STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

J__ K__, Appellant,

vs.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES, Respondent.

Case 2
No. 62882
PA(adv)-14

Decision No. 30860-B

Appearances:

Todd Hunter, Attorney, 115 West Main Street, 2nd Floor, Madison, Wisconsin 53703, appearing on behalf of the Appellant.

Paul Harris, Attorney, Office of Legal Counsel, DHFS, P.O. Box 7850, Madison, Wisconsin 53707-7850, appearing on behalf of the Department of Health and Family Services.

ORDER ON REHEARING VACATING THE MARCH 30, 2004 FINAL ORDER AND DENYING APPELLANT'S MOTION TO REINSTATE

On March 30, 2004, the Wisconsin Employment Relations Commission (Commission) issued an Order Denying Motion for Costs and Final Order in the above-captioned matter. On April 19, 2004, the Respondent Department of Health and Family Services (DHFS) filed a petition for rehearing regarding the Commission's Final Order. On May 18, 2004, the Commission issued an Order granting the Respondent's petition for rehearing. On or before June 7, 2004, the parties filed written argument regarding the issues raised by the Respondent's petition. References below to the Wisconsin Personnel Commission (PC) arise from the fact that the PC held jurisdiction over this matter until July 26, 2003.

For the reasons set forth in our Memorandum, below, we vacate our March 30, 2004 Final Order and instead issue this Order Denying the Appellant's Motion to Reinstate. We also order this matter consolidated with Case No. 62881 for any hearing and decision.

Having reviewed the record 1/ and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Findings of Fact 1 through 13 and 15-16 in the PC's Ruling on Motion and Interim Order issued October 24, 2002 are adopted.

B. Findings of Fact 1 through 36 in the Commission's Order Denying Motion for Costs and Final Order are re-affirmed.

C. Finding of Fact 14 in the PC's Ruling on Motion and Interim Order issued October 24, 2002 is modified as follows and as modified is adopted:

> 14. Respondent did not advise either the Appellant or his attorney prior to the effective date of the termination that the computers had been kept in a secured room and/or that they had been accessible for inspection. Respondent did not advise either the Appellant or his attorney prior to the effective date of the termination of certain details of the investigation the Respondent had undertaken regarding the Appellant's computers, viz., that Respondent had tried to "boot up" the Appellant's primary computer on April 16 and was unable to do so, that the computers were then taken to one of the Respondent's computer specialists, who, by using emergency diskettes to boot up the computer's operating system, discovered that the problem was missing system files, that the computer specialist opined to the Respondent that those system files were unlikely to be missing absent deliberate deletion, and that the precise name of the principal missing system file in both computers was a main dynamic link library (DLL) file, specifically MFC42.DLL, for Windows NT, that tells the machine how to boot up the NT operating system. 2/

1/ As noted in the Personnel Commission's prior rulings, both parties agreed early on that the Commission may rely upon the transcript of the unemployment insurance (UC) hearing held before an administrative law judge on June 26, 2002, and 17 other exhibits (but not the ALJ's decision in the UC case), for purposes of deciding the Appellant's Motion to Reinstate.

2/ The Respondent has challenged Finding of Fact 14 as inconsistent with other findings of fact made by the PC in its October 24, 2002 ruling. While we largely agree with the PC's opinion in response to the Respondent's initial petition for rehearing, i.e., that the Respondent's proposed modification was more a difference in characterization than in substance, we think it important to specify that the information summarized in Finding of Fact 14, above, related to the underlying details of the investigation and not to substantive aspects of the allegations against Mr. K__. This view is explained more fully in our Memorandum, below.

D. Finding of Fact 17 in the PC's Ruling on Motion and Interim Order is vacated and the issue is remanded for hearing. 3/

E. The Conclusions of Law set forth in the PC's Ruling on Motion and Interim Order issued October 24, 2002 and the Commission's Order Denying Motion for Costs and Final Order issued March 30, 2004 are vacated and the following Conclusions of Law are made:

1. The Respondent did not deny the Appellant due process of law by having the ultimate decision-maker rely upon the investigation that was conducted by subordinates, for the reasons set forth in the PC's October 24, 2002 Ruling on Motion and Interim Order.

2. The Respondent did not utilize illegal surveillance in the process used to terminate the Appellant's employment, for the reasons set forth in the PC's October 24, 2002 Ruling on Motion and Interim Order.

3. The Respondent did not violate due process by destroying evidence that the Appellant might need for his defense, for the reasons set forth in the PC's October 24, 2002 Ruling on Motion and Interim Order.

4. The Respondent provided the Appellant with an adequate explanation of the evidence against him, including the allegation that he destroyed system files and rendered his computers inoperable, for the reasons set forth in our Memorandum, below.

3/ In Finding of Fact 17, the PC found that the Respondent would not have terminated Mr. K__ based solely upon the misconduct alleged in his first pre-termination hearing, i.e., the misuse of his computer. This issue was material to the PC's October 24, 2002 ruling, because the PC could not have remanded the matter to Respondent to restore Mr. K__ to his former position based upon due process deficiencies in his second pre-termination hearing, unless Respondent concluded that but for those deficiencies Mr. K__ would not have been terminated. Since we reject the PC's conclusion on the due process issue regarding Mr. K__'s second pre-termination hearing, it is no longer material whether or not Mr. K__ would have been terminated based solely upon his alleged misuse of his computer. Accordingly, we leave the parties to address this issue, as appropriate, in subsequent proceedings.

F. All previous Orders issued by the PC and the Commission in this matter are vacated and the following Order is issued:

1. On rehearing, the Appellant's Motion to Reinstate is denied.

2. This matter is consolidated with Case No. 62881 for hearing and decision.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of October, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

MEMORANDUM ACCOMPANYING ORDER

Summary of Prior Proceedings

Mr. K__'s (the Appellant's) underlying appeal arises from Respondent's decision to discharge him from his position as a Financial Management Supervisor, effective April 23, 2002. The appeal was filed in May 2002 with the Wisconsin Personnel Commission (PC), which was abolished effective July 26, 2003, pursuant to 2003 Wis. Act 33, while this matter was still pending. Authority over this matter was transferred to this Commission.

After Mr. K__ filed his appeal with the PC, he filed a motion to reinstate, alleging, inter alia, that Respondent had failed to provide him with sufficient pre-termination due process. In support, Appellant filed a copy of the 216-page transcript of an unemployment compensation (UC) hearing held before an administrative law judge on June 26, 2002. The UC hearing related to the question of whether Appellant's discharge was for misconduct connected with his employment. Appellant also filed 17 other exhibits. Both Appellant and Respondent agreed that it was appropriate for the PC to rely on the transcript and the exhibits for the purpose of ruling on Appellant's motion to reinstate.

On October 24, 2002, the PC issued an Interim Order holding that Respondent had failed to provide "an explanation of the employer's evidence" as required by CLEVELAND BD. OF EDUCATION V. LOUDERMILL, 470 U.S. 532 (1985), in that Respondent had failed to show that an employee similarly situated to the Appellant would have received enough explanation of the evidence being relied on by Respondent to have had a reasonable opportunity to contest the factual basis for the discharge. The PC accordingly overturned the discharge and remanded the matter to Respondent. In the same decision, the PC ruled against Mr. K__ on three other aspects of his motion, i.e., the PC held that the Respondent had not utilized a biased decisionmaker, had not utilized unlawful surveillance in investigating the charges against Mr. K__, and had not destroyed evidence (by allegedly permanently altering Mr. K__'s computers) that Mr. K__ might need for his defense.

Appellant then filed a Motion for Costs under the Equal Access to Justice Act (EAJA), which the PC denied on January 6, 2003, concluding that the Respondent was "substantially justified" in arguing that it had provided the Appellant with a sufficient explanation of the evidence to satisfy LOUDERMILL standards. In that ruling, the PC also rejected the Appellant's contention that, in order to avoid EAJA assessments, the Respondent also had to be "substantially justified" in its substantive discharge decision to terminate Mr. K__. The net effect of the January 6th ruling was to deny the Appellant's motion for costs and to finalize the October 24th Interim Ruling as the Final Decision in the matter.

Both Respondent and Appellant then filed petitions for rehearing before the PC. Respondent argued in its petition that the PC's ruling was erroneous on the issue of whether the Respondent had supplied a sufficient explanation of the evidence for purposes of the LOUDERMILL pre-termination due process requirements. The Appellant argued in his petition

that the PC erred in finding Respondent substantially justified on the due process issue and also in failing to consider whether Respondent was substantially justified in its decision to terminate Mr. K__, for purposes of EAJA costs. In a ruling dated February 21, 2003, the PC denied Respondent's petition and denied the Appellant's petition in part, but granted the Appellant's petition on the issue of whether the PC had erred in failing to consider the substantive discharge decision in the context of Appellant's EAJA request. This February 21, 2003 PC ruling thus vacated the January 6, 2003 ruling.

Subsequently, Mr. K__ filed a request for clarification and Respondent filed a request to reopen the record so it could provide evidence to demonstrate that its discharge decision was substantially justified. Mr. K__ filed a second appeal with the PC on April 14, 2003, based upon Respondent's alleged actions restoring him to his Financial Management Supervisor position effective March 24, 2003, immediately placing him on paid administrative leave, notifying him of a pre-termination hearing on April 1st and terminating his employment effective April 10, 2003. This second appeal remains pending before the Commission as Case No. 62881. On June 3, 2003, the PC denied Respondent's request to reopen the record and Mr. K__'s request for clarification and established a briefing schedule on the question of whether, for purposes of the EAJA, the Respondent was substantially justified in its substantive decision to discharge the Appellant. Before the PC could rule on that question, the PC was abolished and this matter was transferred to the Commission.

On March 30, 2004, the Commission issued an Order Denying Motion for Costs and Final Order, holding that, for purposes of Appellant's EAJA request, Respondent was "substantially justified" in its decision to terminate Appellant's employment. In explaining the scope of the issue it was addressing in that Order, the Commission noted:

> The only question . . . before the Commission is whether the Appellant is entitled to fees and costs as a consequence of the Respondent's position on the substantive decision it reached to discharge the Appellant.

The Commission's March 30, 2004 Order contained in its entirety the following two components:

1. Appellant's request for fees/costs is denied.

2. The Interim Order issued on October 24, 2002, is adopted as the Final Order in this matter.

Prior to issuing the March 30, 2004 Order, the Commission engaged in no substantive review of the PC's October 24, 2002 Interim Order.

On April 19, 2004, the Respondent filed a Petition for Rehearing, arguing that the Commission should revisit the portion of its March 30, 2004 Final Order that had erroneously

adopted the PC's October 24, 2002 ruling. The Respondent, in essentially the same words that it had offered in support of its earlier petition for rehearing, raised anew the issue of whether the Respondent had failed to provide sufficient pre-termination due process. As indicated earlier, the Commission granted the motion for rehearing and now addresses that issue.

DISCUSSION

The Appropriateness of Rehearing the Due Process Claim

The initial question raised by Mr. K__ is whether the Commission is bound by the determination reached by the PC in its October 24, 2002 ruling granting his Motion for Reinstatement. Mr. K__ contends that it is "arbitrary and capricious" for this Commission to grant the Respondent's April 19, 2004 petition for rehearing, where the PC had rejected the identical arguments in its February 21, 2003 Ruling on Petitions for Rehearing.

The Commission recognizes that, in most circumstances, it is inconsistent with notions of administrative economy for the Commission to reconsider arguments that have previously been rejected in the same proceeding. However, the circumstances present here are hardly typical. This appeal was processed by the Wisconsin Personnel Commission from the date the case was filed in May of 2002, until the PC was abolished, effective July 26, 2003. On that date, and while this matter was still pending at the administrative agency level, the authority to decide the case was transferred to this Commission. At that point, it became the responsibility of the Commission to process the matter to a final decision.

When the Commission assumed responsibility for this case, the sole remaining aspect was Mr. K__'s EAJA request for fees and costs, which the Commission addressed substantively in its March 30, 2004 Order. As part of the same order, the Commission adopted, without argument from the parties and without substantive review, the October 24, 2002 Interim Order that had been issued by the PC in this matter. 4/

4/ In light of the Respondent's latest petition for rehearing, it is unnecessary for the Commission to address the question of whether it would have been appropriate for the Commission to conduct, sua sponte, a substantive review of previous orders issued by the PC.

By filing its most recent petition for rehearing on April 19, 2004, the Respondent has placed before this agency the due process question addressed by the PC in its October 24, 2002 Interim Order and addressed again by the PC in its February 21, 2003 ruling denying the Respondent's initial petition for rehearing. Respondent also filed a petition for judicial review in Dane County Circuit Court that focused on the same due process issue and specified that it did not challenge the Commission's decision on fees and costs. 5/ Rather than blindly

accepting the responsibility to defend the PC's due process decision on judicial review, the Commission has chosen to exercise its discretion to decide whether it agrees with the PC's due process analysis.

5/ The circuit court proceeding was voluntarily withdrawn by Respondent once the Commission issued its May 18th ruling on Respondent's petition for rehearing.

Mr. K__ also argues that "[t]he original hearing examiner, [Personnel Commissioner] Anthony Theodore, was in the best position to reevaluate the facts and the record as challenged by the Department's initial petition for rehearing." App. Br. at 10. The Commission rejects this argument. Commissioner Theodore was serving as the sole sitting Commissioner, and not as the hearing examiner, at the time he signed the PC's February 21, 2003 ruling. The other two PC Commissioner positions were vacant at the time, as reflected on page 6 of that ruling. No hearing examiner has been designated in this proceeding at any time and no evidentiary hearing has been held. In light of this fact, the Commission's perspective is no less advantageous than that of Commissioner Theodore for purposes of deciding the due process question.

The Merits of the Due Process Claim

We turn, then, to the question of whether Mr. K__ received appropriate due process before he was terminated. In this connection, the sole issue placed before the Commission on this petition for rehearing is whether the Respondent provided Mr. K__ with an adequate explanation of the evidence relating to the charges that he destroyed system files and rendered his computer inoperable. 6/ In CLEVELAND BD. OF EDUCATION V. LOUDERMILL, 470 U.S. 532, 545-46 (1985), the United States Supreme Court addressed the subject of pre-termination due process as follows:

6/ In the PC's October 24, 2002 ruling, the PC stated, "In the instant case, appellant does not dispute the adequacy of the process that occurred in connection with the first pre-termination meeting on April 12, 2002. With regard to the process related to the second pre-termination 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 the various subsequent filings in this matter, including the briefs submitted in connection with the instant petition for rehearing, neither party has challenged this articulation of the LOUDERMILL issue that is now before us. Moreover, Appellant is only entitled to procedural due process if he challenges the truthfulness of the facts upon which his discharge was based. CODD V. VELGER, 429 U.S. 624 (1977) (PER CURIAM); PAIGE V. CISNEROS, 91 F.3D 40 (7TH CIR. 1996). In light of Mr. K__'s admissions (for example in his August 2, 2002, brief) that he engaged in extensive internet use by downloading and storing personal materials on Respondent's computers, and that he deleted non-system files from the hard drive after his first pre-termination hearing on April 8, the Appellant cannot challenge the due process he was provided relative to those allegations of misconduct.

> [T]he pre-termination "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 pre-termination 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)

It is also well-settled that, since state law provides for a full post-termination administrative hearing, where the Respondent bears the burden of proving "just cause" and judicial review is available, the pre-termination hearing "need not definitely resolve the propriety of the discharge," but instead "should be an initial check against mistaken decisions." LOUDERMILL, 470 U.W. 532, 546. Upon remand of the Supreme Court's decision in LOUDERMILL, the Sixth Circuit Court of Appeals noted that "courts construing the Supreme Court's language in LOUDERMILL have required only the barest of a pre-termination procedure, especially when an elaborate post-termination procedure is in place." LOUDERMILL V. CLEVELAND BD. OF EDN. 844 F.2D 304, 312 (6TH CIR. 1988) (CITATIONS OMITTED). CF. MARDER V. BOARD OF REGENTS, NO. 03-2755 (WIS. CT. APP. 2004) (where a professor was entitled to an evidentiary determination of "just cause" prior to his discharge, the public employer was not entitled to rely upon any "new and material" information conveyed to the employer in an ex parte fashion after the close of the hearing).

Finally, in determining whether a particular pre-termination hearing satisfies the standard in LOUDERMILL, we must balance the competing interests that are at stake. Those interests are "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of erroneous termination." LOUDERMILL, 470 U.S. 532, 542-43.

Hence, prior to his termination, Mr. K__ was 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." The essence of that opportunity lies in the employee understanding the employer's accusations and the underlying evidence so that the employee can rebut them factually and/or offer mitigating circumstances or another defense. Thus LOUDERMILL's "explanation of the evidence" is an aid in responding to the accusations and its requisite scope and detail will vary according to how clear the accusation is on its face. LOUDERMILL does not require that the employer give Mr. K__ "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). Put simply, LOUDERMILL requires the employer to say what the employee did wrong and how the employer came to that conclusion.

The PC's October 24, 2002 ruling that Mr. K__ did not receive an adequate explanation of the evidence was largely premised upon the PC's view of the Respondent's burden of proof. According to the PC, the Respondent foundered in meeting its burden because the PC could not decide whether the information provided should have been sufficient for Mr. K__ (or a reasonable employee in his situation) to prepare and present a defense. For purposes of this decision, we accept the PC's view that the Respondent would bear the burden of establishing that due process was provided. 7/ It appears that the PC faulted the Respondent for not producing technical or even expert testimony about what a reasonable person would or would not understand if given the information Mr. K__ was given. We hesitate to impose such an evidentiary burden on a public employer regarding a question of pre-termination due process. This is especially so here, where the employee himself did not claim to have misunderstood the accusations. Instead, we believe that, except in extraordinarily arcane or specialized circumstances, the sufficiency of the information is a question of ultimate fact that should be decided one way or the other based upon what the record reveals about the accusation, the underlying evidence, and the surrounding circumstances.

7/ In federal cases, where a plaintiff alleges a deprivation of procedural due process, the burden of establishing the procedural deficiency would then lie with the plaintiff. BAKER V. MCCOLLAN, 443 U. S. 137, 140 (1979). However, in discipline cases brought pursuant to Sec. 230.44(1)(c), Stats., the State bears the burden of proof. REINKE V. PERSONNEL BOARD, 53 WIS. 2D 123, 137 (1971). The former Personnel Commission applied this burden not only to the core just cause issue in discipline cases, but also to the subsidiary issue of whether the employer provided pre-disciplinary process consistent with due process, although, prior to its October 2002 ruling in the instant case, the PC did not explain its rationale. SEE, BRENON V. UW, 96-0016-PC, 2/12/98, AFF'D ON OTHER GROUNDS, BOARD OF REGENTS V. PERSONNEL COMMISSION, 254 WIS.2D 248 (2002); REIMER V. DOC, 92-0781, 2/3/94; RENTMEESTER V. WIS. LOTTERY, 91-0243-PC, 5/27/94. Such an allocation appears consistent with the general principle that the moving party (i.e., here, the employer, who effectuated the discharge) 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. The allocation also seems practical, in that a respondent generally would have access to the relevant facts at least as much as an appellant.

As set forth in detail below, the record contains considerable and largely undisputed evidence about what information Mr. K__ was given and not given. In this case, the accusations and their underlying evidence about Mr. K__'s computer operability were not extraordinarily arcane or specialized, but well within the comprehension of a typical computer end-user -- even more so someone who is in charge of the processing section for an accounting system used for a budget of approximately $4 billion. Accordingly, assuming arguendo that Respondent had the burden of proof on the due process issue, and mindful that Mr. K__ is entitled to comprehensive post-termination process, we believe the Respondent has met that burden and that the record is sufficient to determine that Mr. K__ was or should have been able to understand and respond to the charges from the information he was provided.

We turn our attention, then, to the "explanation of the evidence" that Respondent provided at Mr. K__'s second pre-termination hearing on April 19, 2002. As noted, there is little dispute concerning the facts about what transpired at and prior to that meeting. The Respondent's April 18, 2002, letter provided Mr. K__ the following information about the charges that would be discussed at the meeting the following day:

> 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.

At the April 19, 2002, meeting, Respondent supplied some additional information about the evidence relied upon. In her testimony at the unemployment compensation hearing, Cheryl Thompson described that information as follows:

> 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. (Tr. 110-111)

Hence, as a result of the written notice prior to the pre-termination meeting and the discussion at the pre-termination meeting, Mr. K__possessed the following information:

- He was accused of engaging in an intentional and successful effort to make both computers at his workstation inoperable.
- BIS had conducted an investigation to determine what had happened to cause the inoperability.
- The inoperability occurred on April 8, 2002, after the initial pre-termination meeting held with the Appellant that began at 3:00.
- The inoperability allegedly resulted from actions taken by the Appellant to delete system files.
- Whatever Appellant had done to the computers had caused the elimination of the standard desktop configuration that is necessary to operate the machines normally.
- Appellant had also allegedly deleted other files.
- Appellant allegedly had downloaded and maintained an extremely high number of jpg files on the hard drive that were not work-related.
- The only method to restore the computers to operating condition would be to re-image them. This would destroy all current data on the computers including all work-related information.

On the other hand, there was additional information that the Respondent did not share with Mr. K__, most of which concerned the details of the Respondent's investigation. As far as the record reveals, 8/ Respondent did not inform Mr. K__ that his computers had been left in his locked office, without being turned on, from April 8 (when K__ was suspended) until April 16; that Respondent's agents tried to "boot up" the computer on April 16 and were unable to do so; and that those agents then took K__'s computers to one of the Respondent's computer specialists, who discovered, by using emergency diskettes to boot up the operating system, that the computers were missing critical system files which were unlikely to be missing absent deliberate deletion. The only substantive detail that Respondent appears to have withheld is the precise technical identity of files missing from both computers, i.e., a main dynamic link library (DLL) file, specifically MFC42.DLL, for Windows NT, that tells the machine how to boot up the NT operating system.

8/ As the PC noted in its October 24, 2002 decision, the record was developed for purposes of the unemployment compensation hearing and subsequently relied upon for purposes of Mr. K__'s motion to reinstate. Thus, at the time the record was developed, the parties were not focused upon the due process issue or the particular issue of the adequacy of the employer's explanation of the evidence.

The question before us is whether Mr. K__ needed to know these details of the Respondent's investigatory techniques in order to understand and respond to the Respondent's charges as described in the April 18, 2002 notice. We note that this is not a situation where the Respondent failed to disclose or specify its accusations. Mr. K__ knew what he was accused of, specifically, for purposes of the instant discussion, that after his first pre-termination hearing he had deleted "system files" making it impossible for the computers to be operated by others. Mr. K__ also knew how the Respondent had come to this conclusion: the Respondent's technology specialists had tried to operate his computers on April 16, had been unable to reach the desktop icons or any of the files on the hard drive, had investigated the inoperability, and had discovered that portions of the basic operating software (system files) had been deleted on April 8th, Mr. K__'s last day at work. This is not a situation where the Respondent merely stated, "Your computer doesn't work and it's your fault," or "someone saw you destroy your computer but we won't tell you who or when." Rather, the Respondent explained that the problem was in missing system files and not, for example, a cut cord, damaged housing, or a missing hard drive. In this context, we cannot conclude that the Respondent needed to provide Mr. K__ the technical designation for the missing system files. Nor, assuming that Respondent had failed to mention during the pre-termination meeting that its agents had used emergency diskettes containing the missing DLL files in order to operate the computer, can we conclude that such information was material to Mr. K__'s ability to respond to the accusation. That information merely confirmed the accuracy of the Respondent's diagnosis of missing system files.

While not necessarily dispositive, it is relevant that Mr. K__ has not claimed to have misunderstood the accusations or what they were based upon. Nor do the circumstances suggest that he misunderstood. On the contrary, Mr. K__ was able to respond by (1) admitting he had destroyed non-system files that were an embarrassment, (2) explaining that he had seen a blank screen on his primary computer on March 29th, (3) explaining he had developed a work-around method in order to use his primary computer, (4) noting that he had told a co-worker of this work-around and the underlying problem, (5) stating that the primary computer had been working on April 8th when he logged off of it, (6) stating that his secondary computer had not been working for more than a year and that he had reported this condition, and (7) noting that there had been a virus alert during the week of March 25th that could have accounted for the problem with the primary computer. In short, Mr. K__ denied that he rendered his computers inoperable by deleting system files and offered some explanations for what the Respondent had observed when it tried to operate them. In the absence of any suggestions from Mr. K__, it is difficult to imagine how these responses would have differed if he had been told exactly how the Respondent had conducted its investigation or the precise technical name for missing system files.

Indeed, Mr. K__'s principal contention seems to be that the Respondent permanently altered the computers by using repair disks to reinstall file MFC42.DLL during its investigation, so that Mr. K__ will be unable to vindicate himself without subjecting the computers to forensic examination. This argument lacks factual support in the record, as the Respondent points out and the PC also noted in its earlier decisions. On this record, we have

no reason to conclude that anything the Respondent had done during the investigation, such as using emergency diskettes to boot up the machine, had permanently altered the computers' condition. While the Respondent's technology specialists stated that "re-imaging" would be necessary in order to put the machines back into service, which would destroy all stored data, there is nothing in the record to indicate that the Respondent had actually taken that step. The Commission also finds no basis for Mr. K__'s suggestion that he should be entitled, prior to his termination, to have both of his computers made available to him in order to have them forensically examined and that the failure to do so constituted a pre-termination due process violation.

The PC's conclusion in its October 24, 2002 ruling, that Mr. K__ did not understand the charges, was partly based upon one of Mr. K__'s explanations for why his primary computer had a blank screen. Mr. K__ stated that when he found his screen blank he used the Windows Task Manager (simultaneously pressing the Ctrl-Alt-Delete keys) rather than the desktop icons to reach his programs. The PC concluded that this "work around" explanation does not adequately address the charges and, solely for purposes of the present decision, we agree. However, we see no reason to conclude that an employee's offering an inadequate excuse ipso facto means the employer's accusation was unclear. After all, Mr. K__ used computers routinely in his daily work and also offered at least one other alternative explanation, i.e., that recently installed virus software updates had disrupted the computer's operating system. Accordingly, not only did Mr. K__ not claim that he misunderstood the accusation and the evidence, we see nothing in the surrounding circumstances that would suggest such a misunderstanding.

Accordingly, having concluded that the Respondent supplied sufficient pre-termination explanation of the evidence in this situation, we vacate the PC's October 24, 2002 ruling on that issue, we adopt the PC's October 24, 2002 ruling in all other respects, we deny Mr. K__'s Motion to Reinstate and we order the matter consolidated with Mr. K__'s appeal regarding his second termination for further proceedings as may be appropriate.

Dated at Madison, Wisconsin, this 11th day of October, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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