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

Appearances:

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

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

ORDER DENYING MOTION FOR COSTS AND FINAL ORDER

This matter is before the Commission on the Appellant's request for fees and costs under the Equal Access to Justice Act (EAJA), §227.485, Stats. The underlying appeal arises from Respondent's decision to discharge the Appellant from his position as a Financial Management Supervisor, effective April 23, 2002. The appeal was filed with the Personnel Commission (PC), which exercised jurisdiction under §230.44(1)(c), Stats.(2001-02). The PC was abolished, effective July 26, 2003, pursuant to 2003 Wis. Act 33, and the authority over this matter was transferred to the Wisconsin Employment Relations Commission. In light of the unusual procedural history of this appeal, the Commission finds it helpful to set forth that history in some detail.

In August of 2002, the Appellant filed a motion to reinstate, alleging Respondent had failed to provide due process with regard to the pre-termination process. In support of his motion to reinstate, 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, with regard to 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 the Appellant's motion to reinstate.

On October 24, 2002, the PC found 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, 105 S.CT. 1487, 84 L.ED.2D 494 (1985)" because the Respondent had failed to show that an employee similarly situated to the Appellant had enough of an 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 issued an Interim Order rejecting the discharge and remanding the matter to Respondent. The cover letter to the Interim Order established a schedule for the Appellant to seek costs under the EAJA.

Appellant filed a Motion for Costs under the EAJA and the PC denied the motion in a ruling dated January 6, 2003. In that ruling, the PC concluded that the Respondent had shown it was "substantially justified" in terms of its argument that it had provided the Appellant with enough evidence during the pre-termination process to pass muster under LOUDERMILL. The PC then went on to reject the Appellant's contention that the Respondent also had to show that it was "substantially justified" in terms of the substantive decision Respondent reached to discharge the Appellant. The PC reached this conclusion because the substantive issue of just cause was not reviewed as part of Appellant's motion for reinstatement. 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 filed petitions for rehearing. In a ruling dated February 21, 2003, the PC denied Respondent's petition and denied the Appellant's petition in part but also granted it in part. This had the consequence of vacating the January 6th ruling. The portion of the Appellant's petition that was granted was premised on the conclusion that it was erroneous not to consider the "just cause" or substantive discharge decision in the context of Appellant's EAJA request. The February 21st order reopened the matter "for further consideration of the issue of whether costs should be awarded to the Appellant pursuant to s. 227.485, Stats., with regard to [Respondent's] substantive decision to terminate Appellant's employment."

Subsequently, the Appellant filed a request for clarification and Respondent filed a request to reopen the record so it could provide evidence in an effort to demonstrate that its discharge decision was substantially justified. 1/ In a ruling issued on June 3, 2003, the PC denied both requests and established a briefing schedule on the question of whether the Respondent was substantially justified in its substantive decision to discharge the Appellant. That is the issue now before the Commission.

1/ Appellant and Respondent also filed separate actions in Dane County Circuit Court arising from the PC's decisions/rulings. The circuit court actions were consolidated and then dismissed because there was no final order to review. K_ V. DUBÉ ET AL., 03CV000668, 03CV000884, DANE COUNTY CIRCUIT COURT, 11/7/03.

Having reviewed the record, being fully advised in the premises and for the sole purpose of ruling on the Appellant's request for fees and costs in this matter, the Commission makes and issues the following

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). Appellant had permanent status in class. Appellant's immediate supervisor was Cheryl Thompson, Deputy Director of BFS.

2. Appellant was the chief of the Processing Section of BFS. The section is responsible for the operation of Respondent's accounting system which is named the Fiscal Management System, and for the Community Aids Reporting System, which is used to pay other units of government and non-profits. Respondent's annual budget is approximately $4 billion and all of Respondent's payments are processed as part of the Fiscal Management System. The majority of Appellant's responsibilities related to staff supervision and maintenance and management of information on the computer system.

3. Appellant had two computers in his work area.

4. Respondent had given performance awards to Appellant during the course of his employment. Appellant had not received any formal discipline from the Respondent prior to the discharge decision that is the subject of this appeal.

5. Respondent's Internet Acceptable Use Policy requires supervisors to take appropriate disciplinary action regarding any employee who violates the policy. The policy allows certain "occasional use" of the internet but, for the most part, the occasional use is to occur during mealtime or other breaks. The policy prohibits viewing or distributing sexually explicit material, excessive personal use of internet access, disabling or overloading computer systems and violating the public trust. The Appellant acknowledged receipt of the policy prior to the events in question. Respondent also has a policy on Appropriate Use of State Information System Resources that prohibits storing information on the computer that is not related to state business.

6. Early in 2002, Respondent's Bureau of Information Systems (BIS) performed background work to determine how much bandwidth the Division required. The Bureau used a software program called Cyfin Reporter that generated a list or report showing employee visits on the internet. The software placed the visits into various categories and reflected internet use by individual employees. One category captured by the software was pornography.

7. The Cyfin software tabulated Appellant's internet use for a one-month period (March of 2002) by listing each visit separately. The listing showed the site visited and the time of the visit, to the second. The printed version of the report on Appellant's use took up 444 pages and reflected more than 28,000 internet visits, including 8,000 to sites that were placed into the pornography category by the software. The report also showed 131,000 multi-media hits, including pop-ups, banners and advertisements, out of a total of 172,000 hits by Appellant's computer during March.

8. BIS contacted Respondent's Bureau of Personnel and Employment Relations and the matter of Appellant's use of the internet was assigned to Robbi Murphy, an employment relations program coordinator with Respondent. Ms. Murphy has substantial experience performing disciplinary investigations involving alleged inappropriate computer use.

9. Ms. Murphy analyzed the Cyfin report and concluded that on some days during March, Appellant was accessing the internet for 7 or 8 hours. The lowest use she determined was 1.5 hours and she estimated the average as 50% of Appellant's work day. Ms. Murphy actually visited some of the listed sites and printed images of those sites.

10. Ms. Thompson, Appellant's supervisor, was in the Appellant's office on April 8th sometime before 3:00 p.m. She observed the screen of Appellant's primary computer and could tell the computer was operational. Ms. Thompson understood that it was Appellant's standard procedure to notify her if one of his computers was not working and to get it fixed promptly.

11. Appellant was directed to attend a meeting with Ms. Thompson and another supervisor at 3:00 on April 8th. At the meeting, Appellant was handed a letter dated April 8, 2002, notifying him of a pre-termination meeting relating 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." Respondent informed Appellant he was being placed on administrative leave with pay. Respondent also provided him with a BIS computer-generated report of his internet activity.

12. Appellant asked to return to his office after the meeting so he could send an e-mail message to staff. Respondent agreed. Appellant went to his office and sent the e-mail but he also deleted files from his computer.

13. After Appellant left his office on April 8th, Appellant's two computers were not turned on until April 16th. Ms. Thompson kept Appellant's office locked while he was on administrative leave, except when she or the cleaning people were there.

14. Respondent conducted the first pre-termination meeting on April 12, 2002. Appellant and his attorney attended, as well as Ms. Thompson, 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 by 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." Respondent's representatives indicated they were considering discipline up to discharge.

15. After the April 12th meeting, Ms. Murphy met with Division Administrator Susan Reinardy. Ms. Reinardy asked for confirmation that there were no other areas of Appellant's computer usage that were problematic, such as e-mail or files stored on the hard drive or items listed in his directories.

16. As late as April 16th, Respondent was exploring the possibility of demoting Appellant from his class level but allowing him to retain some of his duties.

17. On April 16th, Ms. Thompson, Mr. Kreklow, and Chris Connell (the Division's IT Destop support person) attempted to boot up the Appellant's computer but the screen remained black.

18. Late in the morning of April 16th, both of Appellant's computers were moved from Appellant's office to the office of Ellen Schuster of BIS. Ms. Schuster is a computer trouble-shooter with 28 years of experience in the field of information systems. Her duties included identifying problems or issues with computer hardware and software and solving those problems.

19. Ms. Schuster began to examine Appellant computers on April 16, 2002. Ms. Schuster 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. . . . [I]t 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.

20. After Ms. Schuster made this determination, she copied a DLL file from a diskette to the appropriate place on the computer. She was then able to get into Windows. She found that there were other system files missing. She also found a number of image files, which appeared to be family-related rather than related to Appellant's work.

21. Ms. Schuster repeated 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, even after inserting a copy of the DLL file, she was unable to get the computer to boot up Windows.

22. Ms. Schuster had never seen system files "disappear" and noted that this had happened to both of Appellant's computers. Once she was able to reboot the primary computer, she performed a "find" for the missing system file and only found the copy that she had installed.

23. At 5:37 p.m. on April 16th, Ms. Stonecipher, Chief of the BIS Technology Services Section sent an email to Cheryl Thompson summarizing the results of her section's examination of Appellant's computers:

> This morning, two PC's from your area were reported to be unusable. They didn't boot up and no functions were operable.
>
> The PC labeled as the primary workstation (ID 00059581) took approximately two hours to bring back into partial operation. It was necessary to use emergency repair disks. Investigation showed that some system files were missing.
>
> The PC labeled as the secondary workstation (ID 00019856) remains inoperable. We spent a couple of hours working on that without success. In our meeting today, you indicated that we should resort to a higher risk intervention. Work continues on this PC and I will contact you and/or BPER with the results.
>
> In each case, smatterings of system files were gone. Both PC's were missing a file called "MFC42.DLL." It would be unusual for two PC's to present with that file missing at the same time.
>
> The bottom line is that neither PC is in operating condition, neither had the DHFS standard desktop configuration and, in order to achieve normal operation, both PC's will have to be reimaged. The process of reimaging will destroy all current data on the respective PC.
>
> Until I receive further direction, the PC's will be securely stored in BIS.
>
> A technical staff person and I met with you to explain the details for approximately two additional hours today.

24. Ms. Schuster took screen shots showing the structure of many of the directories on the primary computer. There were numerous image or picture files on the directories as well as files that appeared to be unrelated to work. Ms. Schuster was unable to open those files.

25. Computer profiles show shortcuts to recently viewed items on the hard drive or on the network drive. The profiles on Appellant's computer referenced target files within a folder on the C drive that was no longer there. There were also entries showing that a number of these files had been accessed during the afternoon of April 8th. There were also cookies that were stored indicating many of the websites that put cookies on Appellant's hard disk were sexually explicit or not related to work.

26. By letter dated April 18, 2002, Respondent advised Appellant that a second pre-termination meeting had been scheduled for the following day and that it related 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. (Exh. 10)

27. The April 19th meeting was attended by Appellant, his attorney, Cheryl Thompson and Richard Kreklow. The participants discussed the allegations contained in the April 18th pre-termination letter. Appellant admitted that on April 8th, after the 3:00 meeting, he had deleted about 40 files because they would be an "embarrassment." However, he stated they were not system files. Appellant also produced a hand-written document (Exhibit 11) he had prepared for the April 19th meeting. In that document, Appellant stated 1) the screen on his primary computer was blank when he logged in on March 29th, 2) he had developed a work-around to access necessary applications, 3) he had informed a member of his staff

(Ms. Lavasseur) of the problem and the work-around, 4) his primary computer had been working when he logged off on April 8th, 5) his second computer had not been in an operating condition for over 1 year and he had reported this problem to Chris Connell of BIS and 6) there had been an alert for a computer virus during the week of March 25th. Appellant described the document at the UC hearing as follows:

> 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

28. Later on April 19th, after the conclusion of the pre-termination meeting, Ms. Schuster was shown Exhibit 11. She concluded that the work-around process described 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 inserting a copy of the DLL file.

29. Ms. Murphy, Janet Stonecipher and Ms. Schuster spent substantial time trying to determine if it was likely the cause of Appellant's computer problems was related to a virus alert. Respondent concluded that Appellant's explanation was not credible because computers known to have been affected by that virus protection software during the week prior to April 8th were affected in a manner that was different than exhibited by the Appellant's computers. Respondent concluded that Appellant's explanation was undermined by the fact that both Appellant's primary and secondary computers were missing the same system file.

30. Ms. Murphy also checked out Appellant's statement that his secondary computer had been inoperable for more than a year but found that it was up and running during that period.

31. Ms. Murphy had never been involved in an internet investigation that involved a comparable volume of internet activity and had never before seen the file destruction that was attributed to the Appellant.

32. Ms. Schuster was unaware of any reason other than intentional deletion that could account for the missing DLL files on the Appellant's computers. She was unaware of any other computer in the department in which that particular file had been "misplaced."

33. Ms. Murphy and Ms. Thompson believed that the Appellant had disabled both of his computers. Ms. Thompson concluded that Appellant's conduct justified discharge because it betrayed the level of trust Respondent placed in its supervisors to manage the work and the financial affairs of the department.

34. Ms. Murphy and Ms. Thompson met with Division Administrator Susan Reinardy and recommended that Appellant be discharged. Ms. Thompson would not have recommended discharge if the only charge against the Appellant was excessive/inappropriate use of the internet.

35. The appointing authority, Deputy Secretary Thomas E. Alt, acting solely on the recommendation of subordinate staff who were familiar with the investigation of Appellant's internet activities, effectuated Appellant's discharge effective April 23, 2002, by letter of the same date. The 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.

36. During the course of the UC hearing held on June 26, 2002, Appellant acknowledged that the files he deleted on April 8th were sexually explicit and were on the hard drive of the computer. He continued to deny that he had deleted any system files. Appellant also said that he would have accepted discipline short of discharge.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Appellant is a prevailing party in this matter.

2. Appellant is entitled to costs incurred in connection with this case unless Respondent was substantially justified in taking its position or unless special circumstances exist that would make the award unjust.

3. It has previously been determined the Respondent was substantially justified in its position that the discharge of Appellant complied with due process.

4. Respondent has established that it was substantially justified in its position of discharging the Appellant.

5. Appellant is not entitled to costs under §227.485, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

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.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of March, 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

Department of Health and Family Services (K)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In an interim ruling on fees and costs in BRENON V. UW, 96-0016-PC, 6/23/98, affirmed, BOARD OF REGENTS V. STATE PERSONNEL COMM., 2002 WI 79, 254 WIS. 2D 148, 646 N.W.2D 759, the PC outlined the standards applicable to an EAJA award for proceedings before it:

> As the prevailing party, appellant argues that he is entitled to fees and costs pursuant to §§227.485, 814.25, 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:
>
> > 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.

As explained above, there has already been a determination that the Respondent was "substantially justified" in taking the position that it had provided due process to the Appellant, even though the PC determined in the October 24, 2002 ruling that Respondent had failed to provide Appellant with an adequate explanation of the evidence on which it was relying. In its ruling issued on January 6, 2003, the PC addressed the topic of whether there was "a reasonable connection between the facts alleged and the legal theory advanced" with respect to the due process question and characterized Respondent's position as follows:

> The respondent's notice to appellant of the second pretermination meeting provided some information about the tentative conclusions on which respondent relied, and respondent provided more information at the April 19, 2002, pre-termination hearing. 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. . . .
>
> 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 CLEVELAND BD. OF EDUCATION V. LOUDERMILL, 470 U.S. 532, 105 S.CT. 1487, 84 L.ED.2D 494 (1985), 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 (footnotes omitted)

The only question remaining 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.

Appellant cites STERN V. DHFS, 212 WIS. 2D 3893, 569 N.W.2D 79 (CT. APP. 1997) for the proposition that "a failure to provide requisite due process, either for [Medical Assistance] benefits or other constitutionally protected property rights like tenured employment is fatal to a claim that the respondent's actions were substantially justified." This argument obviously runs to the question of whether Respondent was substantially justified in terms of the adequacy of the pre-termination process. That question was fully addressed in the January 6, 2003, ruling, and the Commission is unaware of any reason to disturb the analysis set forth in that ruling. In any event, the Commission finds that the Appellant's reliance on STERN is misplaced.

The key facts in STERN are as follows:

> [Eugene Stern] received [medical assistant benefits (MA)] from November 10, 1989, through December 31, 1992, and from February 12, 1993, when he reestablished eligibility. On November 13, 1992, Stern received a written notice terminating his MA effective December 1, 1992, in anticipation of a December 1 closing on the sale of a vacant parcel of land Stern owned with his

> wife, Emma. However, the closing did not occur until December 21. On December 29, [Stern's guardian] was orally advised that Stern's MA would continue through December 31. Stern's MA was terminated on December 3, 1992.
>
> On February 8, 1993, Stern was provided written notice that his "medical assistance benefits will be stopped effective 12/31/92." On February 12, 1993, Stern reestablished his eligibility for MA. The next day Stern requested a fair hearing on the February 8 termination notice. 212 Wis.2d 393, 395-96 (footnote omitted)

An administrative rule provision specifically required medical assistance to continue until the end of the calendar month in which eligibility ended. Despite this rule, Mr. Stern was initially notified that his benefits would end on the beginning of the month, the same day on which his eligibility ended. DHFS later tried to make amends by giving Mr. Stern's guardian *oral* notice of the extension of the termination date to December 31. This notice was contrary to the separate requirement in the administrative code that DHFS provide the benefit recipient timely *written* notice at least 10 calendar days *before* the effective date of its intention to terminate MA benefits. The agency's final notification effort was in writing, but it did not reach Mr. Stern until more than a month after the purported effective date. The Court of Appeals held that DHFS's position that recipient's benefits were properly terminated on December 31st was not substantially justified and that the benefit recipient was entitled to reasonable attorney's fees under the EAJA. The court held that DHFS's position of relying on the oral notice of the December 31st date was "untenable" because it clearly failed to comply with the written notice requirement present in both federal and state MA rules that comported with minimal due process. The court explained how each notice relied on by the agency was clearly contrary to rule.

The facts in the present case are hardly comparable to those in STERN where the agency had violated the unequivocal language of separate administrative rules that had been adopted by the same agency. While DHFS had explicit written rules it failed to follow in STERN, there were no such rules in the present matter. Respondent simply applied a different interpretation of the *degree* of explanation it was required to provide to the Appellant in terms of its pre-termination evidence.

The Commission proceeds to address the three tiers of SHEELY V. DHSS, 150 WIS.2D, 320, 442 N.W.2D 1 (1989), on the substantive issue of just cause, based upon the record the PC relied upon when it considered Appellant's motion to reinstate.

The initial question is whether Respondent demonstrated a reasonable basis in truth for the facts alleged. Respondent relied upon a software program to analyze current internet usage in order to determine bandwidth it would likely need in the future. The program generated a report indicating the Appellant had engaged in massive misuse of the internet by making a huge number of visits to sites unrelated to work, including pornographic sites.

Respondent then relied upon qualified staff members to analyze the information further. The analysis indicated the improper internet usage would have occupied a substantial portion of Appellant's work day. During the April 12th meeting, Appellant admitted to the activity. Respondent had no reason to doubt the accuracy of the computer-generated printout showing the Appellant had visited the internet nearly 30,000 times during a one-month period, including approximately 8,000 visits to pornographic sites.

Before imposing discipline for this conduct, Respondent sought to investigate additional aspects of the Appellant's use of his employer's computer equipment. This investigation, conducted by a very experienced member of Respondent's IT staff, showed there were fundamental problems with and damage to both of the Appellant's computers. The investigator reasonably concluded these problems were attributable to actions taken by Appellant to hide the extent he used the equipment for purposes unrelated to his work. Appellant subsequently admitted that in order to avoid embarrassment, he had deleted a number of files from his computer equipment after he had learned that Respondent was aware of his inappropriate internet usage. However, he denied having disabled the computers and he advanced alternative explanations for the condition of the equipment and software. Respondent's IT staff explored Appellant's theories and rejected them after reasonably concluding they were inconsistent with either observations by witnesses or with the staff's understanding of the equipment and software problems. Respondent reasonably concluded that the computers had been intentionally disabled by the Appellant. This was the information that Respondent relied upon before it imposed any discipline.

In his brief, Appellant notes that the figures calculated by Ms. Murphy would mean he accessed a website every 10 seconds during the estimated 76 hours of time he spent on the internet during March. Appellant contends this conclusion is "questionable" but there is nothing in the record to support his contention. Even though the figure of 28,744 website visits during March is a remarkable number, it is not an inherently impossible number of visits. Appellant also argues that the Cyfin records clearly contain records of many pop-ups and banners which would be inconsistent with Ms. Murphy's testimony. However, Ms. Murphy testified that the 440 pages of Cyfin records reflected total hits, i.e. both visits that the employee chose to make *and* the unsolicited hits such as pop-ups, banners and advertisements. T. 29-30 These unsolicited hits could account for the fact that the Cyfin records periodically showed multiple hits during the same second.

Appellant seems to argue that Respondent had to have immutable proof that he deleted the system files from his computers. That is not the test to be applied in either a just cause analysis or in an analysis to determine whether a prevailing party is entitled to costs under the EAJA. The Respondent did not have to "foreclose [the] possibility" that Appellant's possible explanations caused the malfunctions. Appellant's Brief, p. 16. In an appeal from a decision to impose discipline, it is Respondent's burden to merely show "by a preponderance of credible evidence that there was just cause for the termination of appellant," which is a standard equated to "a reasonable certainty by the greater weight or clear preponderance of the evidence." HOGOBOOM V. WIS. PERS. COMM., DANE COUNTY CIRCUIT COURT, 81-CV-5669, 4/23/84, AFF'D BY COURT OF APPEALS DISTRICT IV, 84-1726, 12/11/85. As already noted, the Commission is applying the lesser "reasonable basis" standard in ruling on Appellant's request for fees and costs.

The second question identified in SHEELY V. DHSS is whether the Respondent has demonstrated a reasonable basis in law for the theory propounded. There were never any disputes in this matter regarding the appropriate legal standard for imposing discipline and the letter of termination dated April 23, 2002, specifically referenced the "just cause" standard that is found in §230.34(1)(a), Stats.

The final question established in SHEELY is whether Respondent demonstrated a reasonable connection between the facts alleged and the legal theory advanced.

The just cause analysis in an appeal of a discharge decision consists of determining 1) whether the greater weight of credible evidence shows that Appellant committed the conduct alleged in the letter of discharge; 2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline; and, 3) whether the imposed level of discipline was excessive. MITCHELL V. DNR, 83-0228-PC, 8/30/84. In considering the severity of the discipline imposed, one must consider, at a minimum, the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to have a tendency to impair the employer's operation, and the employee's prior work record with Respondent. BARDEN V. UW, 82-237-PC, 6/9/83

Here, Respondent concluded that Appellant had engaged in a remarkably extensive pattern of surfing the internet during work time and that he had sabotaged his employer's computer equipment in order to eliminate evidence of many inappropriate computer files that were unrelated to his work yet were stored on his computers. Respondent also concluded it would have to re-image Appellant's two computers in order to be able to use them and that doing so would destroy the data and files on the computers.

After the initial pre-termination meeting but before discovering evidence of additional misconduct, Respondent explored the possibility of demoting the Appellant. Respondent did not consider that option any further once there was a determination the Appellant had deleted system and other files in an effort to cover-up his computer activities. Based on the record in this matter, Respondent reasonably concluded that Appellant's skills were tied to his ability to use a computer but that, at the same time, he could not be trusted around computers. These conclusions in turn allowed the Respondent to reasonably conclude that no discipline other than discharge would be appropriate even after considering Appellant's otherwise excellent work record.

Appellant worked in a high level position with significant supervisory responsibilities. His program responsibilities were directly related to the Respondent's computer system and also related to the agency's entire annual budget of $4 billion. Based on the record in this matter, Respondent reasonably concluded that Appellant's conduct had betrayed the trust required for his position and that discharge was the appropriate level of discipline.

Given all of these circumstances, Respondent has shown it was acting reasonably when it concluded there was just cause for discharging the Appellant from his position as Financial Management Supervisor.

Dated at Madison, Wisconsin, this 30th day of March, 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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