authority as based on racial animus. The complainant also failed to show that his relevant qualifications were superior to those of the successful candidate. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

Respondent's decision to place complainant on a concentrated review program was not discriminatory where respondent verified that complainant was backlogged in her work and performance standards were established for all staff, not just for complainant. *Iheukumere v. UW-Madison*, 90-0185-PC-ER, 2/3/94

While the only two black members of complainant's training class were terminated during their probationary periods, complainant's termination was upheld where the record contained numerous specific observations by numerous individuals of unsatisfactory performance by complainant and complainant failed to address any but a few of the observations other than by generally testifying that he was a good employe who worked hard. The Commission rejected complainant's suggestion that because his work performance did not include any illegal activities, it should have been regarded as satisfactory. *Green v. DHSS*, 92-0237-PC, 12/13/93

Complainant, who is black, was terminated from the State Patrol Academy on the basis of failing to obtain a passing grade on his notebooks. This rationale was not shown to have been pretextual. While the black training officer gave

him a passing grade on his first notebook and the two white training officers gave him much lower, failing grades, all three of their scores were relatively consistent in failing complainant on the next two notebooks. There was no evidence that the black training officer was influenced to lower her grades for the last two notebooks, and there was no evidence that the two white training officers used any different approach to grading complainant's notebooks than they did to grading the other cadets, and they also failed some of the white cadets. Complainant's contention that he was terminated prior to the computation of his final grades, in violation of Academy policy, carried no weight because once it was clear that he could not obtain a passing grade on his notebooks he was subject to dismissal without waiting for his final grades. Complainant also argued he was not permitted to submit a typewritten corrected notebook, while no white cadets were similarly restricted. However, this action was taken because complainant admitted he had not done the typing himself, and Academy policy required that cadets do all their own work. There was no basis for a conclusion that this policy was not also applied to white cadets. Complainant also cited as evidence of pretext the fact that he had been reported for playing basketball when some of the other cadets were working on academics, but there was no mention of the fact he also played tennis. However, complainant had been counseled specifically concerning his academic problems, and subsequently was observed doing something else (playing basketball) when he could have been working on his academics. This observation was made by all three training officers when they were playing tennis. *Owens v. DOT*, 91-0163-PC-ER, 8/23/93

Even though the respondent stipulated that the limitation of recruitment for two positions to only those applicants with Career Executive status had a disparate impact upon minorities including complainant, complainant failed to establish that he would have been hired for either of the positions if he had been allowed to compete for them. *Balele v. DHSS & DMRS*, 91-0118-PC-ER, 4/30/93

770.04 Prima facie case

Typically, statistical evidence is utilized in disparate impact

actions to establish a prima facie case of unlawful discrimination. Complainant failed to establish a prima facie case in a disparate impact analysis where the only statistical evidence presented was that the position at issue was in the Executive/Administration/Manager job group, which consisted of 7 positions, that 8.76% of the qualified and available labor pool were minorities, and that none of the positions were filled by minorities. *Balele v. UW System*, 91-0002-PC-ER, 3/9/94; affirmed by Dane County Circuit Court, *Balele v. George et al.*, 94 CV 1177, 2/17/95

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Section 796.60

[Previous material] [Next material]

796.60 Discharge/termination (including resignation, constructive discharge and non-renewal of contract)

Complainant's separation from employment resulted directly and solely from her failure to show up for work, to call in her absences, to offer an explanation for her absences, or to appear at the last pre-disciplinary meeting, rather than from illegal retaliation. Complainant's attempt to link her attendance problems to an alleged mental health condition resulting from alleged sexual harassment was not credible. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

Complainant would have to prove the existence of intolerable working conditions to sustain a showing of constructive discharge. *McCartney v. UWHCA*, 96-0165-PC-ER, 3/24/99

Complainant, who had longstanding back problems, underwent surgery in February of 1995, and was on medical leave without pay from February of 1995 until June of 1996, was not discriminated against on the basis of disability when his employment was terminated due to continuing medical problems. Complainant was unable to perform the Youth Counselor 2 duties as they were accurately reflected in the relevant position description. The position description specifically referred to lifting 125 pounds, an independent medical exam in September of 1995 concluded that complainant had a lifting limit of 35 pounds and should avoid repetitive bending, and complainant's physician indicated in April of 1996 that complainant was permanently and totally disabled with respect to

complainant's job and was incapable of lifting more than 50 pounds and making certain repetitive motions. Complainant acknowledged he would have to decline a supervisor's request to provide assistance with a large-scale disturbance at the institution. *Wille v. DOC*, 96-0086-PC-ER, 1/13/99 (appeal pending)

Respondent did not retaliate against complainant under the Family Medical Leave Act or the Fair Employment Act for having filed prior FMLA claims when it terminated his employment where respondent's action was consistent with the manner in which respondent treated other apparently similarly situated employes and where there was no showing that respondent's action was *per se* unreasonable. Complainant had chronic attendance problems over a lengthy period of time and the record did not support a conclusion that complainant's termination resulted from anything other than complainant's lengthy and continuing history of attendance problems. *Preller v. UWHCB*, 96-0151-PC-ER, etc., 8/18/98; affirmed by Dane County Circuit Court, 98-CV-2387, 12/6/99

There was no probable cause to believe respondent discriminated against complainant based on sex or retaliated against complainant when respondent terminated his employment, citing 8 specific acts of patient abuse, abusing a co-worker, reading while in work status, demonstrating an undermining attitude, leaving the unit for a smoking break, shoving and screaming at a co-worker and leaving the work unit for an extended break without permission. Although complainant presented evidence that co-workers took unauthorized smoke breaks and read papers, books or magazines in unauthorized areas, complainant failed to show these incidents were seen by or reported to supervisors. *Henebry v. DHSS*, 96-0023-PC-ER, 7/29/98

No sex discrimination was found with respect to respondent's decision to discharge the complainant from her food service worker position at a correctional facility for violating the fraternization policy where complainant gave a watch to an inmate, received a personal note from the inmate and sent a birthday card to the inmate, all without informing her supervisor. Complainant unsuccessfully sought to show pretext by comparing herself to males who had violated the fraternization policy yet were not discharged or had violated other work rules. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

Respondent successfully rebutted the presumption of causation arising from a finding that complainant's disclosure merited further investigation and from complainant's discharge within two years thereafter. Complainant was employed as a food service worker in a correctional institution. Shortly after she successfully completed her probationary period, respondent learned that she had, on several occasions, violated the policy prohibiting fraternization with the inmates. Complainant's actions violating the fraternization policy provided a legitimate, non-retaliatory reason for terminating her employment. *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98

No disability discrimination was found with respect to the decision to terminate complainant's employment where the institution had recommended that complainant's probationary period be extended but, less than a week thereafter, respondent learned that complainant had been absent due to the effects of drinking alcohol and that another employe overheard complainant say he felt "like a postal employe." *Figueroa v. DHSS*, 95-0116-PC-ER, 3/11/98

In order to establish a claim of constructive discharge, an employe must show that the employer knowingly permitted conditions of employment so intolerable that a reasonable person subject to them would resign, citing *Goss v. Exxon Office Systems*, 747 F.2d 344, 36 FEP Cases 345, 346 (3rd Cir. 1984). *Farrar v. DOJ*, 94-0077-PC-ER, 11/7/97

No probable cause was found with respect to complainant's FMLA claim where the stated reason for complainant's discharge was complainant's failure to notify his employer, if he was going to be absent due to illness, at least 30 minutes before the commencement of his shift, where complainant was working under the terms of a "last chance" agreement and where complainant's version of events relevant to his contention that a re-injury prevented him from complying with the 30 minute advance call-in requirement was not credible. *Berghoff v. DHFS*, 96-0033-PC-ER, 6/19/97

Respondent did not discriminate against complainant on the basis of age in connection with its refusal to extend his retirement date for approximately 4 months where respondent was unable to extend complainant's retirement

date because of budgetary constraints and there was insufficient evidence on which to base a finding that respondent had an opportunity to hire the complainant into one of the other positions in the district that were filled during the same time frame. *Lorscheter v. DILHR*, 94-0110-PC-ER, 4/24/97

A conclusion that there was no just cause for a discharge does not equate to a conclusion that respondent was illegally motivated. An employer's mistaken belief or inability to prevail at a hearing or arbitration is not necessarily inconsistent with a good faith belief, independent of complainant's arrest record, that discipline was warranted. However, the less support there is for the charges, the more likelihood there is of pretext. *Russell v. DOC*, 95-0175-PC-ER, 4/24/97

While the FEA prohibits the discharge of an employe because of his or her arrest record, it is clear that this prohibition does not extend to prohibiting an employer from discharging an employe because the employer determines that the employe engaged in conduct which is inconsistent with continued employment, merely because the conduct happened to result in an arrest. The employer does no violate the FEA so long as the disciplinary action is taken because of the underlying conduct and not because of the arrest and accompanying criminal charge. *Russell v. DOC*, 95-0175-PC-ER, 4/24/97

Respondent did not discriminate against complainant on the basis of arrest record when it terminated his employment as a correctional officer as a result of an altercation with his daughter's estranged husband. Respondent's investigation included perusal of the police report of the incident which led to complainant's arrest and other documents related to the criminal proceeding, including statements by witnesses. The investigation resulted in the conclusion that complainant, while in uniform, assaulted his son-in-law and failed to report his arrest to his supervisor. *Russell v. DOC*, 95-0175-PC-ER, 4/24/97

Complainant failed to sustain his burden of proof as to his claim of discrimination based on conviction record arising from a decision to terminate his employment where evidence showed that the decision to terminate complainant's LTE employment was based on his misconduct during his prior employment with the agency

and that respondent would have reached the same decision to terminate his employment regardless of whether he had been criminally convicted with regard to that underlying misconduct. *Rohland v. DATCP*, 96-0080-PC-ER, 3/26/97

Where complainant denied much of the underlying misconduct, if she could establish that respondent had a weak case for discharge, it would be probative of pretext. However, even if the employer's case is not the strongest, and the employer is mistaken about some aspects of the charges, this normally is not conclusive on the issue of discrimination, because the employer may have had a reasonable belief in the accuracy of the information it had available and may not have been motivated by a discriminatory animus. *Mitchell v. DOC*, 95-0048-PC-ER, 8/5/96

Respondent did not discriminate against the complainant based on handicap when it terminated her employment as a Residential Care Technician in a center for the developmentally disabled. Formal standards required RCTs to lift 55 pounds, complainant acknowledged her job required her to lift in excess of that amount and there were various lifting restrictions placed on complainant by medical providers, ranging to a maximum of 45 pounds. Respondent could not have reasonably accommodated complainant because excluding her from all those work activities which required her to lift in excess of her limitations would be to establish a special position for her, would measurably exacerbate problems of cost, staffing, contractual agreements and employe morale, and would eliminate an essential function of the RCT position. The 55 pound weight lifting requirement was formally initiated well before the event that precipitated complainant's termination. *Van Blaricom v. DHSS*, 93-0033-PC-ER, 5/2/96

No discrimination was found on the bases of age, national origin/ancestry or sex, nor was FEA retaliation found, relative to the decision not to retain complainant as a faculty member in respondent's Industrial Engineering Department where complainant did not complete her Ph.D. by the date to which she had contractually agreed and where respondent had concerns about complainant's teaching effectiveness, the evidence of which included routine student evaluations as well as a petition filed by a group of students with a dean. *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

In a complaint of discrimination relating to the academic-related decisions that bore on complainant's employment as a faculty member, the Commission must give appropriate weight to the academic and pedagogical judgments of the academics who are in the best position to make these kinds of evaluations and who have followed a process the university has developed to provide a careful method of evaluation of these factors. *Nowaczyk-Pioro v. UW-Platteville*, 93-0118-PC-ER, 4/16/96

No sex discrimination was found with respect to respondent's decision to terminate complainant's employment while she served a probationary period as a social worker, where complainant, a female, was one of two social workers hired during the relevant time period, and the other hiree, a male, was also terminated, and there was no evidence to support complainant's claim that the misconduct was unsubstantiated. *Krenzke-Morack v. DOC*, 91-0020-PC-ER, 3/22/96

No sex discrimination was found with respect to respondent's decision to terminate complainant's employment while she served a probationary period as a correctional officer. Respondent applied its policy of terminating a probationary correctional officer who is involved in a work rule violation or violations that would be the basis of a suspension or greater penalty for a permanent employe. The record did not support complainant's contentions that 1) that she was not at fault as to some of the occasions she was late; 2) her supervisor held females to a different standard than males; and 3) the institution engaged in a pattern or practice in terms of uneven discipline of male and female correctional officers. *Jaques v. DOC*, 94-0124-PC-ER, 3/7/96

The decision to terminate the complainant's employment was based on complainant's failure to carry out one of the supervisor's orders rather than complainant's requests for leave to care for his wife and children. *Butzlaff v. DHSS*, 90-0097-PC-ER, 1/23/96; affirmed by Dane County Circuit Court, *Butzlaff v. State of Wis. Pers. Comm.*, 96-CV-0431, 3/19/97

Complainant failed to establish that respondent violated the FMLA when it terminated his project employment where respondent had discharged complainant because he left the

employing institution before the end of his shift and without notification that he was leaving. *Emmons v. DHSS*, 93-0097, 0112-PC-ER, 11/27/95

The mere existence of a partial disability, involvement in a subsequent car accident, temporary wearing of a cervical collar/back brace as the result of the car accident, and continuing visits to a physical therapist/chiropractor without a record tying the partial disability or the car accident injuries to substantial and lasting changes in the way that complainant handled the major day-to-day activities of her life does not satisfy the element of the analytical framework that requires the complainant to establish that their impairment is such that it actually makes or is perceived as making achievement unusually difficult or limits the capacity to work. Respondent terminated complainant's employment as an Auditor 3, Lead Worker. Although respondent knew that complainant's impairment prevented her from sitting in one place for long periods of time and that complainant wore a cervical collar/back brace and even though complainant may have appeared on occasion to be in discomfort, respondent did not understand her condition to interfere in any significant way with her ability to perform the duties and responsibilities of her position. Complainant never indicated to her supervisors or her co-workers that her conditions were interfering, in a significant way, with her ability to perform her job duties, even though complainant did submit an accommodation request in which she stated her disability "impairs her from working extended hours at her computer" and makes "it difficult to perform numerous hours on the phone." *Rufener v. DNR*, 93-0074-PC-ER, etc., 8/4/95

No discrimination based on age or handicap was found regarding respondent's decision to terminate the complainant's employment due to negligence in carrying out his duties as a limited term police officer, failure to follow instructions and making false statements.. *Hogle v. UW-Parkside*, 93-0120-PC-ER, 4/28/95

No probable cause on the basis of handicap or retaliation was found regarding respondent's decisions that complainant could not return to his former position and to offer the complainant a position as a voluntary demotion, where the position to which the complainant could demote was the only position available which fit the criteria noted in a psychologist's evaluation of complainant. *Krueger v.*

***DHSS*, 92-0068-PC-ER, 4/17/95**

Respondent attempted to reasonably accommodate complainant's handicap of depression and an obsessive-compulsive condition when it offered complainant a demotion compatible with a psychologist's report. Respondent had rejected the option of returning the complainant to his former position with various adjustments which respondent reasonably rejected as requiring too much supervisory time and resulting in delayed services to respondent's clients. Respondent had provided complainant an unprecedented medical leave in excess of two years in hope that he could return to his former position. *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95

No age or sex discrimination occurred with respect to the decision to discharge the complainant, who worked in a clerical capacity, where she failed to show she performed her job duties satisfactorily and the replacement employes were also in complainant's same protected category. *Smith v. UW-Manitowoc County*, 93-0173-PC-ER, 4/17/95

Complainant, a correctional officer, failed to sustain her burden of showing age or sex discrimination relating to the decision to terminate her probationary employment, where 8 witnesses testified that complainant's job performance was poor. *Snee v. DHSS*, 92-0030-PC-ER, 4/17/95

No discrimination based on sex occurred with respect to the decision to discharge the complainant, a female correctional officer, who had been found to have engaged in the purchase and use of crack cocaine while off-duty and to have been untruthful to management about that conduct. Respondent had also discharged a male correctional employe who had been convicted for an off-duty battery incident, and respondent had suspended a second male employe for 10 days who had engaged in gambling with an inmate, had initially denied the conduct but then admitted the conduct of the following day. Complainant had not admitted her misconduct until an arbitration hearing more than one year after the incident. *Bohl v. DOC*, 93-0004-PC-ER, 2/20/95

Complainant, who was terminated from her position as a house fellow at a campus dormitory, did not establish that she performed her job satisfactorily, where she had violated several requirements of the position by serving alcohol to

underage house fellows in her room, using funds for improper purposes, accompanying underage residents to events where alcohol was served and failing to advise her superior of her absence. *Jazdzewski v. UW-Madison*, 92-0179-PC-ER, 2/20/95

Where respondent conducted its own investigation of complainant's conduct (which served as the basis for complainant's arrest and charge) and reached its own decision that complainant had been involved in an altercation with a female neighbor, had threatened the neighbor when she was in her car, had blocked her car and had kicked her car, respondent's decision to discharge the complainant was not motivated by complainant's arrest record but was motivated by his conduct. *Whitley v. DOC*, 92-0080-PC-ER, 9/9/94

No race discrimination was found regarding respondent's decision to discharge complainant, where the decision was made by someone of complainant's ethnic heritage and the decision was made after considering the internal investigatory report which showed that complainant had been involved in an altercation with a female neighbor, had threatened the neighbor when she was in her car, had blocked her car and had kicked her car, and after discussing the matter with subordinates and legal counsel. *Whitley v. DOC*, 92-0080-PC-ER, 9/9/94

No whistleblower retaliation was established regarding the decision to terminate the complainant's probationary employment where questions about the adequacy of complainant's work performance had existed for months and extensive documentation of the problems with his performance had been prepared before respondent received notice of the complainant's protected activity. *Stark v. DILHR*, 90-0143-PC-ER, 9/9/94

No handicap discrimination was established regarding the decision to terminate the complainant's probationary employment where there were numerous instances where the complainant's work performance was inadequate, numerous complaints received about his performance and these problems had to be viewed in the context of complainant's status as a probationary employe. During the course of a 30 day review period, additional training was provided to the complainant and his work performance was carefully analyzed. *Stark v. DILHR*, 90-0143-PC-ER,

9/9/94

Complainant failed to establish a prima facie case of race discrimination regarding the termination of his probationary employment where complainant acknowledged engaging in behavior which clearly violated applicable work rules, and failed to show that he was treated in a different manner than any other employe under similar circumstances. *Amaya v. DOC*, 93-0104-PC-ER, 7/7/94

Complainant's LTE employment as a security officer was terminated in connection with an off-duty incident where he was drinking, wearing a partial uniform and carrying a pistol in a tavern after closing hours, and subsequently became unruly in a contact with the Milwaukee Police Department. Complainant claimed his termination was based on national origin, but failed to show that he had been treated differently from any other officers, or that respondent's rationale for its action was in any way pretextual. *Romero v. WSFP*, 90-0075-PC-ER, 6/23/94

It was not handicap discrimination to discharge complainant from his position as a sheet metal worker because medical evidence showed he could no longer perform the job safely due to weakness in his left leg caused by stroke. Complainant's deficits in his left leg were "reasonably related" to his ability to adequately perform his job and returning complainant to the job would place his personal safety at risk. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 6/21/94

suffered weakness in his left leg caused by stroke, in order for complainant to perform his job as a sheet metal worker, where to do so would be unwieldy at best. The record also established that mechanical aids would not be adequate from a safety standpoint. Respondent also made a good faith offer of alternate employment, but complainant only was interested in remaining in the sheet metal job. *Keller v. UW-Milwaukee*, 90-0140-PC-ER, 6/21/94

A constructive discharge claim exists if complainant shows the employer knowingly permitted conditions of discrimination or retaliation to exist to such an extent that a reasonable person would feel compelled to resign. *Iheukumere v. UW-Madison*, 90-0185-PC-ER, 2/3/94

Complainant did not establish a prima facie case of retaliation for engaging in fair employment activities

because she did not show that the decisionmakers who terminated her probationary employment were aware that she had filed a discrimination complaint. *Schmidt v. DOC*, 91-0099-PC-ER, 2/3/94

The faculty vote not to retain the complainant resulted from his ineffectiveness as a teacher and a schism within the faculty between those with and without a Ph.D. rather than due to complainant's support for the hire of a minority for a vacant instructor post. *Fleming v. UW-River Falls*, 92-0012-PC-ER, 12/13/93

While the only two black members of complainant's training class were terminated during their probationary periods, complainant's termination was upheld where the record contained numerous specific observations by numerous individuals of unsatisfactory performance by complainant and complainant failed to address any but a few of the observations other than by generally testifying that he was a good employe who worked hard. The Commission rejected complainant's suggestion that because his work performance did not include any illegal activities, it should have been regarded as satisfactory. *Green v. DHSS*, 92-0237-PC, 12/13/93

Complainant's discharge from his employment as a driver's license examiner was in connection with his acting out in the presence of members of the public, certain behavior related to what was diagnosed as an "immature personality disorder in association with a sexual paraphilia," but which was not diagnosed as a psychiatric illness or impairment, but a personality disorder which did not limit his capacity to work. Therefore, he was not a handicapped individual pursuant to §111.32(8), Stats., since his sexual impulses were not uncontrollable and his behavior did not result from an uncontrollable or irresistible urge or impulse. *Miller v. DOT*, 89-0092-PC-ER, 11/23/93

Complainant, who is black, was terminated from the State Patrol Academy on the basis of failing to obtain a passing grade on his notebooks. This rationale was not shown to have been pretextual. While the black training officer gave him a passing grade on his first notebook and the two white training officers gave him much lower, failing grades, all three of their scores were relatively consistent in failing complainant on the next two notebooks. There was no evidence that the black training officer was influenced to

lower her grades for the last two notebooks, and there was no evidence that the two white training officers used any different approach to grading complainant's notebooks than they did to grading the other cadets, and they also failed some of the white cadets. Complainant's contention that he was terminated prior to the computation of his final grades, in violation of Academy policy, carried no weight because once it was clear he could not obtain a passing grade on his notebooks he was subject to dismissal without waiting for his final grades. Complainant also argued he was not permitted to submit a typewritten corrected notebook, while no white cadets were similarly restricted. However, this action was taken because complainant admitted he had not done the typing himself, and Academy policy required that cadets do all their own work. There was no basis for a conclusion that this policy was not also applied to white cadets. Complainant also cited as evidence of pretext the fact that he had been reported for playing basketball when some of the other cadets were working on academics, but there was no mention of the fact he also played tennis. However, complainant had been counseled specifically concerning his academic problems, and subsequently was observed doing something else (playing basketball) when he could have been working on his academics. This observation was made by all three training officers when they were playing tennis. *Owens v. DOT*, 91-0163-PC-ER, 8/23/93

The employer failed to meet its responsibility for accommodation where it failed to determine whether an appropriate job opening was available within the agency through transfer and to offer any such vacancy to complainant. Instead, respondent left the pursuit of such matters to complainant. Complainant was discharged for medical reasons connected to his handicap which left him unable to perform as a Correctional Officer. *Keul v. DHSS*, 87-0052-PC-ER, 6/23/93

There was no probable cause to believe that respondent discriminated against complainant on the basis of his age, national origin or ancestry and/or race with respect to the decision to terminate his employment where complainant, who was born in Mexico, was employed as the sole LTE in the office, although respondent criticized complainant's work performance, he actually was terminated because there was a reduction in the workload. *Villalpando v. DOT*,

91-0046-PC-ER, 9/24/93

Respondent showed it would have made the same decision to terminate complainant's probationary employment absent his arrest where complainant failed to report his arrest, in violation of work rules, and respondent has a policy to terminate probationary employes who have a work rule violation. *Thomas v. DOC,* 91-0161-PC-ER, 4/30/93

Where a substantial portion of complainant's absenteeism could be attributed to her depression, her discharge was substantially attributable to her handicap. Respondent established that complainant was unable to adequately undertake her job responsibilities due to her pervasive absenteeism. *Bell-Merz v. UW-Whitewater,* 90-0138-PC-ER, 3/19/93

Given the pervasiveness and duration of complainant's absenteeism problem, the absence of any expert opinion that a transfer would have been medically indicated, and the fact that complainant failed to suggest a transfer at the time of her discharge, the respondent did not fail in its duty of accommodation by not having pursued on its own motion the idea of a transfer. *Bell-Merz v. UW-Whitewater,* 90-0138-PC-ER, 3/19/93

There was insufficient evidence to find complainant was constructively discharged by respondent on the basis of age where the supervisor's criticisms of complainant were based solely upon work performance. *Betz v. UW-Extension,* 88-0128-PC-ER, 12/17/92

Complainant did not establish that her probationary termination involved sex discrimination, where she failed to successfully challenge respondent's assertions that she was performing below normal expectations and that she was not provided any less training than any other new employe. She also failed to establish that any animosity which may have existed between complainant and her supervisor was due to her gender. *Mongold v. UW-Madison,* 89-0052-PC-ER, 12/17/92

Respondent did not deny complainant an accommodation where he was completely unable to work and there was no foreseeable change in his condition. Respondent was not required to keep complainant's job open and extend his leave of absence indefinitely as an accommodation under these circumstances. An accommodation normally is an

alteration in the working environment, the provision of some special assistance that will enable the employe to perform the duties of his or her position, or the provision of an alternative work assignment or position with duties the employe can perform. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

No retaliation or handicap discrimination was found as to a termination decision where there were consistently negative evaluations of complainant's work by a number of supervisors and the supervisor who spent the most time directly supervising complainant was then unaware of his earlier complaint. The complainant also grabbed a co-worker's wrist, bruising it enough that a doctor recommended a brace and a week's absence from work. *Bjornson v. UW-Madison*, 91-0172-PC-ER, 8/26/92

The greater weight of the credible evidence showed that complainant was terminated during her probationary period due to her poor work performance and not to her age. Complainant did not establish that her work performance was satisfactory or the age of the employe appointed to replace her. *Engel v. UW-Oshkosh*, 89-0103-PC-ER, 8/26/92

Qualifying for Handicapped Expanded Certification does not in and of itself show that complainant is handicapped for purposes of FEA. Complainant's "multiple pulmonary emboli" required only a short hospitalization and a total recovery period of only a few weeks. Complainant did not show that her medical conditions had a tendency to "make achievement unusually difficult or limit capacity to work," or resulted in the relevant work performance problems. The complainant failed to show that those making the subject termination were aware of complainant's depression. *Engel v. UW-Oshkosh*, 89-0103-PC-ER, 8/26/92

Respondent's hiring of complainant as part of a program for "slow learners" and assignment to him of least complex duties to which a lower productivity standard was applied, established that respondent aware of complainant's handicap. In view of expert testimony that complainant's mental impairment would not prevent him from performing duties of Library Services Assistant position once such duties were learned, his performance deficiencies, rather than his handicap, was the basis for his termination. *Fischer v. UW-Madison*, 84-0097-PC-ER, 7/22/92

Complainant's probationary termination violated the FMLA because it was based in part on leave taken that was subject to the FMLA, notwithstanding that complainant's total absence from employment exceeded the 80 hours permitted during a 12 month period pursuant to §103.10(4), Stats. The latter provision does not mean an employe loses all protection under the FMLA once he or she exceeds 80 hours. It simply places an annual limit on the number of hours of statutory leave that an employer is required to provide under the FMLA. *Meyer v. DHSS*, 91-0006-PC-ER, 6/11/92

Respondent's termination decision was overturned where 30 hours of the 62.5 hours of absence and 2 tardy days that were recited in the termination letter involved serious health conditions that were covered by the employe's FMLA statutory leave and where respondent failed to offer any evidence that it would have terminated complainant's employment if it had not considered the FMLA protected absences. *Meyer v. DHSS*, 91-0006-PC-ER, 6/11/92

The FMLA definition of a serious health condition (§103.10(1)(g), Stats.) were not satisfied by a "groin pull" which did not required follow-up care after the initial contact with a health care provider. The definition was satisfied for a condition for which complainant was seen in the emergency room and which was diagnosed as gastroenteritis and hyperbilirubinemia, with a recommendation that complainant see his personal physician in two days, and where he was hospitalized for three days commencing four days after that for the same symptoms. The period for which he was hospitalized, with a diagnosis of acute peptic ulcer disease, was also covered by the statutory definition. *Meyer v. DHSS*, 91-0006-PC-ER, 6/11/92

Although a written psychological evaluation indicated that complainant's handicap would cause him to have a great deal of trouble understanding any form of written instructions and to have trouble retaining any complex oral instructions, and would require him to obtain employment which would involve extensive repetitious training, close supervision, simple tasks, and no self-direction and self-control, complainant's work history indicated that these limitations did not significantly affect complainant's ability to independently perform janitorial tasks. Complainant

failed to show a clear causal relationship between his handicap and his performance deficiencies. No discrimination was found with respect to the respondent's decision to terminate complainant's employment. *McClure v. UW-Madison*, 88-0163-PC-ER, 4/21/92

Complainant, who alleged discrimination based on race, failed to establish a prima facie case with respect to the decision to terminate her employment where her performance did not, at any point during her employment, come close to meeting the performance standards for the position. In addition, respondent had extended complainant's probationary period, located two other positions and encouraged complainant to compete for them and, when she declined to do so, located an LTE position for her. *Watkins v. DHSS*, 89-0073-PC-ER, 4/17/92

Where complainant failed to show a clear causal relationship between his handicap and his performance deficiencies, no discrimination was found with respect to the decision to terminate his employment. *Jacobus v. UW-Madison*, 88-0159-PC-ER, 3/19/92; affirmed by Dane County Circuit Court, *Jacobus v. Wis. Pers. Comm.*, 92CV1677, 1/11/93

Respondent's decision to terminate the complainant's employment rather than to permit him to resign was upheld. Complainant, a male, relied upon a comparison with a female employe who was permitted to resign but the complainant was involved in a security-related disciplinary situation (sleeping on his post) while the female employe's misconduct, excessive absenteeism and tardiness, was not security-related. *Bender v. DOC*, 90-0049-PC-ER, 8/8/91

Respondent failed to sustain its burden with respect to handicap accommodation where it refused to continue to employ the complainant in any capacity at the University of Wisconsin Hospitals and Clinics based upon a physician's evaluation which did not rule out the likelihood of another psychotic episode, where the evaluation was qualified by the facts that there had been a limited opportunity for evaluation, the complainant had received no treatment, and the physician testified he had successfully treated physicians with the same kind of illness as complainant who had been able to continue their employment at the same work site. *Schilling v. UW-Madison*, 90-0064-PC-ER, 90-0248-PC, 11/6/91

There was probable cause based on sex with respect to the respondent's decision to terminate the complainant's employment rather than to permit him to resign where a female employe was permitted to resign and where there was no real basis to distinguish between the two employes other than that the other employe had filed an informal complaint. *Bender v. DOC*, 90-0049-PC-ER, 8/8/91

Complainant, who had been employed as an Assistant State Public Defender, could not or would not adequately undertake the job-related responsibilities of his employment, based on his substantial problems with his attendance, with his aversion to working with certain clients, with his accessibility and with his reluctance to handle jury trials. *Shevlin v. Office of Public Defender*, 87-0101-PC-ER, 4/17/90

No probable cause based on color and race was found with respect to an allegation of an abusive work environment allegedly resulting in the complainant's constructive discharge in 1988 where the allegation rested on two incidents, one occurring in 1979 and the other in 1986. The Commission found that the 1986 incident was arguably related to complainant's race and, although offensive, was isolated in time and the respondent took reasonable steps in responding to the incident. Complainant failed to show that the incidents were pervasive, sustained or numerous. *Yarbrough v. DILHR*, 88-0103-PC-ER, 2/22/90

No probable cause based on national origin was found with respect to the decision to terminate the complainant from an LTE position where during the entire course of her employment, she failed to meet quantity or quality performance standards, required close and constant supervision and frequent retraining, she made the same errors repeatedly, she changed her work schedule without prior notice or approval and she took an excessive amount of leave. *Acharya v. DOR*, 89-0014, 0015-PC-ER, 11/3/89

Probable cause was found with respect to the decision to terminate the complainant's probation where complainant, a male, had been asked out on four occasions by his female supervisor and his employment was terminated relatively shortly after he declined the invitations. Complainant's work performance was comparable in many respects to that of his peers and many of the specific points relied on by respondent in support of his termination were unfounded.

***Kloehn v. DHSS*, 86-0009-PC-ER, 9/8/89**

While complainant, a female, suffered isolated incidents of sexual harassment, respondent, upon notice of such conduct, took immediate action to remedy the matter. Complainant was not subjected to continuous sexual harassment which caused her to fail probation but was terminated when respondent concluded she could not master the necessary job skills within the probationary period. No probable cause was found. *Bender v. DOR*, 87-0032-PC-ER, 8/24/89

Respondent's decision to terminate the complainant's employment as an Institution Aide at a mental health institution constituted discrimination based on arrest record where management knew when complainant was hired about his criminal conviction in 1980 and after more than two years of employment, complainant was arrested and while this charge was pending, the respondent decided to terminate him. The respondent's professed reliance on the 1980 sexual assault conviction as a basis for the discharge was pretextual where the employer had no policy in place concerning conviction records, including no practice of screening job applicants with respect to conviction records. *Snow v. DHSS*, 86-0051-PC-ER, 4/11/89

Where an employer tells an employe in all likelihood he will be terminated, and the employe chooses to protect himself as best he can by resigning rather than have the stigma of a discharge on his employment record, it cannot be gainsaid that the employer has taken some kind of adverse employment action against the employe. *Snow v. DHSS*, 86-0051-PC-ER, 4/11/89

Respondent's action of discharging the complainant, a black female, from her position as a correctional officer for engaging in disorderly or illegal conduct and failing to provide accurate or complete information when requested constituted discrimination based on race, sex and color where complainant worked in a sexually and racially hostile environment, respondent decided to discharge the complainant before it had conducted its fact-finding investigation and white male employes, disciplined under the same personnel policy, were treated less harshly than complainant. *Bridges v. DHSS*, 85-0170-PC-ER, 3/30/89

No probable cause based on arrest/conviction record or race

was found with respect to a decision to terminate the complainant's employment as an LTE where the respondent had concluded, based on a reasonable though not foolproof procedure for checking on the complainant's presence at various times during the work day, that the complainant had been falsifying his hours. The fact that complainant returned to work after a first arrest undermined complainant's contention that the termination decision, made after a second arrest, was motivated by that arrest or by an earlier conviction. *Pugh v. DNR*, 86-0059-PC-ER, 9/26/88

No probable cause based on race, handicap or retaliation was found with respect to the decisions to issue complainant a written reprimand, suspend him and discharge him, as well as to certain conditions of employment where complainant repeatedly called in sick, left work and ultimately failed to appear at work. Prior to the discharge, respondent was advised that the complainant was receiving treatment for alcohol problems and he was placed on a medical leave. When complainant failed to report back to work on the designated date, the respondent was not required by the FEA to extend the complainant's leave of absence if it had ascertained he was unable to work because of alcoholism, citing *Squires v. LIRC*, 97 Wis. 2d, 648 (Court of Appeals, 1980). It was not a situation where the complainant was unable to contact his employer. *Rose v. DOA*, 85-0169-PC-ER, 7/27/88

No probable cause based on national origin discrimination was found with respect to the decision to terminate the complainant's employment as a Data Entry Operator 1 where the complainant did not adequately respond to direction from her supervisors and was a disquieting influence on the work place. Certain misunderstandings did occur, likely based in part on complainant's imperfect English language ability, but there was no evidence of discrimination. *Wilczewski v. DOR*, 86-0113-PC-ER, 7/27/88

Probable cause was found based on conviction record with respect to an allegation arising from a constructive discharge where complainant, who had been convicted of second degree sexual assault, was employed as an institution aide at Winnebago Mental Health Institute, he had been employed with respondent for nearly three years, he had not been asked as part of his employment application

whether he had a conviction record, and the institution had no written policy regarding employment of persons with conviction records and did not screen job applicants or employes on the basis of conviction records, one of his supervisors at the institution had been aware of complainant's criminal record for some time but took no action., and where there was no dispute that the discharge was because of his criminal record. *Snow v. DHSS*, 86-0051-PC-ER, 6/20/88

No probable cause based on color, race, retaliation or sex was found as to claims relating to discharge and providing negative job references where complainant's employment as a limited term employe ended when complainant used compensatory time to finish the 1044 hour maximum of his LTE appointment and respondent's references were based on complainant's poor work record. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

Respondent did not discriminate when it terminated complainant's employment as a Correctional Officer 2, which involved a special duty of care, due to complainant's inability to adequately perform some of the duties listed on the standard CO 2 position standard. Respondent was entitled to assume that a doctor's opinion stating that complainant "will most likely never return to his old job duties" but that he could "engage in sedentary work" meant that complainant was unable to adequately perform a past assignment which he had received four months earlier even though complainant had been on medical leave during the four month period. *Conley v. DHSS*, 84-0067-PC-ER, 6/29/87

No probable cause was found as to complainant's discharge where complainant, who suffered from an organic mental disorder, did not perform his work properly, made threatening statements/gestures to co-workers, supervisors and non-employes, and had unexcused absences, where the complainant's handicap was reasonably related to his ability to carry out his responsibilities and respondent made an effort to accommodate his handicap. *Brummond v. UW-Madison*, 84-0185-PC-ER, 85-0031-PC-ER, 4/1/87

There was no probable cause in regard to the discharge of the complainant from his Building Maintenance Helper 2 position where there was no evidence that retaliations played a part in the decisions and where complainant did

not perform his work properly, made threatening statements/gestures to co-workers, supervisors and non-employes and had unexcused absences. *Brummond v. UW-Madison*, 84-0185-PC-ER, 85-0031-PC-ER, 4/1/87

Respondent failed to show the complainant could not adequately undertake his job responsibilities where there were no observations or reports of complainant's actual job performance and where letters from complainant's physicians and from complainant himself, though seemingly inconsistent, were reasonably explained. Therefore, probable cause was found as to respondent's decision to place complainant on a leave of absence. The Commission concluded that complainant's subsequent pursuit of a worker's compensation claim of disability and an unemployment compensation claim where he asserted certain medical limitations on his capacity to work, was not inherently inconsistent with his discrimination complaint where he argued that he was capable of doing his job satisfactorily at the time of his leave of absence. *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

Termination of the complainant, who suffered from vision problems which affected his ability to quickly locate and identify documents but had a very limited effect on his actual reading speed, was upheld where complainant's lack of speed in performing his tasks meant that he was simply not performing some of those duties set out in his position description. *Rau v. UW-Milwaukee*, 85-0050-PC-ER, 2/5/87

Complainant reasonably refused to assist in the delivery of a drum of sulfuric acid because of a reasonable and good faith belief that the task involved a danger of serious injury or death. The complainant also engaged in protected activity when he sent DILHR a copy of a memo to his supervisor specifically questioning the safety of moving the acid. Complainant's subsequent termination was based in part on these activities but these factors were not a substantial reason for the termination and the termination would have occurred in the absence of these factors. Complainant's attitude toward management throughout the course of his four months of employment was contentious and in some respects contumacious, including one statement that the supervisor's memo would make good toilet paper. *Strupp v. UW-Whitewater*, 85-0110-PC-ER, 7/24/86; affirmed by Milwaukee Circuit Court, *Strupp v. Pers. Comm.*, 715-622,

1/28/87

Complainant, an asthmatic, established the causality element for purposes of a probable cause determination arising from his separation from employment. The complainant's asthmatic condition was exacerbated by complainant's exposure to mace and a further adverse reaction to other gases could be expected if he were to be exposed to them as was required by the training procedure. *Hebert v. DHSS*, 84-0233-PC, 84-0193-PC-ER, 10/1/86

No probable cause based on handicap was found with respect to the termination of the complainant's employment where complainant's job performance was erratic, the quality and quantity of her work was inconsistent and her judgment in the office was questionable. *Kaufman v. UW-Madison*, 84-0065-PC-ER, 8/6/86

The complainant, who had an arrest record of which the respondent was aware, and who was discharged, failed to establish his job performance was satisfactory, where he did not complete his assigned work, was verbally abusive and threatening to both co-workers and supervisors, was threatening toward and made off-color remarks about members of the public with whom he came into contact and had unexcused absences/tardiness. Even if he had established a prima facie case, complainant failed to establish that the unsatisfactory work record was pretextual. *Brummond v. UW-Parkside*, 83-0045-PC-ER, 5/30/86

No probable cause based on arrest/conviction record or handicap was found with respect to the termination of complainant's employment, where complainant, a probationary employe who was handicapped, missed four consecutive days of work after he was arrested, complainant could not say when he would be released from jail and return to work and where there was an immediate need to have someone perform the complainant's duties. No evidence was presented showing that complainant was treated differently than other probationary employes who missed several work days. *Brummond v. UW-Parkside*, 83-0045-PC-ER, 5/30/86

No probable cause was found with respect to the termination of complainant's employment, where complainant, a probationary employe was was handicapped, missed four consecutive days of work after he was arrested,

where complainant could not say when he would be released from jail and return to work and where there was an immediate need to have someone perform the complainant's duties. No evidence was presented showing that complainant was treated differently than other probationary employes who missed several work days. *Brummond v. UW-Parkside*, 83-0045-PC-ER, 5/30/86

No probable cause existed with respect to respondent's decision to terminate the employment of complainant, an insulin dependent diabetic, where complainant had essentially abandoned his job and refused to return, complainant could safely perform his work with a minimum of risk to himself and to others and where respondent perceived complainant's physician to have indicated that complainant could work safely. *Lueders v. DHSS*, 84-0095-PC-ER, 5/29/86

No probable cause based on age was found as to respondent's decision to terminate complainant's employment from a Laborer Special position where complainant's supervisor set high performance standards for all the employes he supervised, complainant's work filed to meet the supervisor's standards and the record failed to show that the complainant was treated differently than any other employe supervised by complainant's supervisor or that complainant's supervisor treated employes over the age of 40 any differently than employes under the age of 40. *Podevels v. UW-Milwaukee*, 84-0204-PC-ER, 3/13/86

No discrimination was found where complainant, who was black, had been discharged for receiving and possessing a quantity of marijuana on the job. A second, white, employe was not disciplined for being suspected of smoking marijuana on the job due to a lack of physical evidence. However, the second employe was verbally warned that, if caught with marijuana, he would be disciplined up to and including termination. *Massenberg v. UW System*, 81-PC-ER-44, 2/6/86

No probable cause was found as to the decision to terminate the complainant's employment while on probation where the complainant was chronically late for work even after having been warned and where the evidence showed that the respondent treated the various employes alike, regardless of their race. *Gray v. DHSS*, 83-0132-PC-ER, 10/23/85

No probable cause was found where, due to a handicapping condition of mental illness, the complainant was unable to adequately discharge the duties and responsibilities of his position of Building Construction Superintendent. *Burnard v. DOA*, 83-0040-PC-ER, 1/30/85

No probable cause was found as to allegations of discrimination based on color, handicap and race, where complainant's employment was terminated based on his unsatisfactory work performance due to consistent failures to meet deadlines for the completion of assignments. *Johnson v. DHSS*, 83-0032-PC-ER, 1/30/85

No probable cause based on sex was found as to complainant's resignation where she had been unable to work effectively with her staff where the complainant was treated in the same manner as other bureau administrators and where complainant's predecessor, also a woman, had effectuated good rapport with her staff during the nine months she had filled the position in an acting capacity. *Lindas v. DHSS*, 80-PC-ER-96, 1/3/85

Respondent did not discriminate against the complainant when it discharged him where his performance was unsatisfactory and he used excessive sick leave and leave without pay. However, the Commission did find discrimination as to certain conditions of employment. The mere existence of a work environment in which religion-based harassment is practiced and tolerated is not sufficient, in and of itself, to force a conclusion that the discharge of the harassed employe was motivated by religious discrimination and that the reasons offered by the employer for the discharge were a pretext for such discrimination. *Laber v. UW-Milwaukee*, 81-PC-ER-143, 11/28/84

Probable cause for discrimination based on race and color was found where complainant, who is black, was discharged for receiving and possessing marijuana during work time where complainant was arrested but no charges were pursued, and where respondent took no disciplinary action against a white male co-worker despite having no doubts that the co-worker had been smoking marijuana on the job. *Massenberg v. UW-Madison*, 81-PC-ER-44, 9/14/84

No discrimination based on race and sex was found where

respondent constructively discharged the complainant, who is white and was employed at a correctional institution, where respondent reasonably concluded that complainant was involved in a romantic relationship with an inmate at the institution and where there were no comparisons establishing that respondent imposed a different level of discipline against similarly situated employes of a different race. *Winterhack v. DHSS*, 82-PC-ER-89, 8/31/84

No discrimination was found where respondent reasonably discharged the complainant, a female who was employed at a correctional institution, where complainant acknowledged she had an affair with a male co-worker who had transferred to another institution five months prior to complainant's discharge, where respondent had reasonably concluded that complainant was also involved in a romantic relationship with an inmate at the institution and where there were no comparisons establishing that respondent imposed a different level of discipline against male employes who had been romantically involved with inmates. *Winterhack v. DHSS*, 82-PC-ER-89, 8/31/84

No discrimination was found as to respondent's decision to discharge the complainant, a male, where respondent's stated reasons for the discharge were credible and justified termination and where complainant failed to establish that female employes with similar or worse work records serving an original probation were retained while complainant was discharged. *Berryman v. DHSS*, 81-PC-ER-53, 8/l/84

No probable cause based on age was found where complainant had argued he was forced into early retirement because of harassment from his supervisors where complainant and his supervisor had disagreed as to the importance of complainant's program, complainant was reluctant to respond to supervision and complainant made no effort to establish the ages of his co-workers. *Hartl v. DILHR*, 82-PC-ER-126, 7/5/84

No probable cause based on creed was found where complainant, an agnostic and an alcoholic, was terminated primarily because of chronic absenteeism, tardiness, and low productivity and complainant was rejected for participation in an alcoholic treatment program because he indicated he did not need the program, not because of his religious beliefs. *Burton v. DNR*, 82-PC-ER-36, 8/31/83

No probable cause was found where complainant, an alcoholic, was terminated primarily because of chronic absenteeism, tardiness, and low productivity, where respondent made extensive efforts to accommodate complainant's handicap via treatment programs and where complainant was terminated after the treatment program was unsuccessful and complainant refused to agree to change treatment programs or to alter the existing program. *Burton v. DNR*, 82-PC-ER-36, 8/31/83

No probable cause was found with respect to the probationary termination of a white female Institution Aide by a black male supervisor, where the record clearly supported the finding that the complainant's work was unsatisfactory, the record included the testimony of many of her white, female co-workers, and this testimony overshadowed the fact that her Performance Planning and Development Report reflected that she had met certain objectives. *Shilts v. DHSS*, 81-PC-ER-16, 2/9/83

Where the complainant did not have a past arrest record, it was not discrimination on the basis of arrest record for the respondent to have discharged him in part for possession of a concealed weapon while at work, where such conduct also was the basis for his arrest. *Buller v. UW*, 80-PC-ER-49, 10/14/82 factual findings modified by order on 12/2/82; appeal dismissed by Dane County Circuit Court, *Buller v. Pers. Comm.*,, 83-CV-8, 12/14/89

No probable cause based on race was found where the complainant was terminated by the UGLRC, and the only substantial evidence of discriminatory animus attributable to the Governor's alternate to the UGLRC was based on the testimony of two long-time political opponents of the alternate whom the examiner believed were lacking in credibility. *McLester v. UGLRC*, 79-PC-ER-38, 10/14/82; affirmed by Outagamie County Circuit Court, *McLester v. Pers. Comm.*, 82-CV-1315, 7/30/84; affirmed by Court of Appeals District 111, 84-1715, 3/12/85

Respondent did not engage in race discrimination by discharging appellant for excessive absenteeism where appellant had previously been disciplined on numerous occasions for his extensive absenteeism during the prior 7 years and was unable to satisfactorily explain his unexcused absence to his supervisor. *Norwood v. UW-Parkside*, 78-PC-ER-62, 5/13/82

There was no showing of discrimination by respondent when it terminated complainant's employment where the complainant, approximately 2½ weeks after leaving work to enter a hospital, had informed the respondent that he did not want his job back. *Green v. UW*, 79-PC-ER-129, 5/13/82

Where the complainant, who had been discharged, was guilty of some misconduct but established that he had been more harshly treated than similarly-situated white employes, and the respondent's stated reason for having failed to discipline a white employe with a comparable record of missed call-ins was that that employe was handicapped due to Agent Orange exposure, and the employe denied a handicap or that he had suggested such a handicap, the stated reason was found to be pretextual and it was determined that discrimination had occurred. *McGhie v. DHSS*, 80-PC-ER-67, 3/19/82

Assuming that the complainant established a prima facie case in a hearing on a complaint of discrimination on the basis of arrest/conviction record, it could not be found that the reasons for termination of probationary employment were pretextual, where the complainant was caught playing checkers on the job and drinking in the dormitory at the Corrections Academy at Oshkosh, had failed to prepare written assignments, and had been the subject of reports of inadequate performance by co-workers. The complainant was unable to show that he had been treated unequally, as while it was established that drinking at the academy was a "tradition", this was an unusual situation as it was the only known case where trainees had been caught and reported back to the employing institution, and all of the involved WCI-GB employes were counseled after their return to the institution. *Peters v. DHSS*, 80-PC-ER-122, 3/19/82

The Commission found no probable cause in regard to the termination of complainant's employment where there was ample evidence of the complainant's inadequate performance, there was little if any evidence that her asthmatic condition was causative with respect to her performance problems, and although the complainant's supervisor was aware of certain complaints by the complainant to the vice-chancellor, this was considered of little significance against her record of inadequate performance. *Way v. UW*, 78-122-PC, 79-PC-ER-4, 3/8/82

The Commission found that the respondent's explanation for the termination of complainant's probationary employment was not pretextual where her prior performance had been unsatisfactory in some respects and where she was six hours late for work one day and failed to offer any explanation therefore. *Glaser v. DHSS*, 79-PC-ER-63, 79-66-PC, 7/27/81

No discrimination based on sex or retaliation was found where the complainant's contract was not renewed. The evidence showed only that there was a dispute between her and other faculty members regarding a curriculum matter, the substantive reasons for non-renewal given by respondent were not challenged, five of the six instructors non-renewed were males, and the complainant was afforded all of her rights of appeal set forth in the statutes and administrative code. *Cole v. UW*, 79-PC-ER-50, 1/13/81

There was no probable cause to believe that respondent had discriminated against the complainant on the basis of handicap where it was difficult to see how respondent could have accommodated complainant in the position in question and where complainant clearly was "physically unable to perform his duties" within §111.32(5)(c) and, therefore, was subject to termination, subject to the requirements of §230.37(2), Stats. *Stasny v. DOT & DP*, 79-192-PC, etc., 1/12/81

The Commission found no race discrimination in the discharge of the complainant food service worker where she was absent on the average about one shift per week and where a non-discharged white employe did not have a similar or worse attendance record. *Bowers v. UW-M*, 78-PC-ER-1, 7/28/80

Complainant failed to show she was discriminated against based on race, retaliation or sex in regard to her discharge where she had been advised that a state car should never be kept out overnight without management approval and one week later, without management approval, she parked a state car overnight in front of her home and it was damaged in an accident. Complainant had filed a charge of discrimination with the Commission approximately one month prior to the state car incident but there was no showing that respondent was aware of the existence of the complaint. *Stonewall v. DILHR*, 79-PC-ER-19, 5/30/80

Where the complainant was handicapped due to back and neck pains, but declared to his supervisors that he was totally unable to do the duties required, did not provide requested medical information on his condition, and did not anticipate being able to return to work at any specific time in the foreseeable future, no discrimination was found with respect to his discharge. *Fuller v. UW*, 78-PC-ER-55, 3/13/80

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 772 through 772.04

[Previous material] [Next material]

---

772 Discrimination based on creed

772.01 Generally

Respondent's motion to dismiss a religious discrimination claim for failure to state a claim over which the Commission had jurisdiction was granted where complainant claimed that respondent's action of not allowing him to wear a hat while it allowed Muslim employes to wear head coverings constituted discrimination. Complainant's significant rights associated with his position (such as his wages and length of employment) had not been affected by the religious accommodation made to the Muslim employees and the impact on complainant was *de minimus*. *Darrington v. DOC*, 97-0108-PC-ER, 12/3/97

An employer's failure to grant a religiously-motivated request for a fringe benefit not provided under its standard personnel and management procedures did not create a conflict between the employe's religious practices and the employer's procedures so as to constitute a violation of the employer's duty of accommodation. *Lazarus v. DETF*, 90-0014-PC-ER, 9/21/92; affirmed by Dane County Circuit Court, *Lazarus v. State Pers. Comm.*, 92 CV 4252, 6/7/93

772.02(2) Finding of *no* probable cause

No probable cause was found with respect to a decision to deny approval, for salary add-on purposes, of the credits earned for a course titled "Fundamental Science of Nature." Complainant, a math teacher in a correctional institution, was entitled to a salary add-on upon the completion of a certain amount of additional relevant course work with the credits subject to approval by respondent. Respondent determined that the course in question was not relevant to complainant's duties as a math teacher and there was no evidence that the respondent's determination was because of complainant's or anyone else's "system of religious beliefs." *Kircher v.DHSS*, 87-0065-PC-ER, 8/10/88

No probable cause was found where complainant, an agnostic and an alcoholic, was terminated primarily because of chronic absenteeism, tardiness, and low productivity and complainant was rejected for participation in an alcoholic treatment program because he indicated he did not need the program, not because of his religious beliefs. *Burton v. DNR*, 82-PC-ER-36, 8/31/83

772.03(1) Finding of discrimination

Discrimination as to conditions of employment was found where religious comments by complainant's co-workers were numerous, they were continuous over complainant's period of employment as a Facilities Repair Worker 3, they were directed at the complainant, they were sufficiently derogatory to be considered non-trivial and at times opprobrious, the respondent was aware that complainant was being harassed due to his religion and failed to take reasonable steps to prevent the harassment. However, no discrimination was found as to complainant's subsequent discharge. For relief, the Commission required respondent to provide training for those employes who supervised complainant during his probationary employment. *Laber v. UW-Milwaukee*, 81-PC-ER-143, 11/28/84

772.03(2) Finding of *no* discrimination

No discrimination based on creed, sex or sexual orientation was found with respect to respondent’s actions of removing

complainant from his position as program leader and setting the level of his pay in his backup position of associate professor, where concerns about complainant's managerial abilities were heightened by receipt of an affirmative action complaint against complainant from one of complainant's colleagues, and where respondent concluded that complainant's leadership was not meeting program needs. Complainant's comparisons relating to his salary claim involved circumstances that were distinctly different from those of complainant. *Kinzel v. UW (Extension)*, 92-0218-PC-ER, 8/21/96

Respondent's motion to dismiss was granted where complainant contended respondent's actions of assigning overtime to the least senior employe constituted discrimination based on creed. The overtime assignments were made pursuant to a provision of the applicable union contract and complainant did not allege that the seniority system was intended to result in the assignment of overtime to the disadvantage of employes who professed the same creed as complainant. *Brackemyer v. UW (River Falls)*, 95-0172-PC-ER, 5/28/96

Complainant failed to establish a prima facie case due to his failure to show that any of those who made the decision to terminate his employment were aware of his religious affiliation or beliefs and failure to show he performed his job satisfactorily. *Green v. DHSS*, 92-0237-PC, 12/13/93

Where all employes, including complainant, were eligible for group insurance coverage that encompassed medical treatment but not any form of non-medical treatment, there was no disparate treatment with respect to complainant, a Christian Scientist who sought coverage for services provided by a Christian Science practitioner. The record did not support a finding that Christian Science treatment either constitutes medical treatment or is generally recognized as medical treatment. *Lazarus v. DETF*, 90-0014-PC-ER, 9/21/92; affirmed by Dane County Circuit Court, *Lazarus v. State Pers. Comm.*, 92 CV 4252, 6/7/93

Respondent did not discriminate against the complainant when it discharged him where his performance was unsatisfactory and he used excessive sick leave and leave without pay. However, the Commission did find discrimination as to certain conditions of employment. The mere existence of a work environment in which religion

based harassment is practiced and tolerated is not sufficient, in and of itself, to force a conclusion that the discharge of the harassed employe was motivated by religious discrimination and that the reasons offered by the employer for the discharge were a pretext for such discrimination.
***Laber v. UW-Milwaukee*, 81-PC-ER-143, 11/28/84**

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material] [Next material]

Sections 796.70 through 796.95

[Previous material]

796.70 Job references

No probable cause based on color, race, retaliation or sex was found as to claims relating to discharge and providing negative job references where complainant's employment as a limited term employe ended when complainant used compensatory time to finish the 1044 hour maximum of his LTE appointment and respondent's references were based on complainant's poor work record. *Browne v. DHSS*, 85-0072-PC-ER, 8/5/87

796.95 Other

A "last chance" warning to complainant that certain conduct would result in the termination of his employment was not an adverse employment action under the Fair Employment Act. The complaint was based solely on that one action by respondent and complainant failed to show that a reasonable employe similarly situated to complainant would experience the action as a hostile environment. *Williams v. DOC*, 97-0086-PC-ER, 3/24/99

No probable cause was found with respect to the actions of denying complainant overtime on two occasions, where respondent's actions were consistent with the provisions of the correctional facility's BFOQ plan. Complainant, a male, did not attack the validity of the BFOQ plan. *Schrubey v. DOC*, 96-0048-PC-ER, 1/27/99

Complainant failed to establish a prima facie case of disability discrimination regarding alleged adverse terms and conditions of employment where she failed to present any evidence that she was treated differently than non-disabled co-workers in similar circumstances. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Where, throughout complainant's employment, respondent consistently provided and demonstrated a willingness to provide complainant a manageable work schedule, respondent adequately accommodated complainant's disability. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Respondent reasonably accommodated complainant's disability where it followed the advice of its expert in establishing the specifications for the ergonomic chair requested by complainant. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Respondent did not retaliate against complainant when it directed her to check in and out of work via electronic mail. Complainant had a flexible schedule and respondent was otherwise unable to know her actual work hours. *Endlich v. DILHR*, 95-0079-PC-ER, 10/13/98

Respondent failed to accommodate complainant's disability within a reasonable period of time where there was no evidence offered by respondent to explain or justify the lapse of time in providing complainant a chair with a headrest. In March of 1994, complainant submitted a Disability Accommodation Report form for such a chair. Respondent's affirmative action compliance officer informed complainant in September of 1994 that respondent would provide him with the chair but then did not follow up until January of 1996. *Hawkinson v. DOC*, 95-0182-PC-ER, 10/9/98

Two alleged references by a program manager to "choking this chicken" as well as hand gestures by the same program manager mimicking masturbation, all made during the same meeting with complainant and two others, were not sufficiently severe or pervasive to satisfy the statutory definition of sexual harassment. The statements were mere offensive utterances which occurred on the same day. *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98

There was no probable cause to believe respondent discriminated against complainant on the basis of handicap

with respect to a number of different terms and conditions of employment. *Farrar v. DOJ*, 94-0077-PC-ER, 11/7/97

Respondent did not discriminate against complainant on the basis of his conviction record when his supervisor and lead worker contacted complainant's probation agent in relation to complainant's extended unauthorized absences from work. Complainant filled a position which required the employment of an ex-offender and the position had a significant rehabilitation component in addition to the traditional components of an employment relationship. *Perrien v. DOC*, 95-0031-PC-ER, 7/2/97

In *dicta*, the Commission concluded that respondent did not retaliate against complainant for engaging in fair employment activities when it investigated him for a possible work rule violation where there was no evidence to contradict respondent's witnesses that the procedure followed in complainant's case was consistent with how other disciplinary cases were handled by the agency even though that procedure was contrary to a training manual issued by the Department of Employment Relations where the respondent had never formally adopted any formal disciplinary procedure. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97

Respondent did not discriminate against complainant based on his handicap when it provided information to complainant about his appeal rights and options during two telephone calls where there was no evidence of wrongdoing by the employer, such as an intent to conceal information or a legal duty to fully disclose such information. Furthermore, the failure to provide certain information was cured by a follow-up letter. *Krueger v. DHSS*, 92-0068-PC-ER, 7/23/96

A few tense conversations between complainant and his supervisor do not amount to opprobrious or severe mistreatment so as to alter the conditions of his employment and create an abusive working environment. Complainant failed to establish harassment based on handicap. *Eddy v. DOT, 93-0009-PC-ER*, 9/14/95

Respondent adequately accommodated complainant, who suffered from motion sickness, during a three month period after respondent required complainant and three co-workers to rotate seats when travelling in a state-owned van. There

had been no prior policy and complainant had invariably ridden in the front seat. At the time the new policy was imposed, respondent's supervisor was vaguely aware that complainant suffered from motion sickness but the supervisor was unaware of the specific connection between riding in the back of the van and the illness. When, after three months, complainant made his supervisor aware of the connection between his handicap and the new policy, respondent immediately instituted a temporary accommodation which satisfied the complainant, and once the need for that accommodation was verified by complainant's physician, respondent made it permanent. *Eddy v. DOT, 93-0009-PC-ER*, 9/14/95

Respondent did not discriminate on the basis of sex regarding its decision to initiate an investigation of complainant's conduct when a co-worker had informed management that complainant's attentions were unwelcome and there was no evidence that management would have acted differently if the sexes of the "stalker" and "victim" had been reversed. *Erickson v. WGC*, 92-0207-PC-ER, 92-0799-PC, 5/15/95

No probable cause on the basis of handicap or retaliation was found regarding respondent's requirement that he obtain a psychological evaluation and a situational assessment at respondent's expense, where respondent had incomplete information from complainant's physicians about complainant's ability to return to work at full performance and the accommodations needed. *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95

Probable cause on the basis of handicap or retaliation existed regarding respondent's conduct of providing incorrect information about complainant's appeal rights where the allegation was not addressed by respondent at hearing. *Krueger v. DHSS*, 92-0068-PC-ER, 4/17/95

No sex discrimination or FEA retaliation existed as to a variety of conditions of employment, including relocation, removing a sign in complainant's office, discussing an internal complaint, denying complainant's request for an adjusted work schedule, declining to investigate the defacement of articles written by complainant, not including complainant in a meeting, the nature of working relationships with co-workers, disclosing to co-workers that complainant had been disciplined, requiring complainant to

attend certain training, assignment of duties, responses to complainant's requests for changing her duties, scheduling meetings, use of a job performance improvement plan and union representation at weekly meetings. *Stygar v. DHSS*, 89-0033-PC-ER, etc., 4/17/95

Where complainant alleged a pattern of verbal harassment on the basis of national origin but frequently initiated and participated in national origin-oriented banter and comments, and never complained of his treatment to higher level supervisors, he failed to establish a violation of the FEA. Complainant's claims that he was discriminated against on the basis of national origin with respect to equipment provided, and having been required to rewrite reports were also not established, because he was unable to demonstrate any pretext with respect to management's explanations for these matters. *Romero v. WSFP*, 90-0075-PC-ER, 6/23/94

Complainant failed to show disparate treatment or retaliation in regard to respondent's request for medical information where complainant had been absent on medical leave for a substantial period of time, where complainant had resisted all attempts by respondent to obtain information relating to her medical condition, and where respondent needed to arrange for coverage of complainant's responsibilities as a lead worker. *Dahlberg v. UW-River Falls*, 88-0166-PC-ER, 89-0048-PC-ER, 3/29/94

Sexual harassment had not been shown where certain actions, e.g., placing nude photos and figurines on complainant's desk and placing soap in her desk drawers, were directed at one of complainant's male co-workers as well; where the other allegations concerned the circulation of rumors to which complainant contributed as well, and as to those two statements made to complainant which did constitute "unwelcome verbal conduct of a sexual nature;" respondent took immediate and appropriate action once made aware of complainant's concerns. *Dahlberg v. UW-River Falls*, 88-0166-PC-ER, 89-0048-PC-ER, 3/29/94

A complaint of sex discrimination under the FEA fails to state a claim upon which relief can be granted where the complaint consists primarily of allegations of an unsatisfactory work environment involving specific problems complainant experienced with supervisors (most of whom were of the same gender), coworkers, and others.

In responding to the motion to dismiss, complainant's attorney did not attempt to explain how these incidents involved sex discrimination, except to the extent that it was alleged that the clerical staff were treated as "emotional punching bags" by their supervisors, who were frustrated and intimidated by treatment they were receiving at the hands of *their* supervisors. Assuming all of complainant's allegations to be true for the purpose of deciding this motion, the chain of causation--complainant's supervisors react to a sexist atmosphere created by their supervisors by using complainant as an "emotional punching bag"--is too extended for a conclusion that respondent discriminated against complainant because of sex in violation of §111.322(1), Stats. Also, management had no obligation to act where the conditions about which complainant was concerned did not involve sex discrimination but rather involved disagreements with her supervisor about her approach to supervision. *Makl v. UW-Stevens Point*, 92-0038-PC-ER, 4/30/93

Respondent did not discriminate against complainant on the basis of handicap or retaliation with respect to conditions of employment. While the record reflected a poor relationship between complainant and his supervisor, there was no reason to conclude that this was attributable to appellant's handicap or to retaliation as opposed to a number of other possible reasons. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

Respondent did not discriminate against complainant on the basis of handicap in connection with his suspension with pay pending an investigation for a crime that ultimately was attributed to another employe. Respondent had a reasonable basis for having suspected complainant, and this was not shown to have been pretextual. *Passer v. DOC*, 90-0063-PC-ER, etc., 9/18/92

Respondent did not retaliate against the complainant when it instructed the complainant to revise a travel expense reimbursement form where this procedure was consistently followed by complainant's supervisor when the claimed amount was in excess of the maximum allowed. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

Respondent did not retaliate against the complainant when it required documentation for a travel expense reimbursement form where such documentation was standard practice for the respondent. *Sieger v. DHSS*, 90-0085-PC-ER, 11/8/91; reversed on other grounds by Court of Appeals, *Sieger v. Wis. Pers. Comm.*, 181 Wis. 2d 845, 512 N.W.2d 220, (Court of Appeals, 1994)

No probable cause based on whistleblower retaliation was found with respect to a decision to reorganize the complainant's work unit where the reorganization did not result in any change in the complainant's classification or his position description and there was no evidence that the reorganization plan was promulgated so as to retaliate against the complainant. *Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91

No probable cause based on whistleblower retaliation was found with respect to the respondent's decision to bar entry of complainant into a correctional institution where such action was standard procedure when there was an investigation pending which directly affected institution security. In addition, the respondent's action was taken by persons who were unaware that complainant had engaged in a protected activity. *Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91

No probable cause based on whistleblower or occupational safety retaliation was found with respect to the respondent's scheduling the complainant for a pre-disciplinary hearing where respondent's practice was to schedule such hearings whenever an investigation had identified a work rule violation and the person who had conducted the investigation was unaware that complainant had engaged in a protected activity. *Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91

No probable cause based on race, sex or retaliation was found with respect to the decision not to create a new position for which the complainant would likely have been a candidate where, even though there were some anomalies, the respondent's staffing pattern did not provide for such a position. *Harris v. DILHR*, 86-0021, 0022-PC-ER, 2/22/90

No probable cause was found with respect to advice given the complainant regarding the effect of certain legislation on his retirement options where the reasons given by

respondent for its statutory interpretation were legitimate and non-discriminatory and the respondent provided the same information to anyone who raised the same issue. *Prill v. DETF & DHSS*, 85-0001-PC-ER, 12/15/89

Respondent's decision not to allow inclusion of the union steward or attorney requested by the complainant to represent the complainant at an investigative meeting did not constitute whistleblower or public employe safety and health retaliation where there was nothing in the department-wide policy which indicated that the represented employe had the choice to select either a personal attorney or a local union grievance representative who was unavailable at the time of the hearing and there was no evidence that on other occasions, delays in the hearings had been permitted to allow for representation by either a personal attorney or by a union representative who was unavailable at that time. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

The following actions by the respondent were not found to be retaliatory under either the whistleblower law or the public employe safety and health provisions: 1) the refusal to provide assistance when the complainant called for help where testimony indicated assistance was not required, 2) the decision to investigate a report which raised serious questions about complainant's conduct, 3) the decision to substitute a day of suspension for a previously scheduled day of vacation where the person who made the change was unaware that the change was not desired by the complainant, 4) the decision to deny complainant admittance to the correctional institution grounds during the period of his suspension where respondent's action was consistent with existing policy. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89

[Personnel Commission homepage] [PC Digest Introduction]

[Previous material]