STATE OF WISCONSIN PERSONNEL COMMISSION

BRENDA GAYLE PLUMMER,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MADISON,
Respondent.

Case Nos. 97-0170-PC-ER and
98-0153-PC-ER

FINAL
DECISION AND ORDER

The Commission mailed an Interim Decision and Order (IDO) to the parties on March 6, 2001, specifically retaining jurisdiction "over the remedy for the portion of the equal pay claim established by complainant" and for "consideration of an award for fees and costs." (*See*, ORDER section of IDO.) The final brief on these issues was filed on July 11, 2001, and the matter is now before the Commission for final resolution.

OPINION

Complainant prevailed on part of issue #2 in case number 97-0170-PC-ER, as follows (taken from the Conclusions of Law section of the IDO):

> Complainant established a prima facie case in her equal pay claim (Case No. 97-0170-PC-ER) which shifted the burden to respondent to show that a reason other than sex accounted for the pay differences, as detailed above in section R of the Discussion portion of this decision. Complainant prevailed on her equal pay claim with respect to Dr. Cohen in 1992-93, AAS professor Dr. Ralston in 1991-92 and 1992-93 and with respect to Dr. Van Deburg in 1991-92 through 1996-97 As to the remaining claims, respondent showed that the pay differences were due to factors other than sex.

Complainant did not prevail on any of her other claims.

Complainant has the burden of proof to show the fact and extent of the injury and to show the amount and value of her 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; and

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; (Circuit Court decision) reversed by Ct. App., *Paul v. Wis. Pers. Comm. & DHSS*, 95-3308, 12/12/96.

1. Back Pay

Complainant contends she is entitled to the following amounts as back pay (complainant's submission of June 11, 2001, pp. 11-12):

1)	Re: Dr Cohen 1992-93:	$ 4,686.70
2)	Re: Dr Ralston 1991-92	310.00
3)	Re: Dr Ralston 1992-93	294.20
4)	Re: Dr Van Deburg 1991-92	225.00
5)	Re: Dr Van Deburg 1992-93	3,205.80
6)	Re: Dr Van Deburg 1993-94	617.55
7)	Re: Dr Van Deburg 1994-95	3,786.40
8)	Re: Dr Van Deburg 1995-96	2,090.18
9)	Re: Dr Van Deburg 1996-97	-0-

Section 111.39(4)(c), Stats., limits the Commission's authority to award back pay to the 2-year period preceding the date the complaint was filed with the Commission. The relevant statutory language is shown below:

> Back pay liability may not accrue from a date more than 2 years prior to the filing of a complaint with the [commission].

The complaint in Case No. 97-0170-PC-ER was filed on October 29, 1997. Accordingly, the Commission lacks authority to award back pay prior to October 28, 1995. Respondent concluded (p. 2, submission dated June 26, 2001) and complainant did not address or specifically refute (submission dated July 11, 2001) that under the two-year rule the years which the Commission has authority to award back pay are limited to 1995-96 and 1996-97; or items #8 and #9 above.

The Commission now turns to consideration of the back pay amounts due for 1995-96 and 1996-97 Both years relate to a comparison between complainant's salary and Dr Van Deburg's salary. The Commission noted in the IDO, where Dr Van Deburg earned $3,052 more

than complainant such difference was due to her sex. Amounts of $3,052 or less were deemed attributable to a factor other than sex. Specifically, he has worked for respondent 17 years longer than the complainant. (IDO, pp. 62-63.)

Dr. Van Deburg earned $68,649 in 1995-96 and $70,087 in 1996-97. His salary after the adjustment noted in the prior paragraph (subtraction of $3,052) in 1995-96 is $65,597 and in 1996-97 is $67,035. The adjusted amounts are then compared to complainant's salary of $59,967 in 1995-96 and $63,000 in 1996-97. The chart below shows the differences

95-96 Calculations		96-97 Calculations	
	$65,597		$67,035
minus	59,967	minus	63,000
	$ 5,630		$ 4,035

The complainant, however, claims less than the above figures as back pay because she concedes that part of Dr. Van Deburg's wages in these years was due to merit (submission of 6/11/01). According to her own analysis of his merit entitlement, she requests only $2,090.18 for 95-96 and nothing for 96-97 (submission of 6/11/01, p. 12).

Complainant is entitled to interest on the back pay award computed as follows:

> Any interest that may be awarded on a back pay award made by the commission shall be added to the award and computed at the annual rate specified in §814.04(4), Stats., simple interest. Interest shall be computed by calendar quarter. Interest shall begin to accrue on the last day of each calendar quarter, or portion thereof, in the back pay period on the net amount of back pay attributable to that calendar quarter, or portion thereof, after any set-offs, and shall continue to accrue until the date of compliance with the back pay order.

§PC 5.07, Wis. Adm. Code. Section 814.04(4), Stats., provides for interest at 12 percent. Respondent, accordingly, is ordered to pay interest on the back pay award at the rate of 12%, to be calculated as noted in §PC 5.07, Wis. Adm. Code.

Complainant also requests contributions to her retirement account, as follows (arguments filed June 11, 2001, p. 12):

> At a standard calculation of ten percent per annum for AY 1991-92 through 1996-97· $2,603.59.

Where back pay is awarded it is appropriate to consider retirement benefits as an element of the back pay award. *See Kesterson v. DILHR & DMRS*, 85-0081-PC, 85-0105-PC-ER, 4/4/88 and *Schilling v. UW Madison and UW System*, 90-0064-PC-ER, 90-0248-PC, 10/1/92. Complainant's back pay award is $2,090.18 for 95-96, and she is entitled to receive retirement contributions for that award using standard calculations as deemed appropriate by the Department of Employee Trust Funds; which, as respondent points out, may be at a lesser rate than 10 percent (respondent's submission dated June 26, 2001, pp. 2-3).

2. $35,001.77 Request for "Other Damages"

Complainant also requests $35,001.77 as "other damages." Her request is shown below (p. 13, submission of 6/11/01):

> Compensation for effort lost to scholarship because of the need to do legal work pro se. At the rate of two 2/9ths summer appointments based on Plummer's current salary of $78,754 = $35,001.77

The above could be viewed as a reimbursement request for the value of complainant's time spent representing herself before the Commission, or as a request for damages other than back pay. Under either theory, the request must be denied as explained below.

Respondent agrees that an award of attorney fees and costs is appropriate for a represented and prevailing complainant in this forum citing to *Watkins v. Labor and Industry Review Commission*, 117 Wis.2d 753, 345 N.W.2d 482 (1984). (See respondent's brief dated June 26, 2001, p. 3.) The Wisconsin Supreme Court in *Watkins* noted that §111.36(3)(b), Stats., authorized an award of back pay but did not expressly refer to an award of attorney fees (*Id., 117 Wis.* 2d at 759). The Court's analysis relied, in part, on Title VII cases, as noted below:

> In determining whether there was statutory authorization for an award of reasonable attorney's fees, federal courts have construed provisions containing broad remedial language to allow recovery of attorney's fees despite the absence of express statutory language allowing such an award. In *Smith v. Califano*, 446 F. Supp. 530 (D. D.C. 1978), the court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e, et seq., conferred authority upon a

> federal administrative agency to allow an award of attorney's fees to successful plaintiffs. Although the court acknowledged that Title VII does not expressly provide that the agency may award attorney's fees, it nevertheless concluded that such power was authorized under sec. 717(b), 42 U.S.C. 2000e-16(b), which requires the agency to "enforce the provisions [prohibiting employment discrimination] through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section " Similarly, in *Krodel v. Young*, 576 F. Supp. 390, 33 Empl. Prac. Dec. (CCH) para. 34,061 (D.D.C. 1983), the court held that an award of attorney's fees to a plaintiff who prevailed in an action brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. sec. 621 et seq., was authorized under sec. 633a(c) of the Act, which allows an aggrieved person to bring a civil action" in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."

Id., 117 Wis. 2d at 758-759.

The *Watkins* Court held that an award of attorney fees under the FEA was appropriate, explaining (in part) as noted below:

> Further, an award of reasonable attorney's fees to a prevailing complainant is justified to promote the second purpose of the Act: to discourage discriminatory practices in employment. We have previously recognized that an individual who brings an action to enforce a statutory right may be acting as a "private attorney general" to enforce the public's rights under the statute. *See Shands v. Catrovinci*, 115 Wis. 2d 352, 358, 340 N.W.2d 506 (1983). Similarly, a complainant who files a complaint under the Fair Employment Act is acting as a "private attorney general" to enforce the rights of the public and to implement a public policy that the legislature considered to be of major importance. The aggregate effect of such individual actions enforces the public's right to be free from discriminatory practices in employment, which in turn effectuate the legislative purpose of outlawing such practices. Without an award of reasonable attorney's fees, few victims of discrimination would be in an economic position to advance both their individual interest and the public's interest in eliminating discriminatory employment practices.

Id., 117 Wis. 2d at 764. The *Watkins* decision has been interpreted as authority for awards of "fees and costs." *Racine Unified School District v. LIRC*, 164 Wis. 2d 567, 582, 476 N.W.2d 707 (Ct. App. 1991): "[T]he ALJ ordered the District to pay the Union $150,957.00 in attorney's fees, together with $11,820.58 in costs. This award was based upon *Watkins* [*Id.*], which recognized the prevailing party's right to such fees and costs."

The complainant here, however, proceeded pro se. It is well established that pro se litigants are not entitled to a monetary award as reimbursement for representing themselves. *See*, *Kay v. Ehrler*, 499 U.S. 432, 435, 111 S. Ct. 1435 (1991). The U.S. Supreme Court explained why as noted below:

> [W]e agree with the Court of Appeals that the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.
>
> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom.

Id., 499 U.S. at 437 Accordingly, to the extent that complainant's monetary request for $35,001.77, is an attempt to obtain reimbursement for the value of her time spent proceeding pro se, the request is denied under the FEA.

The Commission lacks authority under the FEA to grant monetary awards other than back pay (expressly granted in §111.375(4)(c), Stats.) and attorney fees/costs (pursuant to *Watkins*, *Id.*). *See*, *Wis. Dept. of Transportation v. Wis. Personnel Commission*, 176 Wis. 2d 731, 500 N.W.2d 664 (1993). Accordingly, there is no basis for awarding the $35,001.77 requested by complainant and such request is denied under the FEA

3. Request for Costs

Complainant's request for costs is shown below (p. 13, submission received on June 11, 2001):

> The single most costly item in the list is the travel between Madison and North Caroline for the hearing. Complainant had no control over the hearing schedule. In addition, complainant had substantial photocopying expenses for a large

number of documents, some of which were also xeroxed for attorneys that she was trying to retain.

Item	Amount
A. Photocopying	
1997	$ 35.40
1998	99.38
1999	134.78
2000	132.54
B. Postage	
1999	35.95
2000	40.32
C. Copy of hearing tapes	178.08
D. Travel between Madison & N. Carolina to make hearing preparations and attend hearing	1,125.00
E. Van Galder bus	76.00
F. Taxis from Memorial Union	48.00
G. Parking for hearing	46.00
H. Ring binders	18.97
I. *Trial Advocacy* (Nutshell)	15.95
J. *Legal Research*, 7th ed.	26.44

The threshold question here is whether a prevailing complainant is entitled to an award of costs associated with self-representation. Respondent contends complainant, as a pro se litigant, is not entitled to costs under the FEA (p. 3, submission dated June 26, 2001). The Commission found one Seventh Circuit case on point, *Place v. Abbott Laboratories*, 2000 U.S. Dist. LEXIS 5477 (ND Ill 2000). In *Place*, a pro se litigant was awarded costs under Title 7 of the Civil Rights Act for reasonable out-of-pocket expenses traceable to a successful portion of the litigation.

The *Place* case, however, is not reported in an official reporter, and is not binding on the Commission. Because the Commission disagrees with the *Place* court's rationale, the Commission declines to follow it. The *Place* court's reasoning is noted below (emphasis added):

> Place moves the Court for an award of $239.81 for non-taxable expenses. She enumerates charges for postage, recording fees, and travel incurred in connection with the prosecution of her case.
>
> With respect to this final motion, Abbott asserts that Place's supplemental request should be denied in its entirety. Because pro se attorneys are not entitled to fees under civil rights fee-shifting statutes, they should not recover related costs either, argues Abbott. (Def. Obj. at 1, citing *Kay v. Ehrler*, 499 U.S. 432, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991)). Abbott's argument is misplaced. As Abbott acknowledges, **reasonable out-of-pocket expenses**, including postage and travel expenses **are recoverable incident to an award of attorney's fees.** Yet Abbott attempts to distinguish the instant case because Place seeks reimbursement for expenses incurred by her personally, as opposed to by a former attorney. (Def. Obj. at 2). Indeed, the Supreme Court held that pro se attorneys were not entitled to fees in civil rights cases. *Kay*, 499 U.S. at 437, 111 S. Ct. 15 1437 Elaborating on its holding, the Court stated:
>
> > A rule that authorizes awards of counsel fees to pro se litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy, of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every case.
>
> *Id.* 499 U.S. at 438, 111 S. Ct. at 1438.
>
> Withholding costs, as opposed to fees, from a pro se attorney does not create an incentive for pro se litigants to employ counsel as much as it creates—in cases where a pro se litigant must proceed without counsel—a disincentive to prosecute the claim at all. Such a rule, then, would contravene the High Court's express reasoning for withholding fee awards. Consequently, this Court declines to extend *Kay v. Ehrler*'s ruling to costs. (Citations omitted.)

Place at 13-14.

The court in *Place* correctly acknowledged (as quoted previously) that costs "are recoverable incident to an award of attorney's fees." The same principle is supported by the Wisconsin Court of Appeals decision in *Racine Unified School District*, which tied its authority to award costs to the Wisconsin Supreme Court's decision in *Watkins* which authorized awards of

attorney fees under the FEA. It follows that where fees are not awarded then items incidental to such an award (such as costs) also must be denied.

A reviewing court might disagree with the Commission's rejection of the holding in *Place* and proceed to examine the requests for costs. Accordingly, the Commission offers the following comments with regard to the $1,125.00 requested by complainant as reimbursement for travel between Madison and North Carolina.

Complainant incorrectly represents that she "had no control over the hearing schedule." The hearing initially was scheduled for November 15, 16, 18 and 19, 1999, dates to which the parties agreed (see Conference Report dated July 13, 1999). The hearing was rescheduled at complainant's request and the parties agreed on the alternative hearing dates of February 28-March 3, 2000 (see Conference Report dated November 1, 1999). On January 6, 2000, complainant wrote to the Commission as follows:

> This letter is to inform you that I am the recipient of a National Humanities Center Fellowship for Spring semester 2000. This is a residential fellowship and I will be in Chapel Hill, North Carolina from January 7 through May 31, 2000. I will, however, be able to meet all deadlines and commitments associated with the February 28-March 3, 2000 hearing and will be available, on prearrangement, for any telephone conferences .
>
> You may continue to send postal correspondence to me at [her Madison, WI address].

The hearing commenced on February 28th, 2000 but was not completed on March 3rd, so a conference call was scheduled to select additional hearing dates (see hearing examiner's letter dated March 3, 2000). By letter dated March 19, 2000, complainant informed the Commission that she could not participate in the conference call but she "urge[d] that we schedule the University's case in chief as soon as possible." The scheduling conference was held on March 23, 2000, at which time the parties agreed to further hearing on April 24, 25 and 26, 2000 (see hearing examiner letter dated March 28, 2000). Complainant, at best, is disingenuous when she asserts she had no control over the hearing dates.

4. Fees/Costs under EAJA

Respondent cites as separate authority for an award of attorney fees and costs in these cases, the Equal Access to Justice Act (EAJA), §227.485, Stats. The EAJA generally provides for attorney fees and costs. However, pro se litigants are not entitled to reimbursement for the value of their own time spent on a case. *Heikkinen v. DOT*, 90-0006-PC, 4/16/90. *See, Brooke v. UW & DER*, 99-0034-PC, 5/15/00.

The Commission next notes that costs (other than attorney fees) under the EAJA are limited to those enumerated in §814.04(2), Stats. (*See* §814.245(5), Stats., applicable to the EAJA pursuant to §227.485(5), Stats.). Of complainant's requests here, only postage is recognized as a reimbursable cost under the EAJA.

Complainant's request for postage reimbursement in the amount of $76.27 must be adjusted downward because complainant was successful on only part of her claims (*see*, §§227.485(4) and (5), Stats.). Complainant's request for costs is granted to the extent of $20.00, a reduction of about 74% percent from the requested amount. It could be argued that a greater reduction is appropriate based on the fact that complainant prevailed only on a part of one out of eighteen hearing issues; a success rate of about 5.1 percent. If this success rate were applied to the requested postage the award would be about $3.88 (5.1% of $76.27). A higher amount was awarded in recognition that complainant's partial success on the one issue, included success in multiple years.

Respondent contends complainant is entitled to no costs under the EAJA. This contention is based on respondent's perception that it was "substantially justified" in its position, within the meaning of §227.485(3), Stats. The Commission disagrees.

The Wisconsin Court of Appeals explained how to evaluate whether a government's position was substantially justified under the EAJA as noted below (citations omitted):

> In evaluating the government's position to determine whether it was substantially justified, we look to the record of both the underlying government conduct at issue and the totality of circumstances present before and during litigation .
>
> To satisfy its burden the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory pro-

> pounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.

Bracegirdle v. Board of Nursing, 159 Wis.2d 402, 425-426, 464 N.W.2d 111 (Ct. App. 1990).

Complainant prevailed on part of her equal pay claim with regard to Dr. Cohen in 1992-93, Dr. Ralston in 1991-92 and 1992-93, and Dr. Van Deburg from 1991-92 through 1996-97. The record contained no explanation for the difference in pay between complainant and Drs. Cohen and Ralston in these years where the differences exceeded the males' merit awards. Further, respondent offered no evidence of what portion of Dr. Van Deburg's salary was due to merit in any year and no explanation of amounts due to factors other than merit. This was the crux of respondent's burden in the equal pay claim. Under these circumstances, the Commission finds that respondent's position on the equal pay claim was not substantially justified, within the meaning of §227.485(3), Stats.

5. Complainant's Failure to Comply with Briefing Schedule

Each party raised an issue with regard to complainant's failure to timely file an initial brief on her entitlement to fees and costs. Complainant contends (p. 1, submission received June 11, 2001) as noted below (emphasis in original):

> Complainant Plummer does not waive her claim for back pay. She was not a party to a briefing schedule arbitrarily constructed and cunningly coinciding with the busiest week in the academic year for University of Wisconsin teachers. Complainant should not have to choose between service to students and protected pursuit of a fair employment claim.

Her claim is spurious.

The Commission issued the Interim Decision and Order in these cases on March 6, 2001. On March 12, 2001, the hearing examiner sent the parties a letter scheduling a conference call for 9:00 a.m. on Monday, March 26, 2001 "to determine whether the parties plan to work out the damages phase on their own or (whether) the parties wish to have the Commission's assistance." Ms. Plummer indicated by email message dated March 15th, that she was unavailable for the scheduled conference but that she would be available during the week of April 2-6. The

examiner then rescheduled the conference for April 2, 2001, a date complainant indicated she would be available.

Complainant failed to appear at the re-scheduled conference. The conference, however, was recorded on complainant's home answering machine after being unable to reach her at her work telephone number A briefing schedule was established in her unanticipated and unexplained absence. Complainant, the party with the burden of proof, was scheduled to file the initial brief by May 3, 2001, respondent's reply was due by June 4, 2001, and complainant's final brief by June 22, 2001. The briefing schedule established was based on the Commission's standard "30-30-10" schedule whereby the party with the burden of proof files the initial brief within 30 days, the opposing party files 30 days thereafter, and the party with the burden of proof files the final brief 10 days thereafter

The hearing examiner wrote to the parties on April 2, 2001, confirming the briefing schedule. Thereafter on the same day the hearing examiner checked her e-mail and found the following message from complainant:

> This message is to acknowledge receipt of your recorded telephone message this afternoon. According to Ms. Rogers' letter of March 12, 2001, the conference call as originally scheduled was "to determine whether the parties plan to work out the damages phase on their own or the parties wish to have the Commission's assistance." I would like to let you know that I do not see any need for the Personnel Commission's assistance in working out the settlement. Therefore, the timetable you projected with regard to filing of briefs, etc. does not seem to me to be appropriate or necessary.

The hearing examiner wrote to the parties on April 4, 2001, acknowledging receipt of complainant's e-mail message and stating as shown below:

> I took this [email] message to mean that [complainant] feels she could work out the damages portion of her case with [respondent's attorney]. Accordingly, I telephoned [respondent's attorney] this afternoon to see if Ms. Plummer made any contact with her. [Respondent's attorney] informed me that Ms. Plummer has not contacted her
>
> Based on the information available to me, I see no reason to cancel the briefing schedule noted in my letter of April 2nd If Ms. Plummer has a picture of how

> she would like to pursue this matter in lieu of briefs, she needs to make a proposal to [respondent's attorney] and myself by 4:30 p.m. on April 9, 2001.

Ms. Plummer's reply (letter dated April 6, 2001) is shown below:

> Let me reiterate that I am not legally bound to accept any assistance from the Personnel Commission in the manner of settlement in the cases above. There is therefore no need for any briefing schedules and deadlines that are not the product of agreement between the two parties concerned. Further, Ms. Rogers has not given any indication of why she thinks a case that has been on the Commission's desk for four years needs to be settled within less than a six weeks of the Interim Decision and Order. I will not be writing any briefs, and I will not abide by any deadlines set without my consent.

The hearing examiner wrote a letter to the parties dated April 6, 2001, stating (in part) as noted below:

> Ms. Plummer's perception that she is not obligated to have the Personnel Commission involved in the remedy phase of her case is incorrect. It is the Commission's statutory obligation to make an award for damages in this case, pursuant to §111.39(4)(c), Stats. The Commission may allow the parties to attempt to work out the remedy phase themselves, but any remedy agreed to by the parties is reviewed by the Commission and, if appropriate, is adopted in a final decision and order.
>
> The briefing schedule established in my letter of April 2, 2001 remains in effect. Of course, the parties may attempt informal resolution of the remedy and, if agreement is reached, submit an accounting of the agreed-upon terms any time prior to June 22, 2001 (the date the final brief is due). If Ms. Plummer elects not to participate in the briefing schedule, the Commission will resolve the remedy phase based upon the Fair Employment Act and related cases, as well as a consideration of respondent's brief.

The foregoing shows that complainant did not have input into the briefing schedule due to her own unexplained action of failing to appear at the conference call which was re-scheduled at her request to conform with her stated availability. Furthermore, complainant failed to take advantage of the examiner's subsequent offer (letter dated April 4th) for complainant to propose how she would like to proceed in lieu of filing briefs.

The Commission now turns to respondent's argument. Complainant did not file a brief by May 3, 2001 Respondent filed its brief by the scheduled deadline of June 4, 2001, contending as noted below (p. 1):

> With regard to damages, the general understanding is that the burden of proof is on the Complainant to establish an entitlement to a particular remedy and, in regard to damage awards, the amount of such an award. *Chiodo v. UW-Stout*, 90-0150-PC-ER, 7/2/97 In an April 2, 2001 letter, you [hearing examiner] carefully outlined the information that Ms. Plummer's brief must contain regarding any claim for back pay. You also clearly stated that any issue not raised in the submission would be deemed as waived.[1] Ms. Plummer did not submit a brief to the Commission on the issue of remedy. Ms. Plummer has provided nothing to support any claim for back pay or any other remedy. Consequently, she is entitled to nothing.

Thereafter, on June 11, 2001, complainant filed a brief. Respondent's request for an opportunity to reply was granted. Respondent filed another brief on June 26, 2001 wherein the above argument was re-asserted. Complainant was given an opportunity to file a final brief, which she did, by letter dated July 11, 2001. The text of her letter is shown below in full:

> Commissioner Rogers requested that she be informed before July 13 of whether Plummer will reply to Respondent's brief on fees and costs. The reply is herein.
>
> Plummer is entitled to damages and reimbursement for costs and fees. She waives nothing. She has nothing further to say about Respondent's brief on fees and costs.

The Commission does not condone complainant's failure to comply with a deadline established by the Commission. The Commission also understands respondent's frustration with the complainant's petulant behavior. However, respondent has not shown that its interests have

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[1] The hearing examiner's letter of April 2, 2001 included the following paragraph:

> This is complainant's opportunity to present her claim for back pay pursuant to the Commission's Interim Decision and order. It also is her opportunity to file a claim for fees and costs under §PC 5.05(1) & (2), Wis. Adm. Code. Her brief, accordingly, should address both issues. Her initial submission should cover both issues. Any issue not raised in the initial submission will be deemed as waived.

been significantly harmed. Respondent has had a full and fair opportunity to reply to the arguments raised in complainant's brief. Accordingly, the awards discussed previously remain the decision of the Commission.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over these cases pursuant to §230.45(1)(b), Stats., and over damage issues pursuant to §111.39(4), Stats.

2. Complainant has the burden to establish entitlement to requested relief.

3. Complainant met her burden with respect to an award of back pay under the FEA in the amount of $2,090.18.

4. Complainant met her burden with respect to reimbursement for postage under the EAJA.

5. Complainant failed to meet her burden with respect to all other requested relief.

ORDER

Respondent shall cease and desist from discriminating against complainant in violation of §111.36(1)(a), Stats. Respondent, within 90 days after the date of mailing (as shown on the affidavit of mailing sent with this decision) will pay to complainant the sum of $2,090.18 as back pay, plus interest computed as noted in §PC 5.07, Wis. Adm. Code. By the same deadline, respondent will pay complainant $20 for postage reimbursement. By the same deadline, respondent will report back to complainant regarding progress on retirement calculations made by the Department of Employee Trust Funds. Complainant's remaining requests for damages are denied, as are her remaining requests for fees and costs. These cases are remanded to respondent for action in accordance with this decision.

Dated: July 30, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to

§227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

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