STATE OF WISCONSIN PERSONNEL COMMISSION

GREGORY BLUNT, ***Complainant,*** **v.** **Secretary, DEPARTMENT OF CORRECTIONS,** ***Respondent.*** Case No. 01-0134-PC-ER	RULING ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

The above-noted complaint raises allegations of discrimination based on arrest record and race[1] in regard to respondent's decision to discharge complainant. Respondent, by cover letter dated September 24, 2001, moved for summary judgment. Both parties filed written arguments.

The facts recited below are made solely to resolve this motion. They are construed as favorably to complainant as the record permits, which is the proper standard when evaluating a motion for summary judgment.

FINDINGS OF FACT

1. Complainant has worked for the State of Wisconsin since September 4, 1994 and had no performance or disciplinary problems prior to the events giving rise to this case. He is of African-American descent, as is his supervisor Audrian Brown (exh. 129, respondent's final brief).

2. Effective June 20, 1999, he transferred to a position as a Youth Counselor 3 (Advanced) in respondent's Ethan Allen School (exhs. 101 and 113, attached to respondent's motion), a correctional institution for juvenile offenders.

3. The duties of complainant's job are as noted in his position description (PD) (exh. 102, motion). The position summary is shown below:

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[1] Complainant added the race allegation by letter dated August 6, 2001. He clarified the amendment by letter dated October 31, 2001.

> Under general supervision, serve as lead worker/trainer for all Youth Counselor 1's (YC1) and Youth Counselor 2's (YC2) assigned to a work area; assume the lead role in planning, establishing and directing work area operations; assist the work area social workers in the creation and implementation of a total treatment program. This position has primary responsibility for developing and implementing the delivery of treatment services within the work area, while ensuring that recognized security and safety procedures are followed. Supervise juvenile offenders on all shifts to ensure the security of the institution, institution property and the safety and security of staff, offenders and the public inside and outside the institution when offenders are engaged in approved off-grounds activities; assure that the physical needs of assigned offenders are maintained in the areas of food, clothing and general health; provide case management assistance and other treatment services to offenders; and maintain order and discipline within the institution. Provide training and orientation to other institution staff on a regular basis. This position may require physical intervention with assaultive and/or aggressive offenders. Comply with the institution post orders, Wisconsin Statutes, Department's administrative rules and agency's policies and procedures. A shift work schedule that includes day, evening, weekend and holiday hours may be necessary; workers may be called in for duty beyond the normal schedule.

4. Complainant started medical leave on March 12, 2000. He remained on leave on April 24, 2000, when police stopped his car and arrested him for possession of a "nickel bag" of marijuana. He was charged with a felony (second offense) on April 26, 2000. (See complaint and exhs. 103 & 104, motion.)

5. On May 30, 2000, complainant, who still was on medical leave, telephoned his supervisor. Complainant disclosed that he had been arrested in April and provided information about his arrest. According to respondent's notes, complainant said he was arrested for violating a restraining order and for possession of marijuana on a felony charge; he had spent 5 days in jail and had since gone through 45 days of outpatient treatment. Respondent asked complainant to provide documentation of the actual arrest charges. (See exh. 109, motion.) Although there was a gap between the arrest and complainant's report to his supervisor, respondent requires only that the employee report the arrest "before the start of the employee's next shift" (exh. 117, motion). Since complainant was on leave when the arrest occurred and when he reported it to his supervisor, he met the reporting requirement.

6. Complainant returned to work on July 23, 2000. Complainant was led to believe by his supervisor and the union president that situation was not so serious as to warrant termination because he had followed the rules and reported the incidents (p. 2, complainant's brief).

7 On September 15, 2000, complainant's supervisor told complainant to provide the previously requested documentation of the arrest charges by September 20th or he could possibly face suspension.

8. Complainant continued to work until September 17, 2000, when he was taken into custody while he was at work. Respondent placed him on leave without pay.[2] He was released on bail on or about October 5, 2000. He spoke with his supervisor about returning to work. His supervisor asked if he would take a leave without pay pending the outcome of the possession charge.[3] Upon advice of his union representative, complainant told his supervisor he was unwilling to take a leave without pay. (See complaint and complainant's brief dated 10/31/01.)

9. Complainant's attorney faxed a copy of the criminal complaint to respondent on October 11, 2000. The charge indicated that complainant's conduct was contrary to §§961.01(14), 961.14(4)(t), 961.41(3g)(e) and 961.48, Stats. (See, exh. 104, motion.) The charge also contained the following information:

> Detective Otzelberger advised the defendant of his Constitutional rights and he did provide a statement. The defendant stated that he had one previous arrest in 1988 or 1989 for possession of a (sic) cocaine and believes he got a "time served" sentence. The defendant also received a ticket in Green Bay for having a "roach" in his car's ashtray. The defendant stated that regarding his arrest, the marijuana was for his own use. The defendant bought a nickel bag and paid $4 for it. The defendant did use some of the marijuana to smoke a joint
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> The defendant has been smoking marijuana for about 17 years and smokes nearly every day and smokes it in joints. The defendant does not use any other

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[2] Respondent contends complainant was taken into custody on September 20, 2000 and his leave without pay commenced on September 24th (see p. 7 of respondent's motion brief).

[3] Respondent denies that complainant was asked to take leave without pay and avers that this was one of the options discussed.

> type of drugs and does not sell any drugs. The defendant did sign this statement indicating that it was truthful and correct.

10. Complainant's supervisor conducted the investigation concerning complainant (exh. 129, respondent's reply brief). A predisciplinary meeting was held on October 12, 2000, the first day complainant was available after his arrest. Respondent's notes of the meeting (exh. 111, motion) indicate that respondent explained the concept of whether a "nexus" existed between his arrest and his employment. Complainant indicated at this meeting that his pretrial date on the marijuana charge was scheduled for December 7, 2000. He said he was undergoing weekly urine analysis for drug use. He produced documents showing that his wife vacated the restraining order on September 25, 2000.

11. Complainant also revealed at the predisciplinary meeting that there had been another arrest involving marijuana possession, this one in Brown County. He said a warrant was open still and produced documents requesting the court to reopen the case because he was in the hospital at the time of trial (exhs. 111, motion).

12. Management members consulted with one of respondent's attorneys on October 17, 2000. One item discussed was "application of nexus to Mr. Blunt's arrest and employment." (See exh. 109, motion, p. 2.)

13. Respondent informed complainant by letter dated October 13, 2000 (exh. 112, motion), that he was "relieved of duty" with pay effective the same day. Respondent indicated in the letter that the suspension was "pending investigation of your possible violation of Department of Corrections Work Rule 2, "Failure to follow policy or procedure, including but not limited to the DOC . Arrest and Conviction Policy."

14. A second investigatory meeting was held on October 17, 2000, to review complainant's criminal investigation background document (exh. 111, motion). The prior arrest for marijuana possession occurred on December 5, 1988 in Brown County (p. 3, exh. 111) and the conviction for this arrest occurred on August 19, 1999 (p. 1, exh. 111). Complainant indicated at this meeting that he had reported this matter to Jan Long, his supervisor at the time. Complainant still maintains this is true (complainant's rebuttal, p. 1 item #20).

15. On November 7, 2000, Mr. Brown contacted Ms. Long by telephone. Ms. Long told him that complainant never reported the Brown County incident to her (exh. 113, p. 2, motion and Exh. R-124, tendered by letter dated 12/10/01).

16. Respondent notified complainant, by letter dated November 10, 2000, that his employment was terminated (exh. 114, motion). The termination letter stated as shown below (emphasis added):

> This letter will serve as official notice that you are hereby terminated from your position This action is being taken as a result of your violation of the following Department Work Rule:
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> Work Rule No. 11: "Violating a criminal statute or ordinance, or other regulation having the force and effect of law."
>
> Specifically, on April 24, 2000, you were stopped by the Milwaukee Police. Your vehicle was searched and you were found to be in possession of a quantity of marijuana.
>
> On May 30, 2000, you reported your arrest to your supervisor. As a result, an investigation was initiated. During the course of the investigation, it was discovered that you had a prior arrest and conviction for possession of marijuana that resulted in an ordinance violation and fine. Regarding the current violation, you admitted to the possession of marijuana.
>
> Possession of illegal drugs cannot be tolerated as it directly relates to your position as Youth Counselor. There are youth in the institution who have engaged in the same behavior. Your actions leave no choice but to terminate your employment.

17 The termination letter does not mention any violation of work rule #2: "Failure to follow policy or procedure, including but not limited to . Arrest and Conviction Policy." (See exh. 119, motion.)

18. Complainant was convicted of the felony possession charge in April 2001 (complainant's brief, p. 3).

19. Respondent's Arrest and Conviction Policy changed over time. The policy in effect at the time complainant was discharged is dated June 1998 (exh. 117, motion) and

replaced the prior policy dated April 1996 (exh. 126, respondent's final brief). It was the 1998 policy that was applicable to complainant's circumstances (respondent's final brief, p. 2).

20. Gregory Hansen is white. He was convicted of three misdemeanors stemming from actions on November 3 and December 20, 1994. The offenses included forging a prescription, obtaining prescription drugs by fraud and fraud connected with an insurance claim. Other offenses were charged but dismissed. Respondent did not terminate his employment. Respondent indicates there is no information in his personnel file related to a violation of an arrest and conviction policy. These offenses occurred prior to the April 1996 arrest and conviction policy noted in the prior paragraph. Respondent did not provide a copy of the policy applicable at the time of these offenses. Respondent did not provide the classification of Mr. Hanson's position or a description of the job duties. (See respondent's final brief, p. 2.)

21. James Schmeling is white. His arrest and conviction was subject to respondent's Arrest and Conviction policy dated April 1996. In July 1996, he was arrested for operating a motor vehicle while intoxicated (misdemeanor, 3rd offense). He was convicted and sentenced on January 17, 1997 Respondent initiated an investigation after he was convicted. He was not discharged from state service for these offenses. Instead, respondent terminated his probation and in March 1997, he was restored to his prior position, pursuant to §ER-MRS 15.055, Wis. Adm. Code. Respondent did not provide the classification of the Mr. Hanson's position or a description of the job duties. After being restored to his former position at Ethan Allen School (same place where complainant worked), Mr. Schmeling was relieved of duty without pay because he was serving a Huber jail sentence. During the resulting investigation, respondent discovered he had not reported three prior arrests for operating a vehicle while intoxicated and one arrest for theft. On May 8, 1997, he received a written reprimand with a last chance warning for violation of work rule 11. (See respondent's final brief, p. 2.)

22. Wendy Williams is white. Her arrest and conviction was subject to the respondent's June 1998 policy (the same policy as applied to complainant). On February 10, 1999, she was arrested for possession of marijuana, a misdemeanor. She informed respondent of the arrest the day it occurred. On February 12, 1999, she was suspended with pay.

Respondent investigated potential violations of work rules 2 and 11, with an investigatory interview on February 16, 1999, and a pre-disciplinary meeting on May 27, 1999. Respondent determined there was a nexus between the arrest and the job and, on May 27, 1999, terminated her employment. She was convicted of the misdemeanor offense in June 1999. She filed a grievance alleging that her discharge violated the union contract. On August 3, 1999, the grievance was settled and she was returned to work under a "last chance" agreement. On November 15, 2000, she was arrested and failed to report the arrest until March 4, 2001. Respondent terminated her employment on April 5, 2001. Respondent did not provide the classification of Mr. Hanson's position or a description of the job duties. (See respondent's final brief, p. 2.)

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(b), Stats.

2. Respondent failed to meet its burden to show entitlement to summary judgment on the allegations that its decision to terminate complainant constituted unlawful discrimination based on complainant's arrest record and his race.

OPINION

I. Summary Judgment Standard

The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. *Balele v. Wis. Pers. Comm.*, 223 Wis.2d 739, 745-748, 589 N.W.2d 418 (Ct. App. 1998). Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles: a) disputed facts, which would not affect the final determination, are immaterial and insufficient to defeat the motion; b) inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion; and c) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. *See Grams v. Boss*, 97 Wis.2d 332, 338-9, 294 N.W.2d 473 (1980) and *Balele v. DOT*, 00-0044-PC-ER, 10/23/01. The non-moving party

may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. *Balele, id.*, citing *Moulas v. PBC Prod.*, 213 Wis.2d 406, 410-11, 570 N.W.2d 739 (Ct. App. 1997). If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. *Balele, id.*, citing *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis.2d 281, 290-92, 507 N.W.2d 136 (Ct. App. 1993)

The Commission has determined that it is appropriate to apply the above guidelines in a flexible manner, after considering at least the following five factors (*Balele*, *id.*, pp. 18-20):

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* Subjective intent is typically difficult to resolve without a hearing whereas legal issues based on undisputed or historical facts typically could be resolved without the need for a hearing.
2. *Whether a particular complainant could be expected to have difficulty responding to a dispositive motion.* An unrepresented complainant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as a complainant either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.
3. *Whether the complainant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented complainant who either has had no opportunity for discovery or who could not be expected to use the discovery process, is unable to respond effectively to any assertion by respondent for which the facts and related documents are solely in respondent's possession.
4. *Whether an investigation has been requested and completed.* A complainant's right to an investigation should not be unfairly eroded.

5. *Whether the complainant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists it suggests that use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for hearing.

The Commission now turns to applying the above factors to this case. Respondent's motion relies to a degree upon its assertion that discrimination played no part in respondent's decision to terminate complainant's employment. Assertions of this nature are key to resolution of the case and are best resolved at hearing where witness credibility can be observed. Complainant represents himself and has had no prior experience litigating in this forum. Complainant has not conducted discovery, nor has the Commission explained the process to him. He is disadvantaged in this regard especially relating to his claim of race discrimination because he is dependent upon the information provided by respondent, which appears to be incomplete. The present motion was filed with respondent's Answer to the complaint. Accordingly, the investigation of his claims has not been completed. Complainant has not engaged in a pattern of repetitive and/or predominately frivolous litigation.

II. Arrest/Conviction Claim

Complainant contends respondent terminated his employment because of his arrest record in violation of the Fair Employment Act (FEA). It is unlawful to discriminate against an individual because of arrest or conviction record (§111.321, Stats.), unless one of the exceptions applies, as noted in §111.335, Stats. Pertinent here are the following exceptions in §111.355(1), Stats. (emphasis added):

> (b): Notwithstanding s. 111.322, it is not employment discrimination because of **arrest record** to refuse to employ or license, or to **suspend from employment** or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

> (c): Notwithstanding s. 111.322, it is not employment discrimination because of **conviction record** to refuse to employ or license, or to bar or **terminate from employment** or licensing, any individual who:
> 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity

Complainant contends discrimination occurred because respondent terminated him prior to his conviction. Respondent agrees it would be unlawful to have terminated complainant based *solely* on his felony arrest on April 24, 2000. Respondent contends, however, that the termination decision was not based on complainant's arrest for possession of marijuana but instead on his failure to report the arrest in Brown County. Respondent's argument is noted below (motion, p. 13):

> In this case, the Respondent did make the (termination) decision without taking the Complainant's arrest record into account. During its investigation, the Respondent discovered that the Complainant had been convicted of a previous offense that he had not reported in violation of the Respondent's work rules. The Respondent terminated the Complainant for violation of Work Rule 11. "Violating a criminal statute or ordinance, or other regulation having the force and effect of law" and not because of Complainant's arrest record.

The Commission rejects this argument because the failure to report an arrest or conviction would have been a violation of work rule #2 (failure to respondent's Arrest and Conviction Policy), which was not a violation listed in the termination letter (compare to situation in ¶17, Findings of Fact). In the context of the present motion, where it is appropriate to draw reasonable inferences in the complainant's favor, this apparent conflict is sufficient to reject respondent's argument.

Respondent next contends that complainant's discharge was based on his admitted conduct of possessing and using marijuana, rather than on the arrest. (See pp. 13-20, motion.) His possession of marijuana was mentioned in the termination letter as being related to his job duties (see ¶16, Findings of Fact). In a similar vein, respondent argues that even if complainant's arrest record played a part in the termination decision, respondent still would not be liable for discrimination because respondent would have terminated complainant based on

knowledge that he possessed and used marijuana even if he had not been arrested for such conduct. (See pp. 12-13, motion). These arguments are rejected.

Complainant was led to believe by his supervisor and the union president that his situation would not result in termination (see ¶6, Findings of Fact). Further, respondent made no mention of any potential disciplinary action from May 30, 2000, when complainant reported the arrest until after September 17, 2000, when he was taken into custody at work. Also, respondent allowed complainant to return to work on July 23, 2000 and continue to work until he was taken into custody at work. These facts (which must be taken as true in context of the present motion) do not support respondent's assertion that its overriding concern was complainant's possession and use of marijuana independent of any arrest record.

III. Race Claim

Complainant contends respondent terminated his employment because of his race, in violation of the FEA. The analytical framework for this claim is noted below.

The initial burden of proof under the FEA is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant, in turn, may attempt to show was a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

A complainant may establish a prima facie case of discrimination in a discharge case by showing that: (1) he is a member of a group protected under the FEA, (2) he was discharged, (3) he was qualified for the job, and (4) either he was replaced by someone not within the protected class or others not in the protected class were treated more favorably. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 173, 376 N.W.2d 372 (Ct. App. 1985), followed in *Harrison v. LIRC*, 211 Wis. 2d 681, 565 N W.2d 572 (Ct. App. 1997) and in *Eleby v. LIRC*, 223 Wis. 2d 802, 589 N.W.2d 456 (Ct. App. 1998).

Complainant established a prima facie case. The first two elements of the prima facie case are undisputed. The third element (that he was qualified for the job) is established for

purposes of the pending motion by his satisfactory performance in the job prior to his arrest and by respondent allowing him to return to his job after the arrest without any indication that disciplinary action might be warranted. It is presumed here someone of a different race replaced that complainant because this is information solely within respondent's knowledge and respondent failed to state otherwise even though it would have been in its interest to do so.

Respondent's stated non-discriminatory reason for discharging complainant was that his possession and use of marijuana made him unfit to perform the duties of his job.

There is sufficient evidence of pretext at this stage of the proceedings to defeat respondent's motion for summary judgment. As mentioned in the discussion of the arrest record claim, respondent allowed complainant to return to work without any mention of potential disciplinary action until after he was taken into custody Also, complainant's supervisor told him that his situation was not so serious as to warrant termination. Pretext also is shown in respondent's preferential treatment of white employees, as discussed below.

Unique to the race claim is respondent's apparently preferential treatment of certain white employees, as noted in ¶¶20, 21 and 22, Findings of Fact. The circumstances of Williams' situation (¶22) is most similar to complainant's in that both were arrested for possession of marijuana and both were terminated under the same arrest and conviction record policy prior to any conviction for the offense. Respondent, however, has not explained the reasons and circumstances why Williams was allowed to return to work as a settlement of her union grievance. This is information solely within respondent's knowledge and the lack of detail is interpreted against respondent's interests for purposes of this motion. It could be, for example, that respondent settled Williams' grievance for reasons or concerns, which also are pertinent here. The circumstances of Hansen and Schmeling (¶¶20& 21), strongly suggest they were treated more favorably than complainant if for no other reason than the fact that their employment was not terminated until after they were convicted. Respondent's statement that the circumstances warranted a different result was unpersuasive because respondent did not specifically state which circumstances led to a different result under which provision of the arrest and conviction record policy in effect at the time.

Respondent contends complainant cannot prevail on the race claim because his supervisor who conducted the investigation was of the same race as complainant. The Commission agrees that this is a factor to consider and such factor militates against an inference of discrimination. The race of his supervisor, however, is not dispositive of the question of whether race played a part in the termination decision, especially in the context of a dispositive motion where evidence of pretext exists. Respondent's argument (see p. 3, final brief) is based on the Commission's decision in *Whitley v. DOC*, 92-0080-PC-ER, 9/9/94,[4] but in *Whitley* the decision was issued after a full hearing and not in the context of a dispositive motion.

ORDER

Respondent's motion for summary judgment is denied. The Commission will continue in its investigation of the case.

Dated: January 24, 2002.

STATE PERSONNEL COMMISSION

JMR:010134Crul1

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner

Chairperson McCallum did not participate in the consideration of this case.

[4] Respondent cited to *Mitchell v. DOC*, 95-0048-PC-ER, 8/5/96, in error.