STATE OF WISCONSIN PERSONNEL COMMISSION

J[redacted] K[redacted],

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Respondent.

Case No. 02-0027-PC

RULING ON s. 227.485 MOTION FOR COSTS AND FINAL ORDER

This is an appeal pursuant to s. 230.44(1)(c), Stats., of a discharge. The matter is before the Commission on appellant's motion for reimbursement of costs and fees pursuant to s. 227.485, stats., filed November 20, 2002. Respondent filed a response on December 12, 2002. Appellant filed a reply on December 19, 2002. Section 227.485(5) provides the time frames for the parties to file briefs on a motion for fees, but does not provide for a reply. In any event, the reply brief attempts to raise an issue that is not before the Commission, so it can have no bearing on the decision reached here.

In its interim ruling on fees and costs in *Brenon v. UWM*, 96-0016-PC, June 23, 1998, *affirmed, Board of Regents v. State Personnel Commission,* 2002 WI 79, 254 Wis. 2d 148, 646 N. W. 2d 759, the Commission outlined the standards applicable to an award of fees for proceedings before this agency:

> As the prevailing party, appellant argues that he is entitled to fees and costs pursuant to §§227.485, 814.245, Stats., and PC 5.05, Wis. Adm. Code. Section PC 5.05 (3), Wis. Adm. Code, provides that a motion for fees and costs raised under §227.485, Stats. shall be addressed under the standards and procedures of that statute. Sections 227.485 (3), (5) and (6), Stats., authorize the Commission to determine and award costs using the criteria in §814.245, Stats. Section 814.245 (3) provides:
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> > If an individual . . . is the prevailing party in an action by a state agency or in any proceeding for judicial review under §227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position.

> The Commission must determine then whether respondent's position was "substantially justified." *Sheely v. DHSS*, 150 Wis. 2d 320, 442 N.W.2d 1 (1989). Under *Sheely*, to satisfy the "substantially justified" burden respondent must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. *Brenon*, p. 2.

The instant case involves a decision on appellant's "MOTION TO BE REINSTATED IN APPELLANT'S PREVIOUS EMPLOYMENT BECAUSE THE DEPARTMENT FAILURED [sic] TO PROVIDE REQUIRED DUE PROCESS IN ITS INVESTIGATION, PRE-TERMINATION PROCEDURES, AND ULTIMATE DECISION TO TERMINATE" filed August 2, 2002. In its October 24, 2002, decision of this motion, the Commission's conclusions of law included, *inter alia*:

> 4. Respondent did not provide appellant with adequate due process of law prior to his termination with respect to the allegation that he destroyed system files and rendered his computers inoperable.
>
> * * *
>
> 6. Respondent did not utilize illegal surveillance in the process used to terminate appellant's employment.

The Commission's opinion included the following discussion of the issues raised by the motion:

> In the instant case, appellant does not dispute the adequacy of the process that occurred in connection with the first pretermination meeting on April 12, 2002. With regard to the process related to the second pretermination meeting on April 19, 2002, appellant's only alleged constitutional shortfall is that the employer failed to provide "an explanation of the employer's evidence" as required by *Loudermill*, *id*.
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> * * *
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> The question, which presents some difficulty, is whether the description respondent provided complainant of what was found when the BIS accessed complainant's computers, provided sufficient information for complainant to have provided the kind of response contemplated by *Loudermill*. The record before the Commission does not provide a pellucid answer to this question.
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> * * *
>
> Without any explanation in the record from Ms. Schuster of whether the notice respondent provided to appellant should have enabled either appellant, or an employee similarly situated to appellant, to know and understand the charges against him in order to have a meaningful opportunity to contest the factual basis for the proposed action, or to try to show that for other reasons the proposed actions should not be taken, the Commission concludes respondent has not satisfied its burden of proof on this issue, and the termination must be rejected on due process grounds. However, the Commission concludes that appellant's other arguments attacking the validity of the pretermination process are not well-founded. (Ruling, pp. 7, 9, 10, 11)

With regard to the underlying facts related to the due process issue, on this record there is no significant issue as to what occurred, which was substantially as respondent asserts. Therefore, there is no question but that respondent had "a reasonable basis in truth for the facts alleged." *Brenon,* p. 2. This brings us to the second and third elements included in *Sheeley*--whether there is "a reasonable basis in law for the theory propounded; and a reasonable connection between the facts alleged and the legal theory advanced." *Brenon,* p. 2. There also is no real debate here as to what the applicable law regarding the requirements of due process is; rather, the focus is on the third element--whether there is "a reasonable connection between the facts alleged and the legal theory advanced," *id.*--i. e., whether the process that actually was followed complied with the requirements of due process, and, more particularly, whether respondent provided an adequate explanation of its evidence.

The respondent's notice to appellant of the second pretermination meeting[1] provided some information about the tentative conclusions on which respondent relied, and respondent provided more information at the April 19, 2002, pre-termination hearing.[2] The Commission reached the ultimate conclusion that respondent had failed to satisfy its burden of proof on the notice issue, but noted that respondent did provide appellant with some notice of the factual nature of its case that included some idea of the evidence on which it relied.

The question of whether respondent had a "reasonable connection between the facts alleged and the legal theory advanced," *Brenon,* 2002 WI at para. 41, must be

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[1] "We have reason to believe that on Monday, April 8, 2002, you intentionally rendered the two state-owned computers in your workstation inoperable. This activity took place following a meeting with your supervisors wherein you were informed that you were under investigation for inappropriate and excessive use of the Department's IT resources (i. e., internet activity). There is reason to believe that you deleted system files (as well as other files), thus eliminating the standard desktop configuration necessary to achieve normal operation. In order to restore normal operations, both PC's will have to be completely re-imaged. The re-imaging process will destroy all current data on the computer thus rendering the work-related information contained in these computers completely inaccessible to Bureau of Fiscal Services personnel.
In addition, our investigation reveals that you downloaded and maintained an extremely high number of non-work related picture files (jpg files) on the hard drive." (October 24, 2002, ruling, Finding of Fact 4, pp. 2-3)

[2] "Basically the letter and the information that we said: the computer was not operational and the files were not there. . . . We said that the screen had been blank, and that BIS, when they had tried to figure out what had happened with the computer, had indicated that the files necessary to make the computer work were not there, that they had been deleted off the computer." (October 24, 2002, ruling, Finding of Fact 5, p. 3)

considered in light of all the circumstances, and in the context enunciated by the U. S. Supreme Court in *Cleveland Bd. of Education v. Loudermill,* 470 U. S. 532, 545-46, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985):

> [T]he pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending on the importance of the interests involved and the nature of subsequent proceedings." In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. Under state law, respondents were later entitled to a full administrative hearing and judicial review. . . .
>
> . . . Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

Appellant knew he was accused of having deleted files from the computers maintained in his office, and that those files included system files which were required for the "standard desktop configuration necessary to achieve normal operation." (Exhibit 10) This infers that respondent looked for these files but was unable to find them, and also found the computers inoperable. It also can reasonably be inferred that respondent inspected the computers in his office and had found a large number of non-work related files. While ultimately the Commission concluded this was not enough of an explanation of the evidence to pass muster under *Loudermill,* there was a reasonable basis under the circumstances for an argument that this was at least enough information to provide "an initial check against [a] mistaken decision." 470 U. S. at 545. Neither party has cited any legal precedent that would have been available to the respondent with regard to the degree of interstitial computer-related information *Loudermill* and its progeny would require in situations like this. The preliminary conclusions respondent had reached obviously depended on having operated, or having tried to operate, the computers in question. While it would have been helpful for appellant to have had the kind of specific information about the steps followed by respondent's computer expert that later was provided at the UC hearing (see Findings 7-12, October 24, 2002, rulilng), it could reasonably be argued that this degree of detail was not necessary to have allowed appellant to make a meaningful response in the context of a *Loudermill* hearing.

In his reply brief filed December 19, 2002, appellant argues that:

> [W]hile the Department failed its due process responsibility to the Appellant, the key issue is if the Department's actions were substantially

> justified in its accusation and termination of the Appellant for misconduct--the purposeful destruction of system files.
>
> * * *
>
> . . . In the case before the Commission, there is no similar[3] evidence, direct or indirect, that substantiates the claim that the appellant purposefully destroyed system files.

In essence, the appellant attempts here to turn the question before the Commission from one involving the adequacy of the pretermination *process* to the adequacy of the evidence to substantiate the ultimate substantive decision respondent reached to discharge appellant from employment. This improperly attempts to interject an issue via a reply brief that is not before the Commission.

This Commission has never rendered a decision in this case on the substantive issue raised by this appeal--i. e., whether the respondent had just cause to discharge the appellant. The October 24, 2002, interim ruling addressed appellant's "MOTION TO BE REINSTATED IN APPELLANT'S PREVIOUS EMPLOYMENT BECAUSE THE DEPARTMENT FAILURED [sic] TO PROVIDE *REQUIRED DUE PROCESS* IN ITS INVESTIGATION, PRE-TERMINATION PROCEDURES, AND ULTIMATE DECISION TO TERMINATE." (Emphasis added) In his brief in support of his motion for reinstatement filed August 2, 2002, appellant advanced two arguments: that the respondent denied him procedural due process in the procedures that were followed prior to the discharge, and that the respondent violated state law by utilizing illegal electronic monitoring. The Commission found in appellant's favor on the due process issue and against appellant on the illegal monitoring issue. In considering the motion, the Commission had before it the record that had been made in appellant's UC hearing, but the parties never agreed to decide the issue of just cause on the basis of that record, which is an issue the UC proceeding did not address. Therefore, laying to one side the question of whether this Commission should consider a reply brief that is outside the statutorily-provided briefing schedule, to do so would improperly violate respondent's right under the APA, s. 227.44(2), Stats., to fair notice of the issues.

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[3] This refers to the evidence involved in *Board of Regents v. State Personnel Commission,* 2002 WI 79, 254 Wis. 2d 148, 646 N. W. 2d 759,

ORDER

The Commission's interim ruling of October 24, 2002, a copy of which is attached and incorporated by reference, is finalized as the final decision of this matter. Appellant's motion for reimbursement of costs and fees filed November 20, 2002, is denied.

Dated: January 6, 2003.

STATE PERSONNEL COMMISSION

ANTHONY F. THEODORE, Commissioner

KELLI THOMPSON, Commissioner

AJT:020027Arul2

Parties:

J[redacted] K[redacted]
[redacted]
Madison, WI 53715

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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

STATE OF WISCONSIN PERSONNEL COMMISSION

J[redacted] K[redacted],

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Respondent.

Case No. 02-0027-PC

RULING ON MOTION AND INTERIM ORDER

NATURE OF THE CASE

This is an appeal pursuant to s. 230.44(1)(c), Stats., of a discharge. The matter is before the Commission on appellant's motion to reinstate filed August 02, 2002. This motion is based on allegations that respondent failed to provide of due process with regard to the pretermination process and also acted unlawfully by basing the discharge on surveillance prohibited by s. 230.86, Wis. Stats. Both parties, through counsel, have filed briefs and other documents. Most, but not all, of the material facts are undisputed. Appellant filed with his brief a copy of the 216 page transcript of an unemployment insurance (UC) hearing held before an administrative law judge (ALJ) with regard to whether appellant's discharge was for misconduct connected with his employment, and 17 other exhibits, some of which were part of the record before the ALJ.[1] Both parties appear to agree that the Commission can rely on the transcript and the exhibits (other than the

[1] One of these exhibits is the ALJ's decision (including findings of fact and conclusions of law) (Appellant 18). Because s. 108.101(1), Stats., provides that such materials are inadmissible in other administrative proceedings, the Commission has given no consideration to this exhibit. References in this ruling to the UC transcript are indicated by "T." References to exhibit numbers correspond to the exhibit numbers used by appellant, although some of these documents also have the exhibit numbers used in the UC process.

ALJ's decision) as a basis for deciding the instant motion[2], and the Commission has done so.

FINDINGS OF FACT

1. Appellant had been employed by respondent since 1974, most recently in the classified civil service position of Financial Management Supervisor, Bureau of Fiscal Services (BFS), Division of Management and Technology (DMT), Department of Health and Family Services (DHFS), with permanent status in class. Respondent terminated his employment effective April 23, 2002. This termination was preceded by a process which included the following.

2. By a letter dated and provided to appellant April 8, 2002 (Exhibit 3 at p.1) he was notified of a pretermination meeting with regard to respondent's assertion that it had "reason to believe that you have engaged in excessive and inappropriate use of the Department's information systems resources, specifically Internet sites." He also was advised he was suspended with pay. At the time he received this notice, he was given a Bureau of Information Services (BIS) computer generated report (Exhibit 6) of his internet activity.

3. The first[3] pretermination meeting was held April 12, 2002. Appellant and his attorney attended, as well as members of management Cheryl Thompson, BFS deputy director; Richard Kreklow, DMT personnel manager; and (for part of the meeting) Randy Parker, Deputy Director of the Bureau of Personnel and Employment Relations. At this meeting, appellant admitted to the activity reflected in the report, and explained his actions, saying "I had gotten sucked in gradually, and all of a sudden that it was overwhelming and that I was very sorry to have embarrassed the department." T., 131. Respondent's

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[2] Appellant states in his reply brief (at p.2) that the Commission should make its decision on the motion on the basis of the other documents submitted, including the hearing transcript. In its brief in opposition to the motion (p. 1), respondent also relies on these documents: "there is no statutory prohibition on consideration of the hearing transcript, portions of which will be referenced below. On the issue of due process in this case before the Personnel Commission, the brief and exhibits filed . . . on behalf of Mr. K[redacted] provide the evidence demonstrating that sufficient procedural protections were provided by the Department."

[3] As discussed below, a second pretermination meeting was held on April 19, 2002.

representatives indicated they were considering discipline up to discharge, and advised they would be getting back to him.

4. By letter dated April 18, 2002, respondent advised complainant that a second pretermination meeting had been scheduled for the following day, with regard to the following subject:

> We have reason to believe that on Monday, April 8, 2002, you intentionally rendered the two state-owned computers in your workstation inoperable. This activity took place following a meeting with your supervisors wherein you were informed that you were under investigation for inappropriate and excessive use of the Department's IT resources (i. e., internet activity). There is reason to believe that you deleted system files (as well as other files), thus eliminating the standard desktop configuration necessary to achieve normal operation. In order to restore normal operations, both PC's will have to be completely re-imaged. The re-imaging process will destroy all current data on the computer thus rendering the work-related information contained in these computers completely inaccessible to Bureau of Fiscal Services personnel.
>
> In addition, our investigation reveals that you downloaded and maintained an extremely high number of non-work related picture files (jpg files) on the hard drive. (Exhibit 10)

5. The April 19th meeting was attended by complainant and his attorney, and by Cheryl Thompson, BFS deputy director, and Richard Kreklow, DMT personnel manager. At the meeting there was a discussion of the allegations contained in the April 18, 2002, pretermination letter (Exhibit 10). Respondent's presentation or explanation of the evidence it had with regard to appellant's misconduct identified in that letter was essentially as stated by Cheryl Thompson at the UC hearing:

> Q And in that meeting—the purpose of that meeting was what?
> A To give J[redacted] an opportunity to address the concern that we had that the state computers were not operable, which were in his office, which had been operable on the day that J[redacted] left on paid administrative leave.
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> * * *
>
> Q At that meeting did you present Mr. K[redacted] . . . with any information?
> A Basically, we identified what's in here [April 18, 2002, letter providing notice of second pretermination meeting (Exhibit 10)], that the computer was not working.
> Q Any reports?

> A I had no reports.
> Q Any—any files or—or computer explanations or documentation that would speak to why the computer wasn't operating?
> A No.
> Q So the only thing that was presented to J[redacted] [appellant] was the letter[4] [Exhibit 10]?
> A Basically the letter and the information that we said: the computer was not operational and the files were not there. . . . We said that the screen had been blank, and that BIS, when they had tried to figure out what had happened with the computer, had indicated that the files necessary to make the computer work were not there, that they had been deleted off the computer.

6. At the April 19th meeting, complainant produced a hand-written document (Exhibit 11) he had prepared before the meeting. The nature of this document and the reason for, and circumstances surrounding its preparation was essentially as stated by appellant at the UC hearing:

> Q What prompted you to create that document?
> A I'd spoken with my attorney, who had contacted the department concerning this meeting and what the nature of the meeting was going to be.
> Q And this—why—Exhibit [11]. Describe what is in there.
> A Well, this basically talks about what Cheryl Thompson testified to very recently in terms of a work-around. In—in other words, the allegation is made that the computer was disabled. This gives you a technique for accessing the information on the computer.
> Q And where did you come by that technique, how did you arrive at that technique?
> A Well, it's bas—your basic Windows technique that you would use a control, alt, delete command, which brings up something called the task manager in Windows, and then from the task manager, you can select and execute programs, which is exactly what I did. T. 135.

Exhibit 11 also included an indication that there had been a computer virus alert during the week of March 25, 2002, that might have played a role with regard to the problems with the primary computer.

7. The April 19th meeting also included the following discussion, as essentially accurately described at the UC hearing by Ms. Thompson:

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[4] As set forth above, this document had been given to appellant the previous day (April 18th).

Q What happened in that meeting? What was the purpose of that meeting?
A The purpose of that meeting was to identify that when we had tried to boot up the computer, that we could not do it, and that the files had been deleted off of the computer, that they were rendered impossible to boot directly.
Q Was Mr. K[redacted] asked any questions in the April 19th meeting?
A About whether he did that?
Q About—well, was he asked that question?
A Yes, we asked about it.
Q And did he respond?
A He gave a write-up [Exhibit 11] that described what he thought had happened with the computer.

* * *

Q . . . Did he make any admissions in the April 19th meeting concerning the computer problems?
A He said that he had deleted about 40 files but that they were not system files. He said that he had had problems with the computer previously.
Q The 40 files that he deleted, did he explain when he deleted them?
A No.
Q Did he explain why he had deleted them?
A That they would be an embarrassment.
A And was there any further elaboration on that?
Q I don't think so. T. 94-95.

8. The two computers in question had been examined prior to the second pre-termination meeting held on April 19, 2002, by Ellen Schuster, a BIS employee who worked as a computer troubleshooter for the department. She has been employed in that capacity for about two and one-half years and has about 28 years of experience in the information systems field. She began this project on April 16, 2002. She found she could not boot up appellant's primary computer. Her activities at that point were essentially accurately described in her testimony at the UC hearing:

> I obtained a set of emergency repair diskettes . . . and what they do is boot the computer into the DOS operating systems so you can view what's on the hard drive. . . . it did let me into what we call a C drive or the hard drive, and I was at that time able to look at the directory structure and try to identify what may be causing Windows not to launch. I found that one of the main DLL [dynamic link library file]'s for the windows NT . . . was not located in the file where it was supposed to be. It

> usually resides under Windows NT/System 32, and it resides in there and when the computer boots up, that file is a machine-level file that tells the computer that it's a Windows NT machine and it boots up in the Windows NT. It's one of the primary system files. T. 170.

9. After she made this determination she copied a DLL from a diskette to the appropriate place on the computer. She was then able to get into Windows and found that there were other system files missing. She also found a number of non-work-related image files, which appeared to be family related.

10. She tried to repeat this process with the secondary computer and was once again able to reach the C drive where she discovered the same DLL file was missing. However, after inserting a copy of the DLL file, she was unable to get the computer to boot to Windows.

11. Subsequently, on April 17th or 18th, she made screen shots of the structure of many of the directories on the primary computer.

12. On April 19, 2002, she was shown Exhibit 11, appellant's hand-written "work around" that he had given to management at the pretermination hearing that had been held earlier that day. She reached the conclusion that this process would not have been effective prior to the insertion of a copy of the DLL file, because the process required the use of the Windows operating system which she had been unable to access prior to the insertion of a copy of the DLL file.

13. She left both computers in a secured room on the departmental premises.

14. Respondent never advised either appellant or his attorney prior to the effective date of the termination that the computers were in a secured room and/or that they were accessible for inspection. Respondent also never advised either appellant or his attorney prior to the effective date of the termination of the activities of Ms. Schuster's activities, observations, or findings.

15. Appellant had consented to being monitored with regard to his internet activities.[5]

16. Following the two pretermination meetings, the appointing authority, Deputy Secretary Thomas E. Alt, acting solely on the recommendation of subordinate

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[5] This point is not in dispute. See appellant's brief at p. 17.

staff who were familiar with the investigation of appellant's internet activities, effectuated appellant's discharge effective April 23, 2002, by letter of even date (Exhibit 2). This discharge was based on appellant's alleged excessive, non-business related internet usage while at work, including accessing pornographic sites, and his alleged destruction of system and other files which rendered his two computers inoperable after he learned of management's investigation of his internet usage.

17. Respondent earlier had reached the conclusion that while there was just cause to have disciplined appellant because of his inappropriate internet usage, that misconduct alone would not have justified a discharge.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to s. 230.44(1)(c), Stats.

2. Respondent has the burden of proof.

3. Respondent has not satisfied its burden of proof as to the provision of due process prior to appellant's termination, with regard to the allegation that he destroyed system files and rendered his computers inoperable.

4. Respondent did not provide appellant with adequate due process of law prior to his termination with respect to the allegation that he destroyed system files and rendered his computers inoperable.

5. Respondent satisfied its burden of proof with regard to the illegal surveillance issue.

6. Respondent did not utilize illegal surveillance in the process used to terminate appellant's employment.

OPINION

The first issue before the Commission is the question of whether respondent provided appellant due process prior to his termination. In *Cleveland Bd. of Education v. Loudermill*, 470 U. S. 532, 545-46, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 506 (1985), the U. S. Supreme Court addressed this subject as follows:

> [T]he pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending on the importance of the interests involved and the nature of subsequent proceedings." In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. . . .
>
> . . . Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.
>
> The essential requirements of due process, and all that respondents seek or the Court of Appeals required are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. (citations omitted)

In *State ex rel. Messner v. Milwaukee Co. Civil Service Commission,* 56 Wis. 2d 438, 444, 202 N. W. 2d 13 (1972), the Wisconsin Supreme Court also stressed that due process is a flexible concept:

> [D]ue process is not to be measured by rigid and inflexible standards. . . . "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." The degree of procedural rigor required in a proceeding varies from one case to another and depends upon the particular facts and upon the weight to be afforded to private interests as contrasted to governmental interests in the circumstances. (citations omitted)

In the instant case, appellant does not dispute the adequacy of the process that occurred in connection with the first pretermination meeting on April 12, 2002. With regard to the process related to the second pretermination meeting on April 19, 2002, appellant's only alleged constitutional shortfall is that the employer failed to provide "an explanation of the employer's evidence" as required by *Loudermill, id.*

In making the above findings of fact, the Commission has relied on the testimony of both appellant and respondent's representatives. In the Commission's view, there was little dispute concerning the factual issues of what occurred at the April 19th meeting and in the process related to the subject of the meeting. However, there is a significant ques-

tion as to whether the information respondent supplied to appellant was sufficient to enable appellant or an employee similarly situated to the appellant to effectively respond during the pretermination process to the charges against him. In addressing this question the Commission must consider which party bears the burden of proof as to this particular question.

Since this is a discharge case, we start with the basic principle that the state bears the burden of proof on such an appeal. *Reinke v. Personnel Board,* 53 Wis. 2d 123, 137, 191 N. W. 2d 833 (1971). The Commission has applied this burden not only to the core just cause issue in discharge cases, but also to the subsidiary issue of whether the employer provided a pre-disciplinary process consistent with due process. *See, Brenon v. UW,* 96-0016-PC, 2/12/98, affirmed other grounds, *Board of Regents v. State of Wisconsin Personnel Commission,* 2002 WI 79; *Reimer v. DOC,* 92-0781, 2/3/94; *Rentmeester v. Wis. Lottery,* 91-0243-PC, 5/27/94. In all of these cases the Commission concluded in the Conclusions of Law that the employing agencies had the burden of proof on the due process issue, although none of these cases discussed this issue. However, such an allocation of the burden of proof appears consistent with the general principle that the moving party (i. e., here, the employer, as having effected the discharge and deprived the employee of his or her property interest in employment) has the burden of proof on all factual issues, *see State v. McFarren,* 62 Wis. 2d 492, 499-500, 215 N. W. 2d 459 (1974); *WPEC v. DMRS,* 95-0107-PC, 5/14/96; and there do not appear to be any particular reasons to deviate from the normal rule. In particular, access to the relevant facts are not peculiarly available to the appellant. The Respondent knows as well as, or better than, the employee what process was actually afforded the employee. The particular question of whether that process would have enabled an employee similarly situated to the appellant to prepare a defense to the charges against him during the pretermination process appears to be at least as, if not more available to the respondent than the appellant.[6]

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[6] In the Commission's opinion, an objective test is appropriate, but if respondent could show that, even though the notice was defective from an objective standpoint, appellant in fact could understand the charges against him sufficiently to be able adequately to prepare a response at the pretermination meeting, then arguably there would not be a due process violation. *Cf. Weibel v. Clark,* 87 Wis. 2d 696, 704-05, 275 N. W. 2d 686 (1979) (in unemployment compensation proceeding charges per se provided inadequate notice but no due process violation where employee

In its April 18, 2002, letter providing notice of the second pretermination meeting (Exhibit 10), respondent stated:

> We have reason to believe that on Monday, April 8, 2002, you intentionally rendered the two state-owned computers in your workstation inoperable. This activity took place following a meeting with your supervisors wherein you were informed that you were under investigation for inappropriate and excessive use of the Department's IT resources (i. e., internet activity). There is reason to believe that you deleted system files (as well as other files), thus eliminating the standard desktop configuration necessary to achieve normal operation. In order to restore normal operations, both PC's will have to be completely re-imaged. The re-imaging process will destroy all current data on the computer thus rendering the work-related information contained in these computers completely inaccessible to Bureau of Fiscal Services personnel.
>
> In addition, our investigation reveals that you downloaded and maintained an extremely high number of non-work related picture files (jpg files) on the hard drive.

In effect, this statement informs appellant of what tentative conclusions respondent reached as a result of its investigation, but it does not explain the specific pieces of evidence respondent relied on. Obviously, some of the evidence upon which respondent depended is implied by these allegations. For example, it is implicit that the person conducting the investigation for the respondent found the computers in an inoperable condition, that she found evidence that some system and other files were missing, and that she found non-work related jpg files on the hard drive.

At the April 19, 2002, meeting, some additional information about the evidence respondent relied on was provided, as Cheryl Thompson testified at the UC hearing in response to the question of whether the April 18th letter was the only thing that had been presented to appellant:

> Basically the letter and the information that we said: the computer was not operational and the files were not there. . . . We said that the screen had been blank, and that BIS [Bureau of Information Services], when they had tried to figure out what had happened with the computer, had indicated that the files necessary to make the computer work were not there, that they had been deleted off the computer. T. 110-111.

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in fact knew why he had been fired and he was not prejudiced by the inadequacy of the charges). However, this was not established here.

As *Loudermill* makes clear, the pretermination process does not need to provide a full-fledged, adversarial evidentiary hearing. Related to this is the point that the *Loudermill* requirement for an explanation of the employer's evidence does not require that the employer give him "complete disclosure of *all* the evidence that was acquired during the course of the investigation." *Reimer v. DOC*, 92-0781-PC, 2/3/94 (emphasis added) However, the extent of this disclosure or explanation necessarily must be sufficient to enable the employee to have a meaningful opportunity to contest the factual basis for the proposed action, and/or to try to show that for other reasons the proposed actions should not be taken, consistent with *Loudermill's* basic principles. The question, which presents some difficulty, is whether the description respondent provided complainant of what was found when the BIS accessed complainant's computers, provided sufficient information for complainant to have provided the kind of response contemplated by *Loudermill*. The record before the Commission does not provide a pellucid answer to this question.

Presumably due at least in part on the fact that the UC proceeding was not concerned with the due process question raised by the instant motion, there was no testimony from Ms. Schuster (the DHFS computer expert) or appellant (or from anyone else for that matter) directed to the question of whether the information respondent provided appellant was adequate to have given him a meaningful opportunity to contest the factual basis for the proposed action, and/or to try to show that for other reasons the proposed actions should not be taken. However, the UC hearing record, and particularly the testimony of Ms. Schuster, suggests that the allegations concerning the missing files and complainant's related attempt to render his computers inoperable contained in Exhibit 10, the April 18, 2002, letter providing notice of the second pretermination meeting,[7] involve technical computer matters, and that the letter provides notice of the allegations or charges but does

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[7] "We have reason to believe that on Monday, April 8, 2002, you intentionally rendered the two state-owned computers in your workstation inoperable. This activity took place following a meeting with your supervisors wherein you were informed that you were under investigation for inappropriate and excessive use of the Department's IT resources (i. e., internet activity). There is reason to believe that you deleted system files (as well as other files), thus eliminating the standard desktop configuration necessary to achieve normal operation. In order to restore normal operations, both PC's will have to be completely re-imaged. The re-imaging process will destroy all current data on the computer thus rendering the work-related information contained in these computers completely inaccessible to Bureau of Fiscal Services personnel." (Exhibit 10)

not provide an "explanation of the employer's evidence" as required by *Loudermill,* 470 U. S. at 546.

Ms. Schuster testified at the UC hearing[8] that she tried to boot up the first computer, but it did not boot into the Windows NT environment. She then testified as follows:

> I went with option 1, which was the emergency repair diskettes, and what they do is boot the computer into the DOS operating systems so you can view what's on the hard drive. I don't believe I was successful on the first attempt, so I tried it again and it did let me into what we call a C drive, and I was at that time able to look at the director[y] structure and try to identify what may be causing Windows not to launch. I found that one of the main DLL [dynamic link library file]'s for the Windows NT . . . was not located in the file where it was supposed to be. It usually resides under Windows NT/System 32, and it resides in there and when the computer boots up, that file is a machine-level file that tells the computer that it's a Windows NT machine and it boots in the Windows NT. It's one of the primary system files.
>
> * * *
>
> . . . I wanted to get it into being able to launch Windows again so that we could use the gooey [sic] interface. It's easier to look at it that way. So when I identified that that DLL as not in the System 32 file, I copied—I had a copy of a DLL on a diskette, copied it to the appropriate place, rebooted the computer and was able to get into Windows.
>
> * * *
>
> Q When you first got access—got possession of these computers, did you do control, alt, delete to try to obtain information?
> A . . . The state that computer was in, it wasn't launching Windows, so you could not do control, alt, delete. You would just get a blank screen. It was not—it wasn't getting—the operating system was not launching. . . . T. 170-172.[9]

Another part of the record that suggests that the April 18th letter providing notice of the second pretermination meeting (Exhibit 10) fails to provide an adequate explanation of the employer's evidence is the handwritten document appellant prepared on April 18th (Exhibit 11) in response to the notice (Exhibit 10). This "workaround" explained how appellant allegedly had been accessing the first computer since March 29, 2002,

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[8] Appellant did not have access to this or similar information prior to his termination.

[9] She went through a similar process with the second computer, but, unlike the first computer, it failed to launch Windows after she had inserted a copy of the same DLL file.

when he said he found the desktop was blank but was able to use the command ctrl+alt+delete to get to the "Task Manager" program and from there to the applications necessary for his job. However, a prerequisite for the operation of this "workaround" is that the Windows operating system be operational, which was not the case when Ms. Schuster came into possession of the computers on April 16, 2002. Without Windows, the command ctrl+alt+delete is non-functional, and this document addresses a situation that is not material to the circumstances actually encountered by the respondent in the person of Ms. Schuster.

Without any explanation in the record from Ms. Schuster of whether the notice respondent provided to appellant should have enabled either appellant, or an employee similarly situated to appellant, to know and understand the charges against him in order to have a meaningful opportunity to contest the factual basis for the proposed action, or to try to show that for other reasons the proposed actions should not be taken, the Commission concludes respondent has not satisfied its burden of proof on this issue, and the termination must be rejected on due process grounds. However, the Commission concludes that appellant's other arguments attacking the validity of the pretermination process are not well-founded.

Appellant contends respondent violated due process by destroying evidence that presumably would play a role in his defense. He states DHFS "had already destroyed the evidence at issue three days before the Department requested Mr. K[redacted] to respond to its allegations. The Department, by reformatting the computers, not only wiped out the evidence but also all opportunity for Mr. K[redacted] to vindicate himself." (Appellant's brief, p. 12) This argument appears to have been based on the statement in the April 18, 2002, pre-termination notice that "[i]n order to restore normal operations, both PC's will have to be completely re-imaged. The re-imaging process will destroy all current data on the computer thus rendering the work-related information contained in these computers completely inaccessible to Bureau of Fiscal Services personnel." (Exhibit 10). However, there is no evidence this occurred (other than to the extent appellant himself is alleged to have destroyed files); rather, Ms. Schuster testified the computers were and have remained secured. In his reply brief, appellant argues:

> The respondent claims that the "repair" disks used to gain access to the information on the computer did not alter the system files. Employee testimony contradicts this assertion and also reveals that the Department's technical staff never applied Mr. K[redacted]'s work-around technique provided at the pretermination meeting because they had previously altered the computer's systems with the repair disk. Staff also testifies that they looked for the missing system file only after they had altered the computer equipment changing its original state. (Tr. 67-70, 184-182 [sic], 192)
>
> The respondent attempts to mitigate its actions by explaining that the computers are in their original state because they were not "re-image[d]" and therefore the Respondent did nothing wrong to the evidence. The Department's argument is simply disingenuous—it changed, replaced, altered, deleted or reformatted the system files in question, the same system files it accuses Mr. K[redacted] of purposefully destroying. Any independent evaluation of the computer equipment prospectively is futile. Had the respondent applied Mr. [redacted]'s work-around procedure before altering the computer equipment when it commenced its second investigation, it would have found its assumptions regarding his conduct to be erroneous. (Appellant's reply brief, p. 4) (footnote omitted)

There simply does not appear to be anything in the referenced testimony that would provide a factual basis for appellant's contention. Rather, Ms. Schuster testified that "[w]hen I received the computers into my possession, I found the system files were not there' (T. 192), and "in the state that I received the computers, you could not use this method [appellant's "work-around"] to get to the—to the applications." (T. 185)

Appellant also argues that he was denied due process because the decision-maker in the department (Deputy Secretary Thomas E. Alt) was biased:

> Department employees testified that the ultimate decision-maker, the Deputy Secretary, based his termination of [sic] staff recommendations, recommendations based on factual findings not supported by the evidence. Therefore, the decision-maker is necessarily biased in fact to the degree that erroneous staff recommendations thwart Mr. K[redacted]'s constitutional rights.
>
> There is no evidence that the decision-maker did anything other than follow staff recommendations. Testimony reveals the decision-maker was several levels removed from the investigation and the evidence (Tr. 102). By failing to review the evidence independently of staff conclusions and relying on fatally flawed evidence, are [sic] special facts and circumstances to demonstrate that the risk of unfairness was intolerably high. (Appellant's brief, p. 15)

Laying to one side the question of whether due process requires the decision maker involved in the pretermination process to be impartial when the termination is followed by a full contested case administrative hearing before an impartial body (like this Commission),[10] appellant cites no authority for the proposition that an appointing authority cannot rely on the investigation of subordinate agents.[11] If the subordinate agents relied on "fatally flawed evidence" as appellant contends, this would not run to bias or impartiality on the part of the appointing authority, but rather to the substantive merits of the ultimate conclusion that was reached.

Appellant also argues that respondent's process puts the employer in violation of s. 230.86, Stats., which prohibits "any disciplinary action based in whole or in part on wiretapping, electronic surveillance or one-way mirrors . . . unless that surveillance is authorized by the appointing authority and is conducted in accordance with the rules promulgated under s. 16.004(12)."[12] Appellant contends that respondent's reliance on reports of appellant's internet activity generated by a software application constitutes electronic surveillance.

Section 230.86 does not define "electronic surveillance." The dictionary definition of "surveillance" is:

> 1: close watch kept over one or more persons: continuous observation of a person or area (as to detect developments, movements or activities) <place a suspected person under police surveillance> <surveillance of air activity by radar> 2: close and continuous observation for the purpose of direction, supervision, or control <club facilities . . . are conducted under close surveillance of the U. S. Forest Service . . . > <place the disputed

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[10] Appellant cites *Baldwin v. LIRC,* 228 Wis. 2d 601, 599 N. W. 2d 8 (Ct. App. 1999), which did not involve a pretermination process but a hearing on the merits before a worker's compensation administrative law judge who allegedly was biased. *Compare Walker v. City of Berkeley,* 951 F. 2d 182, 184 (9th Cir. 1991) (failure to provide impartial decisionmaker at pretermination stage is not denial of due process as long as there is impartial decisionmaker at post-termination hearing), *and England v. DOC,* 97-0151-PC, 9/23/98 (*Loudermill* standard does not support employee's due process claim that employer failed to provide impartial decisionmaker at pretermination hearing), *with Fofana v. DHSS,* 90-0210-PC, 6/28/91 (constitutionally adequate pretermination hearing requires an impartial decisionmaker).

[11] *See, e. g., Riccio v. County of Fairfax,* 907 F. 2d 1459, 1466 (4th Cir. 1990) (no due process violation from inability to present case before ultimate decisionmaker).

[12] No such rules have been promulgated.

> territory under UN surveillance> (WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2302 (1981))

BLACK'S LAW DICTIONARY 1459 (7th Ed. 1999) has a similar definition of "surveillance": "Close observation or listening of a person or place in the hope of gathering evidence." Neither of these definitions appear to include respondent's activity of compiling a record of internet usage on a state-owned computer located and used on state property.[13]

Appellant also relies on criminal statutes prohibiting the "[i]nterception and disclosure of wire, electronic or oral communications." S. 968.31, Wis. Stats. He argues:

> Sec. 968.31(2)(9), Wis. Stats., defines Intercept:
>
> > "Intercept" means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.
>
> There is no qualification as to when the communication is intercepted, obtained or accessed. Furthermore, the fact that Mr. K[redacted] granted permission to be monitored is wholly irrelevant because electronic monitoring contrary to state law is strictly prohibited. Section 968.31(2)(c), Wis. Stats., requires [sic] that it is not unlawful,
>
> > For persons acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any tortuous or criminal act in violation of the constitution or laws of the United States or any state or for the purpose of committing any other injurious act.
>
> Evidence collected pursuant to monitoring activity performed in the absence of required administrative rules mandated by statute, and expressly forbidden by the legislature to be used for disciplinary purposes, is an illegal and tortuous act.

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[13] Robbi Murphy, an employee in respondent's personnel operation, described the process as follows: "it is not real time monitoring, it is a snapshot. It's a historical record of what an employee has used the system for. It is not as though while an employee is sitting at their computer accessing, that something is—is making reports off of that. It—the software goes out and takes from our record that ID and the sites that they made, and then . . . the computer takes all of the internet activity in the department, and I say 'show me what J[redacted] K[redacted] was doing,' and it matches his log-in to the sites and puts together a report." T. 74.

> Evidence illegally obtained should be disregarded in its entirety, similar to the principles applied in criminal proceedings where evidence is suppressed when collected illegally. Otherwise, a state agency will be free to violate the legislative mandate to protect employees in the work-place. (Appellant's brief, p. 17)

Laying to one side the appropriateness of interpreting s. 230.86, Wis. Stats., by reference to s. 968.31(2)(c), Wis. Stats.[14], this argument is unpersuasive. Section 968.31(2)(c) provides that it is not unlawful to intercept an electronic communication "where one of the parties to the communication has given prior consent to the interception." Since appellant concedes he gave prior consent to the interceptions of electronic internet communications on respondent's computer and internet connection, the interception is not illegal unless used for committing a criminal or tortuous act or other "injurious" act. This does not describe the context of this case unless one assumes that respondent's action of accessing the record of appellant's internet usage constitutes "surveillance" under s. 230.86(1), Wis. Stats. However, as discussed above the Commission concludes that what occurred did not constitute "surveillance" as used in that statute.

Furthermore, s. 968.31(1)(a), Wis. Stats., is not violated unless there is an interception of an electronic communication. "Electronic communication" is defined as the transfer of material wholly or partially by "wire, radio, electromagnetic, photoelectronic or photooptical system." S. 968.27(4), Wis. Stats. Assuming *arguendo* that this definition comprehends what happens when a user accesses the internet, the record reflects that respondent did not intercept this transmission when it occurred, but rather the software compiled the internet usage information from the data stored in the computer (presumably on the hard drive). This does not fall within the proscription of s. 968.31(1)(a), Wis.

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[14] In his reply brief at p. 8, appellant asserts that the "definitions cited in Appellant's brief include the wiretapping statutes because they are applied *in comity* with sec. 230.86, Wis. Stats." (emphasis added) "Comity" is defined as "Courtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts . . . **judicial comity.** The respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and judicial decisions." BLACK'S LAW DICTIONARY 261-62 (7th Ed. 1999)

Stats., which prohibits interception of an electronic communication, but does not extend to the records of such communications.[15]

ORDER[16]

Respondent's action of discharging appellant is rejected on due process grounds, and this matter is remanded to respondent for restoration of appellant with back pay and benefits, less any mitigation, pursuant to s. 230.43(4), Wis. Stats.

Dated: OCT. 24, 2002.

STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

AJT:020027Arul1.2

KELLI THOMPSON, Commissioner

Parties:

J[redacted] K[redacted]
[redacted]
Madison, WI 53715

Phyllis Dub'e
DHFS Secretary
1 West Wilson St., 6th Floor
P. O. Box 8861
Madison, WI 53707-7850

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15 This provision can be contradistinguished from the definition of "wire communication" which includes the electronic storage of an aural transfer. S. 968.27(17), Wis. Stats., although even the definition of "electronic storage" is limited to "temporary, intermediate storage . . . incidental to the electronic transmission thereof," s. 968.27(8)(a), Wis. Stats., or "storage . . . by an electronic communication service for purposes of backup protection of the communication," s. 968.27(8)(b), Wis. Stats., as opposed to more permanent storage not fitting within the parameters of these subsections.

16 This order is being issued on an interim basis to allow for the possible submission of a motion for costs pursuant to s. 227.485, Wis. Stats. Notice of this process will be promulgated separately.