STATE OF WISCONSIN PERSONNEL COMMISSION

LEE W. PILLSBURY,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 99-0069-PC-ER

FINAL DECISION AND ORDER

A proposed decision and order was mailed to the parties on December 28, 2001. Complainant filed written objections by cover letter dated February 4, 2002. Respondent filed a reply by cover letter dated February 14, 2002. The Commission considered the parties' arguments and adopts the proposed decision and order as its final decision, with changes denoted by alphabetical footnotes. The Commission agrees with the examiner's credibility assessments.

A hearing was held in the above-noted case on October 10-12, 2001. At the hearing examiner's request, the parties agreed to a limited briefing schedule to address perceived unique legal issues. The final brief was filed on November 9, 2001.

The parties agreed to the following statement of the issue for hearing (see Conference Report dated February 16, 2001):

> Whether respondent discriminated against complainant in violation of the Wisconsin Fair Employment Act (FEA) on the basis of disability in regard to his separation from state service in 1998.

By letters dated April 10 and 17, 2002, after the proposed decision was issued, the complainant also objected to Commissioner Thompson's involvement in the consideration of the matter.

FINDINGS OF FACT

1. Complainant has worked at respondent's Columbia Correctional Institution (CCI) as a correctional officer since sometime before 1987 (Exh. R-208, p.2 and Exh. C-36, p.2).

2. Sometime in or around 1987, complainant permanently was assigned tower duty at CCI (Exh. C-1, p. 2). In this position he was in charge of weapons and fence security. This position was considered as the "last defense" for protection of staff, inmates and the public. People working in the tower needed mental alertness and clear vision to identify people and activities on the ground and to be able to shoot using deadly force at the right target. (Schneider testimony).

3. Complainant injured his back at work in December 1991. He returned to work in April or May 1992 to the Tower position. The Tower position met his medical restrictions at that time which included no inmate contact and no lifting over 40 pounds. (Exh. C-1, p.2 and R-202, p. 2). He applied for workers' compensation benefits and received them pursuant to a settlement agreement.

4. On February 11, 1998, complainant met with Bruce Schneider, Personnel Manager at CCI. At this point in time, complainant had no sick leave and was identified as a "sick leave abuser" under respondent's policies. He was required to provide medical verification of subsequent illnesses. (Exh. R-102, p. 8)[1]

5. Complainant called in sick on March 19, 1998. When he returned to work, Captain Trattles asked about his illness. Complainant indicated he took prescription medication and did not feel he could drive to work. The prescription bottle said to use caution when driving but the pharmacist had said not to drive. He had reason to be cautious because he had driven recently on the medication and was arrested for driving under the influence. (Exhs. R-113 & R-114)

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[1] This paragraph and others describing disciplinary action taken against complainant are pertinent here only regarding any motive he may have had for entering into a settlement agreement wherein he agreed to resign. Whether the disciplines were appropriate is beyond the scope of this hearing.

6. On April 9, 1998, complainant tendered a medical leave slip for his absence the prior day. Respondent felt the excuse was insufficient because it was written pursuant to a telephone call to the physician rather than an in-person medical evaluation on the day he called in sick. The complainant's doctor noted as follows in the slip (Exh. R-105, p. 2):

> Called again for recurrent medical problems. I have concerns about his overall fitness for duty. I have discussed this in detail with him. He will see me again on 4-14-98.

7 A disciplinary meeting was held on April 13, 1998, regarding complainant's illness on March 19, 1998. Complainant was asked at the meeting whether the medications he was taking affected his work performance. Complainant answered in the affirmative indicating that he gets tired, his vision gets blurred and his speech gets slurred. He further indicated that he did not believe he had been unable to perform his job despite the medication side effects. (Exh. R-102, p. 11)

8. Schneider sent complainant's doctor a letter on April 13, 1998 (Exh. C-26), stating as follows (in pertinent part):

> In the past month or so, Mr. Lee Pillsbury, a patient of yours and employee of ours, has been having difficulties with his medications as he describes to us. He explains that the medications cause side effects to include: blurred vision, blurred speech, drowsiness, etc. Mr. Pillsbury is employed by Columbia Correctional Institution as a Correctional Officer, and his position is in an armed guard tower. In the past month, he has been sick because of his medication. He has also been tardy in notifying us.
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> We are concerned with his ability to perform his job while under the prescribed medications, as he describes the side effects. Enclosed please find a position description, and list of job duties. As I described before, Mr. Pillsbury is assigned to an armed guard tower, who is in a position to decide when to use deadly force. Would you please evaluate his condition in performing his job while under these medications, and send me your findings and clarifications. It is very important to know for the safety of Mr. Pillsbury, the staff, inmates and the public, that Mr. Pillsbury can perform his duties as a Correctional Officer.

9. Complainant did not restrict respondent from writing to his physician to obtain information as Schneider did, as described in the prior paragraph. However, complainant

would not authorize respondent to obtain answers to questions directly from his physician either orally or in writing. Instead, complainant required his physician to write a response to complainant which complainant might decide to pass on to respondent.

10. As a result of complainant not allowing the doctor to respond directly to Schneider, respondent did not receive the physician's reply to Schneider's letter (see ¶8) until complainant gave it to Schneider on June 30, 1998, *which was more than two months after it was written* on April 14, 1998. (Exhs. R-113, R-114, R-304, C-17 and Schneider's testimony) The doctor's report indicated that each medication had potential side effects and that the combination of medications could produce stronger effects than if taken alone. The potential side effects included dizziness or light-headiness, drowsiness, as well as impaired mental and/or physical abilities inconsistent with performance of potentially hazardous duties. The letter encouraged complainant to share the information with respondent.

11. Complainant was suspended without pay on April 3, 1998, for providing late notice of his absence on March 2, 1998. Complainant said he was unable to call his in absence sooner because he was experiencing muscle spasms in his back which kept him on the bathroom floor and unable to reach a telephone. (Exhs. R-101 & R-201)

12. Complainant was off work without pay due to additional disciplinary suspensions from May 5 to July 18, 1998. He was scheduled to return to work on July 19, 1998. The disciplinary suspensions are summarized below.

a. 3-day suspension (on June 1, 4 & 5, 1998) for failing to provide an acceptable medical verification slip for March 19, 1998, when he called in sick. (Exhs. R-102 & R-203)

b. 5-day suspension (from June 6-12) for reporting late for work on April 2, 1998. Complainant said he overslept due to medication he took the previous evening for back pain. He did not wake up until respondent called him at home. Complainant said he could not get off the floor or reach a phone due to severe back pain. He called in as soon as he was able. (Exhs. R-103 & R-204)

c. 5-day suspension (from June 13-17) for providing late notice of his absence on April 8, 1998. (Exhs. R-104 & R-205) Complainant said he could not get off the

floor or reach a phone due to severe muscle spasms in his back. He said he called in his absence as soon as he was able.

d. 10-day suspension (June 20-25, 29-30 & July 1-2) for failing to provide acceptable medical verification for his absence on April 8, 1998. (Exhs. R-105 & R-206)

e. 30-day suspension (May 5-7, 11-15, 19-24, 27-31, July 3, 7-12 and 15-18) based on a non-attendance-related incident on April 9, 1998. (Exhs. R-106 & R-207)

13. Complainant contacted the Department of Employee Trust Funds (DETF) on June 1, 1998, seeking information about disability benefits under §40.65(4), Stats. A person is eligible for such benefits if they are injured while working in a protected occupation, the disability is likely to be permanent and the disability causes the employee to retire from his or her job. Other scenarios also could qualify for benefits but there is no requirement that the person be totally disabled. DETF sent him an informational packet the same day. (Exh. R-401)[2] Respondent did not encourage this contact or lead complainant to believe that this was his sole or best option.[3]

14. A grievance hearing over all disciplinary actions noted previously was held on June 25, 1998, at which complainant had union representation through Harvey Hoeft. A local union steward also was present. Complainant or his representative stated at the hearing that complainant had a documented back condition that at times prevented him from reaching a phone. It also was stated that the prescription medications may cause him to oversleep and that he has reported to work under medication when he probably should *not* have. (Exh. R-202, p. 2). Tomas Garcia, respondent's Employment Relations Specialist, presided at the grievance hearing.

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[2] The benefits were granted and complainant continues to receive these payments.

[3] Complainant testified at hearing that Schneider told him in July that a meeting had been held in Madison where respondent determined it was in his best interest to collect disability. At another point in his testimony he indicated that the first he heard about disability benefits was at the grievance hearing held on June 25th Respondent, however, had as an exhibit DETF's record of his call for information on June 1st Complainant's recollection clearly could not be deemed reliable or credible on this point. Accordingly, his attempt to characterize respondent as forcing disability as his sole or best option was not persuasive.

15. On June 25, 1998, at the end of the grievance hearing, Hoeft approached Garcia about possibly settling the grievances by returning certain paid time to complainant, by complainant resigning and by respondent agreeing not to contest complainant's application for duty disability benefits.

16. A few days after the grievance hearing, Garcia contacted Schneider by telephone to let him know that settlement discussions were pending. All settlement negotiations were between Garcia and Hoeft. Complainant was not involved directly in these negotiations but Hoeft was his representative and kept him informed. (Garcia and complainant testimony)

17. Complainant received notice of each disciplinary action mentioned (see ¶¶11-12) by separate letters. (Exhs. R-101 through R-106) Each letter contained a warning that future violations could result in more severe disciplinary action and, in fact, this occurred with discipline starting with a 1-day suspension and escalating to a 10-day suspension. The disciplinary letter of May 6, 1998, specifically stated a "last chance warning" cautioning that termination could occur for a repeated incident of the same nature (attendance-related). From this information, complainant knew that his job was in jeopardy due to the various disciplinary actions. This was part of his incentive to enter into a settlement agreement.[4]

18. Complainant filed a claim for unemployment compensation (UC) to recover at least part of his wages during the duration of his disciplinary suspension. A UC hearing was held on June 30, 1998. Complainant appeared with his union representative and Schneider appeared on respondent's behalf (Exh. C-36).[5] Complainant gave Schneider two medical reports at the UC hearing. One was the report dated April 14, 1998 (Exh. R-304, see ¶10) and the other was a report dated June 24, 1998. The latter report was addressed to complainant and, therein the doctor stated his recommendation that complainant should "avoid performing hazardous tasks while on this medication."

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[4] Complainant testified at hearing that he was unaware that if another disciplinary action occurred he could be terminated. He denied that this was a consideration for his signing of the settlement agreement. Due to the specific warning given in each letter, neither statement was found credible.

[5] Exh. C-36 is a "transcript" of the UC hearing. It was admitted into the record to show what was said at the UC hearing, but not for the truth of the recorded statements.

19. Schneider felt complainant could not safely perform as a correctional officer based on the doctor's letters provided at the UC hearing. Schneider sent complainant a letter on July 3, 1998 (Exh. R-307) saying he could not return to work on July 19th (after the disciplinary suspensions ended) due to the medical reports. Instead, complainant would be placed on medical leave; respondent would review the matter and would report back to complainant. Warden Jeffrey Endicott and Deputy Warden Fran Paul agreed and approved placing complainant on medical leave. (Exhs. R-310 through R-312, Schneider and Endicott testimony) This leave was without pay because complainant had no paid leave time left. (Exh. R-306) Furthermore, because he had no leave time, his health insurance benefits would continue only for about 3 months (through the pre-paid period), after which he would be required to pay premiums for additional coverage.

20. Schneider left for a weeklong vacation after he sent the July 3rd letter to complainant. Complainant called him about the letter after Schneider returned from vacation. During this conversation, Schneider never told complainant that he had to be 100% before he could return to work or that it was decided in a meeting in Madison that it was in complainant's best interest to apply for duty disability. (Schneider testimony)

21. The anticipated review of complainant's situation (see ¶19) was to have Colleen Jo Winston, respondent's Director of Office of Diversity Employee Services and/or Garcia review complainant's situation for potential accommodations or to otherwise recommend appropriate action. (Schneider testimony, Exh. R-311) Such action was specifically requested by Endicott and Paul (Exhs. R-311 & R-312). The review never occurred. No one asked Winston or Garcia to conduct such a review that typically would have included a search for alternative jobs, which complainant could perform within his medical restrictions with or without accommodation. Garcia did not suggest that complainant consider a position other than correctional officer because Garcia reasonably understood, based on Hoeft's suggested settlement terms, that complainant wished to resign and collect disability benefits rather than find alternative work.

22. On August 14, 1998, Schneider left CCI to take another position with the Wisconsin Veterans' Home. James Parrisi filled Schneider's position on a temporary basis until

October 1998, when Kim Kannenberg was hired as a permanent replacement. Neither Schneider, Parrisi nor Kannenberg ever discussed with complainant the possibility of looking for alternative positions (other than as a correctional officer) as an accommodation.

23. Complainant called Warden Endicott in August 1998, asking to return to work as a correctional officer Endicott said complainant would need a medical release to return to work. Endicott said if a release were obtained, he would welcome complainant back because he was a good correctional officer Pillsbury never contacted Endicott again. Complainant even had gone to another physician but that physician also would not release complainant to return to work. (Endicott and complainant testimony)

24. On November 4, 1998, Garcia sent an e-mail message to Endicott and Paul regarding settlement negotiations. Warden Endicott was on medical leave at this time and was off work. The message stated as follows:

> In trying to work out some last minutes (sic) minor problems in the [Lee Pillsbury] settlement, I learned that Lee was in the red on accrued leave time. According to both Nancy Darnell and Ruby Karpelenia, the DOC would normally try and recoup this time and deduct it from the last paycheck. In talking to the Field Rep, Harvey Hoeft, he feels that if the DOC deducts the time Lee owes us, Lee will kill the idea of the settlement agreement all together.
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> I then spoke to Elaine Brown who informed me that it is up to the appointing authority to decide if the time is recouped or not. I'm recommending that the DOC/CCI not attempt to recoup this time or deduct it from his last check. I believe it is in everyone's best interest that we cut this employee loose as soon as possible. In discussing this with Fran, she is in agreement with position (sic). With CCI's agreement I will inform the Field Rep so we can wrap this up as quickly as possible.

25. Respondent had covered complainant's absence by having existing staff put in overtime hours (paid at a higher wage rate), which was a significant expense to CCI at a time when institutions were told to keep overtime in check. Garcia meant by the above statement that it was in respondent's best interest to "cut this employee loose as soon as possible" that if complainant resigned, respondent could hire a permanent replacement thereby ending the overtime expense.

26. Kannenberg first learned of complainant's situation when Paul forwarded a copy of Garcia's e-mail message (see ¶24) to Kannenberg.

27 On November 5, 1998, complainant's attorney filed a duty disability application with DETF, on complainant's behalf (Exh. R-415). Attached to the application was a report from complainant's doctor indicating that complainant should not lift more than 30 pounds on an occasional basis, should not engage in repetitive bending and should avoid direct contact with inmates (Exh. R-417).

28. Garcia never wrote a decision on the arbitration hearing because the matters were settled basically under the terms suggested by Hoeft, plus respondent's agreement to expunge the pending disciplinary matters from complainant's personnel file.[A] (Exhs. 201-207). Complainant, on his own volition, added to the settlement agreement two hand-written paragraphs, the text of which was his own choosing (complainant's testimony) and is shown below (see, for example, R-201, p. 4):

> I Lee Pillsbury as of Dec 4th 1998 am submitting my resignation as a correctional off II for the state of Wisconsin due to the fact that at this time my doctor recommends that I no longer work in a protective class status such as correction or law enforcement do (sic) to medical reasons sustained on the job.
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> I Lee Pillsbury authorize Mr Harvey Hoeft to sign and date said agreement with the state concerning my medical resignation, on December 4, 1998.

29. Another incentive complainant had to enter into the settlement agreement was that he needed money.[6] Through the agreement his chances of obtaining disability benefits

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[A] This sentence was changed to complete the description of what respondent agreed to do as part of the settlement agreement (see, e.g., Exh. R-203, p. 2, item #1).

[6] Complainant's attorney stated in opening arguments that complainant's UC benefits were about to end at the time of the settlement agreement.

[7] Complainant gave conflicting information on this point. He first testified that respondent did not tell him he could have a different job as an accommodation, but that his union representative did. He later said he did not recall Hoeft telling him he could look for other jobs. The contrary testimony was pointed out during the hearing and complainant was given an opportunity to explain the discrepancy. Ultimately, his explanation raised credibility concerns and was unpersuasive. The examiner notes in this regard that complainant never called Hoeft as a rebuttal witness even knowing this credibility issue existed. Complainant was represented by an attorney at the hearing.

were enhanced based on respondent's agreement not to contest the same. It also was near Christmas time and the money he received for ten workdays was needed for Christmas gifts.

30. Hoeft informed complainant that he could have a different job (other than a correctional officer) as an accommodation. This conversation occurred on an unspecified date prior to complainant agreeing to settle his grievances. Complainant did not want and therefore did not choose to pursue a different job as an accommodation.[7]

31. Complainant entered into the settlement agreement fully informed of his options, of his own will and without coercion from respondent.

32. Respondent wrote complainant a letter dated December 10, 1998 (Exh. R-209), acknowledging his resignation effective December 4, 1998.

33[B] Complainant called Winston sometime in December 1998, after he signed the settlement agreement. She offered to look at positions for him, other than correctional officer jobs, but he said he was not interested in any other kind of position. He said he was unhappy with the difference between his unemployment compensation benefit amount and the wage he would have received as a correctional officer. Winston told him she would look into the potential of respondent paying the difference. Sometime later, complainant called Winston and left a voice mail message saying he did not want her to look into anything for him, that he was working with his attorney and did not want to mess anything up so she should do nothing.

CONCLUSIONS OF LAW

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

2. Complainant established that he was an individual with a disability within the meaning of §111.32(8), Stats.

3. Complainant established that respondent took one of the actions enumerated in §111.322(1), Stats. on the basis of his disability.

[B] This finding is added for completeness. Complainant asserted in his objections to the proposed decision (p. 7) that this testimony by Ms. Winston was barred. It was initially excluded but that ruling was later reversed. The examiner offered to play back the hearing tape of this portion of Winston's testimony but this was not done based on complainant's attorney's suggestion that this was unnecessary and that it would suffice for the hearing examiner to simply "un-strike" the previously stricken testimony. (Hearing tape #7, approx. counter 1951 through 2154.)

4. Respondent established that even with a reasonable accommodation, complainant could not continue working as a correctional officer.

5. Respondent established that it met its duty to accommodate complainant.

6. Respondent established that this controversy is moot.

OPINION

The complainant in a disability discrimination case must show that: (1) he or she is an individual with a disability, within the meaning of §111.32(8), Stats., and (2) the employer took one of the actions enumerated in §111.322(1), Stats., on the basis of complainant's disability. Once the employee has met the first two showings, the employer must show either that a reasonable accommodation would impose a "hardship" within the meaning of §111.34(1)(b), Stats., or that, even with a reasonable accommodation, the employee cannot "adequately undertake the job-related responsibilities" within the meaning of §111.34(2)(a), Stats. *Target Stores v. LIRC*, 217 Wis. 2d 1, 9-10, 576 N.W.2d 545 (Ct. App. 1998)

Respondent disputes that complainant was an individual with a disability within the meaning of §111.32(8), Stats., the text of which is shown below:

> "Individual with a disability" means an individual who:
> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
> (b) Has a record of such an impairment; or
> (c) Is perceived as having such an impairment.

The crux of respondent's argument is noted below (post-hearing brief dated 10/31/01):

> p. 1. [C]omplainant has failed to meet his burden that he was disabled under the FEA because of the drugs he was taking for his back condition. Complainant alleged during pre-disciplinary hearings in April, 1998, that medications he was taking caused him to have blurred vision, blurred speech, drowsiness, etc.
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> p. 3: As Bruce Schneider testified, the Department never determined if complainant was disabled as a result of the medications. (Case citations omitted.) The medications may have been temporary, dosages could have been changed, the timing of the medications could have been changed to reduce the effects of the medication.

Respondent's argument is rejected for several reasons. First, it improperly focuses only upon the medication side effects to the exclusion of the prior injury and resulting disability which respondent accommodated. Second, respondent's suggestion that the timing of the medications could change to reduce the effects of the medication is without medical support in the record. Third, respondent's suggestion that complainant's need for the medications could have been temporary is unsupported by the record. The record supports the conclusion that the medications were taken to control pain and other problems associated with complainant's back injury in December 1991. Specifically, Schneider wrote a note to the wardens (Exh. R-310) recommending that complainant not be allowed to return to work after his disciplinary suspensions and be placed on leave instead. In this note, Schneider wrote that complainant "has been on these meds forever." Also, when Schneider wrote to complainant's physician about the side effects of the medication (Exh. R-304), he never questioned whether complainant's need for them would change. Also[C], respondent submitted an Answer to the complaint stating that complainant was placed on medical leave when respondent became aware that the injuries and restrictions were permanent. (Exh. C-6, ¶5 and C-7, p. 2, ¶5)

Complainant established that he is an individual with a disability within the meaning of §111.32(8), Stats. As described in the prior paragraph, *in the least*, respondent perceived him as having such impairment.

Complainant established that respondent would not allow complainant to perform duties as a correctional officer until he obtained a medical release authorizing his return to work. Respondent's action could be characterized either as a refusal to employ or as affecting a term, condition or privilege of employment within the meaning of §111.322(1), Stats.

The burden shifts to respondent to establish its burden under §111.34(2)(a), Stats. Respondent met this burden showing that complainant could not adequately undertake the job-related responsibilities of any correctional officer position and that no accommodation would

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[C] The wording of the proposed decision has been changed to clarify that this is but one of several factors rather than the most important factor.

enable him to do so. These conclusions are supported by the medical opinions of complainant's own physician and of a second physician.

Complainant contends respondent failed in its accommodation duty because respondent did not advise him about looking at alternative positions (other than correctional officer positions) prior to his entering into the settlement agreement. The Commission notes in this regard that Schneider testified he had discussed this option with complainant during the telephone call in July (¶20). This testimony was found unreliable based on his prior deposition testimony that he had no specific recollection of what was discussed.

Respondent failed to suggest the option of looking at alternative positions, either before or after the parties entered into the settlement agreement.[D] At the time complainant's union rep made the settlement proposal as a means of settling the grievances associated with the complainant's attendance problems, complainant was not working but was either on medical leave because respondent had concluded, based on the medical documentation complainant had provided during his UC hearing, that he was not able to work without medical clearance, or on disciplinary suspension. In the Commission's opinion, the substantive controversy between the parties was rendered moot because complainant took the position that he wanted to resign from state service and take duty disability benefits as a resolution to his employment problems, and because he was not interested in employment by DOC in a non-CO position.

A case is moot when a determination is sought which can have no practical effect on a controversy. *Burns v. UWHCA,* 96-0038-PC-ER, 4/8/98. Complainant's position that he was not interested in a non-CO position leads to the conclusion that any type of remedy the Commission could impose which would be consistent with a conclusion that respondent had violated the Wisconsin Fair Employment Act (WFEA) by failing to notify complainant of his right to an accommodation that would involve his move to a different position, and/or failing to look for such a position—e. g., an order that respondent either provide such information, look for such

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[D] The timeframe was added to this sentence. The following discussion is added to explain the Commission's rationale for concluding that this case is moot as to the substantive issue, and reaching a different conclusion from the proposed decision regarding the question of accommodation.

[E] This paragraph was added to address complainant's main objections to the proposed decision and order.

a position, and/or not discriminate against complainant in the future with regard to his transfer rights—would not have any effect, because complainant was not interested in coming back to work with the state in a non-CO position.

In the judicial system, a matter that is moot "will be decided on the merits only in the most exceptional or compelling circumstances." *In re DeLaMatter v. DeLaMatter,* 151 Wis. 2d 576, 591, 455 N. W 2d 676 (Ct. App. 1989). In the instant administrative proceeding, the Commission believes it is appropriate to address the substantive issue for three reasons. First, the issue in question has been tried on the merits and been fully addressed by the parties. Second, in the event this decision were to be judicially reviewed, and the reviewing Court were to reverse the Commission's conclusion on mootness, deciding the substantive issue now could prevent the need for a remand. Third, while this case is moot with regard to the substantive issue, it is not moot with respect to the question of his entitlement to attorney's fees under the WFEA. *See, e.g., State ex rel. Young v. Shaw,* 165 Wis. 2d 276, 285, 477 N. W 2d 340 (Ct. App. 1991) (Where a party would be entitled to attorney's fees if he prevailed in a mandamus action under the open records law, the court will address the substantive issue that itself is moot.)

Turning to the merits, the proposed decision includes the following analysis of the accommodation issue:

> Respondent failed to suggest the option of looking at alternative positions. Respondent contends such inaction should not be viewed as a failure to accommodate because of the settlement discussion initiated by complainant's union representative on June 28, 1998, which led respondent to reasonably believe that complainant was interested in collecting disability benefits and not working for respondent (p. 7, 10/31/01 post-hearing brief). It is true that Garcia testified that he did not consider other positions for complainant because of the settlement terms suggested by Hoeft. However, the record supports the opposite conclusion for top management at CCI. Specifically, even after Schneider was informed of the settlement agreement, it was his intention to have the matter referred to Garcia or Winston for considering accommodations as both the Warden and Deputy Warden suggested (¶¶19, 21). He provided no persuasive explanation for why this was not done. Winston testified that no such request came to her and Garcia did not provide testimony on whether he received such a request.

> The Commission concludes from the foregoing that respondent did not meet its duty to accommodate complainant due to its failure to inform him that an alternative position was an option for his consideration. (Proposed decision, pp. 13-14)

In the Commission's opinion, a violation of the WFEA does not follow from the facts that one level of management attempted to initiate a process to explore accommodation that would have included examination of transfer opportunities, but another level of management never followed through on this process. There has to be an obligation of accommodation in the first instance, based on the circumstances, before respondent's failure to pursue accommodation would violate the WFEA. Garcia had a reasonable basis to have decided not to pursue possible accommodations once complainant's union rep made an offer to settle the attendance-related grievances that was inconsistent with finding him another job within DOC—i. e., that complainant would resign and respondent would not contest complainant's application for duty disability benefits. An employer is not obligated to pursue a particular type of accommodation if there is more than one way of providing a reasonable accommodation. *See, e. g., Vallez v. UW-Madison,* 84-0055-PC-ER, 2/5/87; citing *American Postal Workers Union, San Francisco Local v. Postmaster General,* 39 EPD ¶ 35,863 (9th Cir 1986). In the same vein, if an employee requests a particular approach to resolving his or her disability-related employment problem, an employer should not run afoul of the WFEA if it does not explore other means of accommodation while negotiating with the employee with regard to the employee's specific request that would resolve the employment problem that is the subject of the need for accommodation, and which request is inconsistent with the alternative method of accommodation in question. The Commission agrees with respondent's contention that "[i]t would be unfair to respondent to say that it had discriminated against Mr Pillsbury because it gave Mr Pillsbury what he requested in a settlement agreement, and that it did not provide him what he never requested—another position within DOC." (Respondent's reply to complainant's objections to the proposed decision and order, p. 5) Also, it is not just a matter of complainant not requesting another position in DOC—what he did request was inconsistent with taking another position in DOC. Furthermore, the Commission has found that he did not want and did not pursue employment with respondent as a non-correctional officer with respondent, Finding 33. In

view of this, the Commission is unable to grasp how a conclusion of failure of accommodation is dictated because members of management other than Garcia, who had been handling complainant's grievances and whom complainant's union representative quite logically approached with complainant's settlement proposal, put in motion a request to explore accommodation possibilities that could have been expected to include the exploration of alternative employment. Since it was a result of the *complainant's* settlement proposal and related posture concerning reemployment in DOC that leads to the conclusion that respondent has no obligation to pursue other types of accommodation that complainant did not ask for and did not want, it can not be the case that this result is changed by a request by one member of management that did not result in either any action or any change in respondent's position regarding complainant's proposed settlement agreement.

Complainant contends there is no substantial and credible evidence in the record to support findings of fact 30 and 31.[E] (See objections filed, pp. 2-10.) He notes that he "never offered inconsistent testimony regarding the fact that he would have welcomed an opportunity to stay with the respondent as an employee even at a lower paying position" (objections, p. 4). His testimony may have been consistent in this regard but it was not believed. He knew from Mr. Hoeft that he had the right to explore positions other than as a correctional officer but he never communicated such a desire to anyone in management and, in fact, led management to believe he only was interested in working as a correctional officer and specifically rejected Ms. Winston's offer to try to find him a position other than as a correctional officer

Request to recuse commissioner[F]

After the proposed decision and order was issued in this matter and before the complainant's objections could be considered, two of three sitting Commissioners resigned and one new Commissioner, Kelli S. Thompson was appointed. By letter dated April 2, 2002, the Commission provided the parties an opportunity to object to participation by the new Commissioner In a response dated April 9, 2002, respondent noted the following:

[F] The following paragraphs have been added to the opinion portion of this order to address respondent's objection that was filed after the proposed decision was issued.

> Please be advised that Ms. Thompson worked as an attorney for the Department of Corrections during most of the year 2000, when this case was pending before the Personnel Commission. I don't believe Ms. Thompson had any direct contact with this case when she worked for the Department of Corrections. I want all parties to be aware of this potential conflict of interest.

In a response dated April 10th, Commissioner Thompson noted:

> As indicated, I was on a temporary interchange with the Department of Corrections from the Office of the Public Defender from February 13, 2000 to February 13, 2001. I have reviewed the file of *Pillsbury v. Dept. of Corrections,* 99-0069-PC-ER, and determined that I did not have any direct contact or even any knowledge of this case, during this period.

On the same date, complainant wrote:

> Based on [respondent's] disclosure that Kelli S. Thompson recently worked for the Department of Corrections, the defendant in this case, I regrettably feel that I should object to Ms. Thompson's involvement in this matter. While I have no doubt that Ms. Thompson would do her utmost to be fair, I know from my extensive employment law work that putting aside past employment experiences is extremely difficult.

The Commission has recently addressed the standards to be applied when considering a motion to recuse a Commissioner from participation in a case. In *Balele v. DHFS et al.*, 00-0133-PC-ER, 8/15/01, the Commission denied a motion to recuse Commissioner Laurie McCallum, where the motion was based on the fact that Commissioner McCallum's husband was then serving as the Governor of Wisconsin. The Commission's analysis included the following language:

> This analysis begins with the principle that constitutional due process of law requires that an administrative adjudicative body such as this Commission be a fair and impartial decision-maker *Guthrie v. LIRC,* 111 Wis. 2d 447, 454, 331 N. W 2d 331 (1983); *State ex rel. DeLuca v. Common Council,* 72 Wis. 2d 672, 682, 242 N. W 2d 689 (1976). Due process can be violated not only "when there is bias or unfairness in fact. There can also be a denial of due process when the risk of bias is impermissibly high our system of law has always endeavored to prevent the probability of unfairness." *Guthrie, id. See also, e.g., Baldwin v. LIRC,* 228 Wis. 2d 601, 599 N. W 2d 8 (Ct. App. 1999).
>
> A number of cases provide some guidance on the question of the degree of risk of bias that is necessary to amount to a violation of due process. In *DeLuca,*

the Court addressed the possibility of bias arising out of the combination of investigatory and adjudicative functions. While the case currently before the Commission does not involve a question relating to a combining of functions (e.g., investigative and adjudicative) such as in *DeLuca,* the court's discussion of the manner of analyzing the degree of risk of bias is useful:

> The Court[1] nevertheless went on to say that not only is a biased decisionmaker constitutionally unacceptable, but, in addition, that the system of due process must endeavor to prevent the probability of unfairness. . . Circumstances which lead to a *high probability* of bias, even though no actual bias is revealed in the record, may be sufficient to give the proceedings an unacceptable constitutional taint.
>
> The Court pointed out that, even where the investigative and adjudicative functions are combined, the objector must assume the *heavy burden* of showing that this combination of functions create an unconstitutional risk of unfairness:
>
> > "[The objector] must overcome the presumption of honesty and integrity in those serving as adjudicators; and it must convince that under a *realistic appraisal of psychological tendencies and human weakness*, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."
> >
> > [A]lthough there is no *per se* disqualification because of the combining of the investigatory and the adjudicatory functions, special facts and circumstances may in a proper case impel a court to conclude that the risk of unfairness is intolerably high. 72 Wis. 2d at 672, 684-85 (citation omitted) (emphasis added).

This holding indicates that the party seeking recusal or disqualification has a high burden to carry in order [to] overcome the presumption of honesty and integrity in administrative adjudicators.

Marris v. City of Cedarburg, 176 Wis. 2d 14, 498 N. W. 2d 838 (1993), involved an issue of impartiality concerning the Chairperson of the Board of Zoning Appeals for the City of Cedarburg. The Court held that comments by the Chairperson[2] "indicated that he had prejudged Marris's case and created an impermissibly high risk of bias. Under these circumstances he should have recused himself in order that Marris have a fair hearing." 176 Wis. 2d at 20.

In determining whether the Chairperson's comments "created an impermissibly high risk of bias," *id.,* the Court's analysis included the following:

> A *clear* statement "suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision." 176 Wis. 2d at 26 (emphasis added; citation omitted).
>
> [S]ome of the chairperson's comments *clearly* indicated that he has prejudged Marris's case, thus creating an impermissibly high risk of bias. Therefore, we conclude that the chairperson erred when he refused to recuse himself and that he deprived Marris of her right to common law due process. 176 Wis. 2d at 31 (emphasis added)

This emphasis on a clear showing of risk of bias is consistent with the holding in *DeLuca* that the objector to an official's participation in a case carries a "heavy burden," 72 Wis. 2d at 684, to overcome the presumption of honesty and integrity in administrative adjudicative officials, *Id. See also LeBow v. Optometry Examining Board*, 52 Wis. 2d 569, 574, 191 N.W 2d 47 (1971):

> An administrative officer exercising judicial or quasi-judicial power is disqualified or incompetent to sit in a proceeding .. in which he has a personal or pecuniary interest, [or] where he is related to an interested person within the degree prohibited by statute. [A]n interest to disqualify an administrative officer acting in a judicial capacity may be small, but it must be an interest direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical. (citation and internal quotation marks omitted)

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[1]This is a reference to *Withrow v. Larkin,* 421 U. S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

[2]The chairperson's comments included a reference to Marris's legal position as a "'loophole' in need of 'closing,'" 176 Wis. 2d at 29; a suggestion to the other board members that "they should try to 'get her [Marris] on the Leona Helmsley rule'", 176 Wis. 2d at 27; and a statement questioning "how the board, in analyzing expenditures, could know whether Marris 'bought a door for that building or for another building she built.'" 176 Wis. 2d at 28.

Courts have analyzed the issue of recusal or disqualification of judges presiding over criminal cases, when the judges in question had previously been employed by the District Attorney's office. In *Tennessee v. Ellis*, No. W2000-02242-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 579, the court held a judge does not need to disqualify himself or herself from

hearing a criminal matter which was pending at the time when he or she served as an assistant district attorney in the same judicial district, if the judge neither reviewed, personally prosecuted, nor had any direct involvement in the case. In *Tennessee v. McNeal*, No. W2001-01058-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 254, the trial judge refused to recuse himself from hearing a probation revocation case because he had not been the prosecutor on defendant's case during his employment with the district attorney's office and because the location of his office did not provide him access to defendant's file. The judge stated that he had not spoken with the prosecution regarding the *McNeal* case and had no prior knowledge of defendant's case, and therefore, did not see a conflict with his decision to preside over the case. *Id.* at 2. The appellate court upheld its previous ruling in *Tennessee v. Ellis*, No. W2000-02242-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 579, reiterating that "a judge need not disqualify himself from hearing a criminal matter which was pending at the time when he served as an assistant district attorney in the same judicial district, if the judge neither reviewed, personally prosecuted, nor had any direct involvement in the case." *Id.* at 4.

In *State v. Santana*, 220 Wis. 2d. 674, 584 N.W 2d 151 (Ct. App. 1998), the defendant argued the judge should have recused himself because he had sentenced the defendant during a recall effort, which was based on the allegation the judge was too lenient in his sentencing. The court analyzed the case in the context of whether the judge should have recused himself from the sentencing because of the danger of bias or prejudice.

> There is a presumption that a judge is free of bias and prejudice. In order to overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased or prejudiced.
>
> In determining whether Judge Kennedy's decision not to recuse himself resulted in bias or prejudice to Santana, we must evaluate the existence of bias in both a subjective and an objective light. The subjective component is based on the judge's own determination of whether he will be able to act impartially. In determining whether this component is satisfied, it is only necessary to examine Judge Kennedy's decision not to recuse himself. If he had subjectively believed that he could not act impartially, he would have been required to disqualify himself from the case. Because he did not, we may presume that Judge Kennedy

> believed himself capable of acting in an impartial manner, and our inquiry into this factor is at an end.
>
> Under the objective test, we must determine whether there are objective facts demonstrating that judge Kennedy was actually biased. Under this test, Santana is required to show that the judge "in fact treated him unfairly." . Wisconsin law is clear that "merely showing that there was an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial is not sufficient." 220 Wis. 2d 674, 684-85 (citations omitted)

The courts have observed that that standard for a conflict of interest for judges is more stringent than the standard for administrative adjudicative officials. *See Clisham v. Board of Police Commissioners*, 223 Conn. 354, 361-62, 613 A. 3d 254 (1992):

> The applicable due process standards for disqualification of administrative adjudicators do not rise to the heights of those prescribed for judicial disqualification. The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator Moreover, there is a presumption the administrative board members acting in an adjudicative capacity are not biased. To overcome the presumption, the plaintiff must demonstrate actual bias, rather than mere potential bias, of the board members challenged, unless the circumstances indicate a probability of such bias too high to be constitutionally tolerated. (internal quotation marks and citations omitted)

Even if we were to review Commissioner Thompson's previous employment in the context of judicial conflicts of interest, the Commission does not believe the complainant's objection to her participation has merit. The Commission does not find that complainant's objection meets the other standards as laid out in *Balele v. DHFS, DER & DMRS*, 00-0133-PC-ER, 8/15/01, which include the "reasonable person" test articulated in *Debaker v. Shah*, 194 Wis. 2d 104, 116-17, 533 N.W 2d 464 (1995) and the standard for "evident impartiality" standard as set forth in *In re Mason*, 916 F. 2d 384, 385-86 (7th Cir 1990).

Respondent has not put forth any contentions that Commissioner Thompson had any prior information, knowledge, or participation in the present case. Therefore, complainant's request for the recusal of Commissioner Thompson from participating in this matter is denied.

ORDER

This case is dismissed as moot.

Dated: July 17, 2002.

STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

KST/JMR/AJT:990069Cdec2.24

KELLI S. THOMPSON, Commissioner

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

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

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the

Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

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

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

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

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

2/3/95