STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEPHEN W. GROHMANN, Appellant,

vs.

Executive Director, OFFICE OF JUSTICE ASSISTANCE, Respondent.

Case 1
No. 62930
PA(adv)-18

(Previously Case No. 02-0053-PC)

Decision No. 31021

Appearances:

Stephen W. Grohmann, 1750 Skidmore Road, Stoughton, Wisconsin 53589, appearing on his own behalf.

Mark J. Saunders, Deputy Legal Counsel, Department of Administration, P.O. Box 7864, Madison, Wisconsin 53707-7864, appearing on behalf of the Office of Justice Assistance.

INTERIM DECISION AND ORDER

Stephen W. Grohmann appeals from a demotion and a 10-day suspension imposed in a letter of discipline dated October 3, 2002. The appeal was filed with the Personnel Commission on October 11, 2002. While the case was pending, the Personnel Commission was abolished pursuant to 2003 Wis. Act 33, effective July 26, 2003, and the authority for processing this matter was transferred to the Wisconsin Employment Relations Commission. The parties agreed to the following statement of issue for hearing:

> Whether there was just cause for Respondent's decision to suspend the Appellant for 10 days and demote him as set forth in the letter of discipline dated October 3, 2002.

By letter dated November 4, 2003, the Wisconsin Employment Relations Commission designated Dennis P. McGilligan as Hearing Examiner. Examiner McGilligan subsequently convened an administrative hearing that was held over the course of three days and the parties completed their post-hearing briefing schedule on April 9, 2004. The examiner issued a proposed decision on August 5, 2004, that would have upheld the discipline imposed. Appellant filed written objections and Respondent filed its response on September 20, 2004.

The Commission has consulted with the examiner. After carefully considering the record, the proposed decision and the objections, the Commission rejects the proposed decision, rejects the Respondent's action and remands the matter to the Respondent. The

Commission has concluded that (1) regarding some of the alleged conduct, the Respondent has failed to sustain its burden of showing that Mr. Grohmann engaged in the alleged conduct, and (2) regarding such conduct as has been established, the Respondent has failed to meet its burden of demonstrating that the conduct amounted to misconduct under the circumstances presented in the record. The Commission's analysis is set forth in its Memorandum, below.

The Commission has substantially revised the Findings set forth in the proposed decision by reorganizing them, correcting those that were not supported by the record, supplementing them with additional relevant information, and deleting language, often relating to Respondent's investigatory procedures, that was unnecessary to the resolution of the matter. 1/

1/ Specifically, we have omitted as unnecessary the content of Findings 7, 8, 10, and 11 in the proposed decision, which relate to the Respondent's reaction to and investigation of the allegations that became the subject of the instant discipline. We have also omitted the content of Finding 12 of the proposed decision, which was in the nature of an ultimate factual conclusion about Mr. Grohmann's misconduct. We have rejected the conclusion set forth in that finding. In addition, we believe it more appropriate to state our conclusions on the just cause issue as conclusions of law and we discuss them in detail in the accompanying Memorandum.

The Commission makes the following

FINDINGS OF FACT 2/

1. Stephen W. Grohmann has been employed by Respondent, the Office of Justice Assistance (OJA), and its predecessor agency, the Wisconsin Council on Criminal Justice, for approximately 27 years. Prior to the action that is the subject of this appeal, neither the Respondent nor its predecessor agency had disciplined Grohmann.

2/ The Commission has chosen not to use the complete names of various women who are mentioned in this decision.

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2. OJA has various responsibilities relating to criminal and juvenile justice within the State. It is attached to the Department of Administration (DOA) pursuant to Sec. 15.03, Stats., and, as a consequence, OJA's budgeting, program coordination and related management functions are performed under the direction and supervision of the Secretary of DOA.

3. Mr. Grohmann is tall and lanky in physical appearance, speaks and moves quietly, and has a tendency to approach people in a manner that does not announce his presence. It was not unusual for Mr. Grohmann to sit in meetings, including one-on-one meetings with female OJA employees, with his legs spread and his hands in his lap. Several

female employees perceived Mr. Grohmann as habitually intruding into their "personal space," by passing in the hallways or standing too closely, or by failing to step aside without being asked to do so. Other employees, both male and female, including some female employees who worked with Mr. Grohmann for many years, did not have such perceptions of him. The hallways in OJA's offices are approximately four feet wide. Except as specifically found in Findings 7, 8 and 11, below, no one at OJA ever complained to Grohmann or otherwise informed him of discomfort with the way in which he approached employees or his manner of sitting, standing, passing in hallways, or failing to step aside.

4. During the relevant time period, Jerry Baumbach was the Executive Director of OJA. During the early portion of the same period, Ms. Kevyn Radcliffe was OJA's Deputy Director. At all relevant times, the majority of OJA's approximately 20 employees have been female.

5. At the time of the disciplinary action that is the subject of this appeal, Mr. Grohmann was employed as a Research Analyst – Advanced Supervisor and had supervisory responsibilities. He closely managed the programs assigned to him and, at times relevant to this proceeding, was viewed by management and many employees as the sole effective program manager in the agency. 3/ During the relevant time period, including the period that followed the incidents referred to in Findings 7 and 8, below, Mr. Grohmann was assigned responsibilities to manage several, if not all, of the different programs within OJA irrespective of the gender of the staff assigned to the program. Mr. Grohmann has been commended on more than one occasion in the past for his work performance.

3/ The dissent states that Grohmann has admitted that his management style is intimidating. This substantially misconstrues Grohmann's comments as partially quoted in the dissenting opinion. At most those comments indicate Grohmann's attempt to understand why some employees claim to have felt intimidated. It is clear from the context that Grohmann attributed that feeling of intimidation to a resentment of his relatively strict management style. It is clear on this record that not only Grohmann but the agency's management team in general viewed him as a successful manager precisely because he was relatively strict and therefore able to implement the agency's programs.

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6. Debra B began working at OJA in March 1997. Until she left OJA in January 2000, she was a Financial Specialist for OJA's Violence Against Women program. Her supervisor was Linda Miller and Mr. Grohmann was her program manager. Angie H began working at OJA in January 1999. Mr. Grohmann was not her supervisor.

7. During 1998 and 1999, Debra B complained to Mr. Grohmann and Ms. Miller that Mr. Grohmann seemed to be taking a social interest in her (Debra B) that she did not reciprocate. In or about July 1999, Debra B also complained to Ms. Miller and in writing to Ms. Radcliffe that Mr. Grohmann had once touched her shoulder and once her back in an unwelcome manner. She also complained that she perceived Mr. Grohmann as standing too

close when he spoke to her and passed her in the hallway. Ms. Miller met with Grohmann to convey Debra B's complaints. Also in July 1999, Angie H complained to Ms. Radcliffe that Mr. Grohmann had looked over her (Angie's) shoulder while she was using her computer and had commented to her about playing games on her computer. 4/

4/ Finding 6 in the proposed decision also described a complaint that Angie H raised with Ms. Radcliffe and with Mr. Baumbach regarding an incident in which Mr. Grohmann allegedly placed his hands on Angie H's shoulders. The dissent treats this incident as having been firmly established, but does not discuss the competing evidence. More importantly, the dissent implies that this incident was one of the grounds for discipline, whereas in fact there is no reference to it in the Summary of Findings or other documents included with the letter of discipline. As to the record, both Ms. H and Baumbach testified about such an incident and corresponding complaint to Baumbach, and Baumbach testified that he "counseled" Mr. Grohmann at that time. It appears that Baumbach and Angie H viewed this as a separate and distinct incident from the one that occasioned the July 1999 meeting referred to in Finding 8, below. Mr. Grohmann vehemently and consistently denied having ever touched Ms. H on the shoulders or elsewhere and also denied that anyone, including Mr. Baumbach, ever brought such an allegation to his (Grohmann's) attention prior to the 2002 investigation. Had this been one of the grounds for discipline, this record would not be sufficient for us to conclude that such a second incident occurred. However, even if it did occur, we credit Mr. Grohmann's testimony that he was not advised or counseled about any such occurrence. First, neither Ms. H nor Mr. Baumbach provided sufficient detail about the circumstances (even the approximate date) of this alleged occurrence or counseling. Indeed, Baumbach's recollection was that it occurred in 2000, by which time Ms. H had already left her employment at OJA. Baumbach was also vague regarding the content or circumstances of the alleged "counseling." Grohmann, on the other hand, had a very clear memory about the various incidents that had been brought to his attention, albeit his version of events differed from those of other witnesses. This was the only specific incident that allegedly had been brought to his attention that Mr. Grohmann denied in its entirety. While something (other than the July 1999 incident) may have caused Angie H to complain to Baumbach about Grohmann, and while Baumbach may have promised Angie H that he would talk to Grohmann about it, the record indicates that Baumbach did not in fact talk to Grohmann. Contrary to the dissent, we see no inherent reason to believe Baumbach, whose recollection was not as firm as that of Grohmann in general, who often revised his assertions on cross examination, who seemed focused on exonerating himself and the agency for what occurred, and who would be motivated to exaggerate the frequency and clarity of his "warning" Grohmann. Hence, especially given Respondent's burden of proof, we do not find the evidence sufficient to conclude that the Respondent provided a second "counseling" to Grohmann regarding Angie H, and we reject that portion of Finding 6 in the proposed decision.

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8. The complaints by Debra B and Angie H referred to in Finding 7, above, resulted in a meeting on July 22, 1999, among Mr. Grohmann, Ms. Radcliffe and Mr. Baumbach. At the conclusion of that meeting, Baumbach chose not to discipline Mr. Grohmann but warned him not to approach either Debra B or Angie H directly and instead

to go through their supervisors, and to be careful not to invade employees' personal space or act in a manner that might engender sexual harassment charges. Neither Baumbach nor Radcliffe directed Grohmann not to touch anyone or not to be alone with female employees. 5/

5/ Finding 5 of the proposed decision indicated that the warnings given during this meeting extended to touching employees. Ms. Radcliffe prepared contemporaneous notes of the meeting, which do not refer to any warning or discussion about touching. In any event, those notes comprise hearsay that should have been excluded from the record, since Ms. Radcliffe did not testify at the hearing. Hence, the basis for determining what was said during this meeting is limited to the testimony of Baumbach and Grohmann, neither of whom testified that the issue of touching was broached during this meeting.

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9. Angie H chose to end her employment with OJA in December 1999, partly because she disliked Grohmann's behavior around her and partly because of the tedious nature of her work. Debra B left employment at OJA in January 2000, for reasons unrelated to Grohmann.

10. After the July 1999 meeting, Debra B incorrectly believed that Mr. Grohmann had been instructed not to be alone with her. This misunderstanding led to a widely-circulated but inaccurate rumor in the work place throughout the relevant time period that Grohmann had been told never to be alone with any female OJA employee. There were also widespread rumors about inappropriate behaviors by Mr. Grohmann, including an unsupported rumor that female employees received promotions and transfers out of Grohmann's programs in order to cover up his sexually harassing conduct.

11. In August 2000, employee Lori P was sitting in an office also occupied by two other employees. Mr. Grohmann entered, engaged in a work-related discussion with the other two employees and then approached Lori, whose back was to him, placed his hand on her shoulder, and asked her to see him when she was finished. Lori informed Mr. Grohmann in an e-mail that she objected to his touching her, and he responded by thanking her for mentioning it and noting he was tapping her to get her attention and had not intended to make her uncomfortable. The record contains no evidence that Grohmann touched Lori P in any manner after said occurrence.

12. Aura B began working at OJA in November 2001. At one point during her employment, Grohmann mentioned to her that he had seen her running into the office that morning and it had looked as though she was barefoot. Aura responded that she had been wearing beige shoes and was running because she was late to work. Grohmann and Aura B also had several conversations which included reference to the house she was renting. Aura B had informed Grohmann of the house location (in connection with a credit check for a loan), and the house happened to be on the route Grohmann regularly traveled to work. During one

of those conversations, Grohmann mentioned that he had seen Aura B getting her mail one morning as he drove by on his way to work. Aura B had articulated to some of her co-workers that she was uncomfortable around Mr. Grohmann.

13. Several female OJA employees felt uncomfortable around Mr. Grohmann. Several other female employees, including some who worked with him for many years, did not observe anything offensive in Mr. Grohmann's behavior and were not uncomfortable around him. Neither Aura B nor others, except as specifically found in Findings 7, 8 and 11, above, advised Grohmann of their discomfort nor was Mr. Grohmann informed in any other way (i.e., by his superiors, other than as found in Findings 7, 8, and 11 that women perceived any of his behaviors to be offensive). Some of those employees passed their perceptions along to Mr. Baumbach, who occasionally stated to Mr. Grohmann in casual conversations words to the effect that he should "watch out" or "be careful," because "these women are out to get you." Mr. Baumbach did not inform Mr. Grohmann in these conversations that any of his behaviors were inappropriate. Mr. Grohmann interpreted Baumbach's remarks as indications that employees were unhappy with his (Grohmann's) relatively strict supervisory style. 6/

6/ A significant element of disagreement between the Commission's decision and the dissenting opinion lies in the degree to which Grohmann had been warned about various behaviors prior to April 2002, when the incidents that gave rise to this case occurred. As discussed in footnote 5, above, we do not find that Grohmann had been warned about "touching" during the July 1999 meeting. As discussed in footnote 4, above, we also conclude that Grohmann had not been "counseled" in connection with the alleged "shoulders" incident involving Angie H. Baumbach testified on direct examination to having warned Grohmann not to touch female employees, but this testimony was vague as to circumstances or context and, on cross-examination, Baumbach conceded that he had no specific memory regarding such a warning. Similarly, Baumbach testified on direct that he had warned Grohmann in connection with the Lori P incident described in Finding 11, but on cross examination acknowledged that he had no specific memory of actually speaking with Mr. Grohmann about that incident. Grohmann emphatically denied such a discussion occurred. For reasons explained in footnote 4, above, we credit Grohmann and find that Baumbach did not speak with Grohmann about "touching" at any time prior to the events giving rise to the instant case.

We also credit Grohmann that he reasonably interpreted Baumbach's general cautionary comments as "supportive" and related to Grohmann's supervisory style rather than inappropriate conduct. We note that the record pervasively indicates that Mr. Grohmann was a relatively strict supervisor, one who "micromanaged" (Baumbach's term), whose style was "the opposite" of the other "lax" supervisor (according to former OJA supervisor Linda Miller), and who was hence unpopular with the rank and file employees. We note that Baumbach continually shifted "problem" programs to Grohmann for management and supervision even after 1999 and continuing up to the April 2002 events that gave rise to this case. This is an important point, as we see Baumbach's expansion of Grohmann's supervisory responsibilities over the largely female OJA staff as significantly undermining the credibility of Baumbach's testimiony that he had serious concerns about Grohmann's conduct toward subordinates and that he had given Grohmann clear and effective directives in that regard. We further note that Baumbach met or spoke with Grohmann almost daily about OJA matters and had plenty of opportunities to address sexual harassment concerns specifically and directly, if Baumbach had been seriously concerned about them. Yet Baumbach did not do so. Finally, as to the additional warnings implied in Finding 7 of the proposed decision and relied upon by the dissent, we note that any such

discussions between Baumbach and Grohmann occurred either after the events giving rise to the instant case (ipso facto not "prior" warnings) or were unrelated in substance to the August 13th incident, which involved allegedly inappropriate comments. For all these reasons, we have concluded that the Respondent has demonstrated only one relevant warning to Grohmann, which occurred at the July 1999 meeting.

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14. April 25, 2002 was "Take Your Daughter to Work" day, and OJA employee Tami D brought her 14 year old daughter, Ashley, to the OJA offices that day. Shortly after they arrived, Tami D pointed out Mr. Grohmann to her daughter and passed along to her the inaccurate rumor that Grohmann was not allowed to be alone with female employees. Tami D told her daughter that if she was alone and Mr. Grohmann began speaking with her, she should politely excuse herself and find her mother. Ashley D was somewhat jittery after receiving this advice. Later that morning, Tami D was in the office copy room and Ashley D was standing in the doorway to the copy room, leaning against the doorjamb and talking with her mother. Mr. Grohmann approached in the hallway and, as he passed by, he positioned himself more closely than necessary and lightly brushed up against her clothing. Shortly thereafter, Tami D asked Ashley to retrieve a file. While Ashley was in her mother's office looking for the file, she observed Mr. Grohmann pass by the office twice and also stand in the hallway near Tami D's office for several minutes, glancing at some files he was holding. 7/ This was a hallway that Mr. Grohmann would have to pass through in order to go from his own office to any other location in the work place. Shortly thereafter, as Tami D and her daughter were leaving for lunch, Mr. Grohmann was standing in the hallway outside Tami D's office, looking through his files, close enough that Tami D had to say "excuse me" in order to pass by. As Ashley D exited the office, she hugged both the doorframe and the hallway wall until she had passed by Mr. Grohmann because she wanted to make sure that she did not touch him as she left. 8/

7/ Ashley D testified to the effect that Mr. Grohmann was pretending to look through his files while he lingered outside the office, implying that Mr. Grohmann was actually there to observe Ashley. Mr. Grohmann recalls nothing about this incident, including meeting Ashley that day. However, he stated in substance that he would never engage in such behavior, in part because he was much too busy to spend time aimlessly looking through files or hanging around hallways. We do not see a conflict in this testimony. While we do not doubt that Ashley truthfully testified about her perception of the situation, she was a young teenager at the time, one who had been made "jittery" by her mother's warnings about Grohmann, and in any event was not in a position to know whether or not Grohmann was merely pretending to look through files. By the same token, we credit Mr. Grohmann's testimony that he was unlikely to have engaged in such behavior, given the undisputed level of his responsibilities at the time.

8/ As explained in the Memorandum that follows this decision, the Commission has accepted Ashley's description of this event solely for the purpose of progressing to a subsequent stage of the just cause analysis.

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15. Tami D promptly complained to management about Mr. Grohmann's conduct on April 25, 2002. Susan Canty, the Respondent's Affirmative Action Officer, began an investigation and interviewed various OJA employees.

16. In mid-2002, Aura B gave two-week notice of her departure from OJA. Grohmann scheduled a meeting for August 13 to discuss transition matters, as another employee in addition to Aura B was leaving the agency. A day or two earlier, Grohmann had asked Aura if she would be willing to work part-time as an LTE after she left her classified full-time position. During that conversation, Aura B had indicated displeasure to Grohmann when he told her that her hourly pay as an LTE would be the same as her previous rate of pay instead of something more. During that same conversation, Aura B had also expressed displeasure that Grohmann had filled out her time sheet for an earlier week as "leave without pay" because she had not been in the office during that week. Even before the meeting began on August 13th, Aura appeared to be upset. During the meeting, another employee, Yvonne H, asked if it would be all right to call Aura B with questions after she left the agency. Aura signaled her agreement, but Grohmann, concerned that Aura would be offended by Yvonne's question based upon their earlier conversation, interjected a comment to the effect of, "Well, I know where you live. I could just stop by your house," or "I could just drop work off at your house." Aura B sat silently for a moment and then walked out of the meeting. The other employees who were present did not perceive Mr. Grohmann's remark as offensive or having sexual connotation, although one of them was not surprised that Aura would become upset, knowing Aura's feelings about Mr. Grohmann. After leaving the meeting, Aura became demonstrably upset in the outer office area, informed Mr. Baumbach about the incident, and then left the office to have lunch with some coworkers, as it was Aura B's last day at work. Baumbach discussed this incident with Grohmann and, in light of the ongoing investigation by Ms. Canty, placed him on administrative leave pending further investigation.

17. The letter of discipline that is the subject of this appeal is dated October 3, 2002. It includes the following language:

> This letter is to notify you that you are being suspended from work without pay for 10 working days beginning Monday, October 7, 2002. You must report back to work as scheduled on Monday, October 21, 2002. In addition, you are being involuntarily demoted to a Grants Specialist – Advanced position effective October 20, 2002. . . . You will also be required to attend sexual harassment awareness training.
>
> These actions are being taken because you violated the following Office of Justice Assistance work rules:
>
> 1) Insubordination, failure or refusal to follow the written or oral instructions of supervisory authority in carrying out

work assignments;

2) Discourtesy in dealing with office employees . . .; and

3) Sexually harassing a person of the opposite gender, including but not limited to . . . unwelcome sexual advances . . . or deliberate verbal . . . conduct of a sexual nature that substantially interferes with an employee's work performance or creates an intimidating, hostile or offensive work environment.

The details concerning these actions are outlined in the attached Summary of Findings and Investigatory Interview transcripts. You should be aware of the aforementioned work rules because you acknowledged receipt of them on October 20, 1995. Failure to comply with these work rules in the future may result in further disciplinary action up to and including termination of your employment.

18. Attached to the October 3, 2002 letter is a four-page document entitled "Summary of Findings," as well as a 15-page transcript of Grohmann's investigatory interview held on August 27, 2002, and a 21-page transcript of Grohmann's investigatory interview held on September 12, 2002. The Summary of Findings, which the Commission has organized by numbering in boldface the allegations that serve as the basis for discipline, contains the following language:

The purpose of the [August 27, 2002, investigatory] interview was to investigate Mr. Grohmann's alleged violations of [OJA] work rules . . . .

Those violations related to an incident that occurred on August 13, 2002, in a meeting convened by Mr. Grohmann with Lynn S, Aura B, and Yvonne H to discuss various work priorities for the coming week, including Aura B's departure from OJA employment. At that meeting, when Yvonne H mentioned to Aura B that she would like to be able to call Aura B as questions arise regarding her work at OJA after she leaves, Mr. Grohmann stated to Aura B, "Well, I know where you live. I could just stop by, couldn't I?" or words close to that. **[Allegation 1]** Mr. Grohmann and Aura B had never been friends or had any relationship outside of the workplace setting. This, in conjunction with his pattern of behavior that many women at the office perceived as improper and inappropriate, and of which he had been warned against on earlier occasions by [OJA Executive Director Jerry] Baumbach, this remark was received by Aura B as having an unwanted and disturbing sexual connotation.

On September 12, 2002, the original investigatory interview was reconvened with the same parties present, in order to follow up on information obtained from DOA Human Resources Coordinator, Susan Canty's investigation of allegations of Mr. Grohmann's sexual harassment against several female OJA employees. . . . Ms. Canty's investigation . . . brought new, specific allegations to light, which demonstrated an intolerable pattern of behavior dating back to 1999, in spite of earlier warnings from the Executive Director to avoid such behavior.

Specifically, Aura B alleged that Mr. Grohmann practiced an unacceptable pattern of behavior toward her from approximately November 2001 through August 2002. This behavior involved positioning himself inappropriately close to her, often when coming into her workspace cubicle. At times, when she was seated at her computer, he would come in unannounced and either sit on the top of a counter-like workspace immediately to her right, **[Allegation 2]** or stand **[Allegation 3]** in such a way that when she turned around after realizing he was in the room, his crotch area was positioned inappropriately close to her (5 or 6 inches), well within what is commonly considered a person's personal space.

During meetings in his office or elsewhere when meeting with Aura B and other women one on one, Mr. Grohmann often sat with his legs spread "as far apart as possible" facing them with his hands occasionally brushing his crotch area. **[Allegation 4]** It was alleged that because he either wore tight pants or the pants would tighten over the crotch area due to the way he was sitting, his genitals were clearly displayed through his clothing. These behaviors appeared to be deliberate.

Aura B also became extremely upset when Mr. Grohmann came into her workspace excited and agitated for the sole purpose of telling her that he had watched her run from her car down the hill to the office building and that due to the light tan color of her shoes, he had assumed that she was running barefoot. **[Allegation 5]** In that same conversation he mentioned to her that he had watched her get mail at her house on several occasions. **[Allegation 6]** She was stunned and upset to find out that he knew where she lived and had watched her activities there.

On April 17, 2002, Tami D was standing in the doorway of Deb D's office when Mr. Grohmann walked out of his office and joined their conversation. He positioned himself directly in the doorway so close to Tami D that she felt she had to enter Deb D's office in order to avoid him touching or brushing against her. **[Allegation 7]** When Tami D moved all the way into Deb D's office,

Mr. Grohmann then moved to block the entire doorway with his body. He stood in the middle of the doorway with his arms on his hips providing no way for the women to leave without asking him to move or to squeeze past him. After a few minutes, as Tami D began to feel intimidated and uncomfortable in the situation, she excused herself to him and attempted to leave. He moved only slightly to one side, forcing Tami D to squeeze by in order to avoid touching him. **[Allegation 8]** This type of behavior, including sitting facing women with his legs spread wide and standing inappropriately close, was noted by at least six other women in Ms. Canty's investigation (and as many as nine dating back to 1999).

Also, on April 25, 2002, Tami D brought her fourteen year old daughter, Ashley D, to work for "Take Your Children to Work Day." At one point, Ashley D was leaning against the doorframe of the supply room talking to her mother while she was making copies. Out of the corner of her eye Ashley D saw Mr. Grohmann walking down the hallway from his office towards the supply room. She made sure she was not standing in his way blocking the hallway. As he walked down the hallway and approached the doorway, he walked toward the supply room door where Ashley D was standing. Mr. Grohmann then turned his body toward the doorway and her as he passed by. When he did this, his clothes brushed against Ashley D's clothes. This was so close that Ashley D said to her mother, "Mom, it was like I was standing in the middle of the hallway when he needed to pass me, but I wasn't. How much room do I take up standing in a doorway, anyway?" (Ashley D is 5 feet 8.5 inches tall and weighs 115 pounds.) **[Allegation 9]**

Right after this, and without her knowledge, Tami D asked Ashley D to go to her office to get a folder. After Ashley D entered the office, she noticed Mr. Grohmann walking past the office door in the other direction back towards his office. He then kept walking back and forth in a pacing manner in front of Tami D's office door about five or six times looking at a folder while trying not to be, in Ashley D's opinion, obvious. **[Allegation 10]** A little while later when Ashley D and Tami D were leaving Tami D's office, Mr. Grohmann was standing outside the office door with his back towards the wall – but standing in the middle of the hallway. As Ashley D and her mother attempted to walk out of her mother's office, they had to pass extremely close to Mr. Grohmann in order to get out of the door and, in fact, Ashley D had to turn sideways in order to pass him by without touching. . . . . **[Allegation 11]**

CONCLUSIONS OF LAW

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

2. Respondent has the burden of proof.

3. Respondent has failed to sustain its burden as to the allegations set forth in the October 3, 2002 letter of discipline.

4. There is no just cause to discipline Mr. Grohmann.

ORDER

Respondent's disciplinary action set forth in its October 3, 2002, letter to Mr. Grohmann is rejected and this matter is remanded to Respondent for restoration of Appellant with compensation, less any mitigation, pursuant to Sec. 230.43(4), Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

I dissent.

Paul Gordon /s/
Paul Gordon, Commissioner

OFFICE OF JUSTICE ASSISTANCE (Grohmann)

MEMORANDUM ACCOMPANYING INTERIM DECISION AND ORDER

In its recent decision in DEPARTMENT OF CORRECTIONS (DEL FRATE), Dec. No. 30795 (WERC, 2/04), the Commission explained the legal standard it applies when analyzing an appeal of a disciplinary action under Sec. 230.44(1)(c), Stats.:

> On appeal of a disciplinary matter, the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. Section 230.34, Stats., requires that suspension of an employee with permanent status in class . . . be for just cause. The Courts have equated this to proof to a reasonable certainty by the greater weight or clear preponderance of the evidence. REINKE V. PERSONNEL BOARD, 52 WIS. 2D 123, (1971); HOGOBOOM V. WIS. PERS. COMM., DANE COUTY CIRCUIT COURT, 81CV5669, 4/23/84; JACKSON V. STATE PERSONNEL BOARD, DANE COUNTY CIRCUIT COURT, 164-086, 2/26/79. The underlying questions are: 1) whether the greater weight of credible evidence shows the Appellant committed the conduct alleged by Respondent in its letter of discipline; 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 discipline was excessive. MITCHELL V. DNR, CASE NO. 83-0228-PC (PERS. COMM. 8/30/84). In considering the severity of the discipline to be imposed, the Commission 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 the Respondent. SAFRANSKY V. PERSONNEL BOARD, 62 WIS. 2D 464 (1974); BARDEN V. UW, CASE NO. 82-237-PC (PERS. COMM. 6/9/83).

1. DID THE APPELLANT ENGAGE IN THE ALLEGED MISCONDUCT?

A. The allegations

The relevant portions of Respondent's October 3rd letter of discipline that is the subject of this appeal are set forth in Finding 17 along with portions (Finding 18) of the attached "Summary of Findings," prepared by Susan Canty, the person assigned to conduct an investigation of Mr. Grohmann's conduct. These documents identify the following alleged misconduct:

1. On August 13, 2002, Grohmann told Aura B: "Well, I know where you live. I could just stop by, couldn't I?" (or words that were substantially similar).

2. Grohmann periodically entered Aura B's work area unannounced and sat on the top of a counter-like workspace immediately to the right of Aura B, in her work area, with his crotch area positioned inappropriately close to her, well within what is commonly considered someone's personal space.

3. Grohmann periodically entered Aura B's work area unannounced and stood quietly and immediately behind her in such a way that when she turned around after realizing he was in the room, his crotch area was positioned inappropriately close to her (5 or 6 inches), well within what is commonly considered someone's personal space.

4. During one-on-one meetings with female staff, Grohmann often sat facing the woman with his legs spread "as far apart as possible" with his hands occasionally brushing his crotch area. Because of the way he was sitting or the type of pants he was wearing, his genitals were clearly displayed through his clothing.

5. On another occasion, Grohmann, who was both excited and agitated, entered Aura B's workspace for the sole purpose of telling her that he had watched her run from her car down the hill to the office building and that due to the light tan color of her shoes, he had assumed that she was running barefoot.

6. In that same conversation, he mentioned to Aura B that he had watched her get mail at her house on several occasions.

7. On April 17, 2002, Grohmann positioned himself directly in the doorway to Deb D's office in a location that was so close to Tami D that she felt she had to enter Deb D's office in order to avoid Grohmann touching her or brushing against her.

8. Somewhat later on April 17th, Grohmann stood in the middle of Deb D's doorway with his arms on his hips so as to provide no way for Tami D or Deb D to leave without either asking him to move or squeezing past him. Tami D soon began to feel intimidated and uncomfortable due to Grohmann's position. She excused herself and attempted to leave. Grohmann moved only slightly to one side, forcing her to squeeze by in order to avoid touching him.

9. On April 25, 2002, Ashley D was leaning against the doorframe of the supply room, talking to her mother while she made copies. Grohmann walked down the hallway from his office toward the supply room door where Ashley D was standing. Grohmann then turned his body toward the doorway and passed so close to Ashley D that his clothing brushed against Ashley D's clothes.

10. Later on April 25th, after Ashley D entered her mother's office, she noticed Grohmann walking past the office door in the other direction back towards his office. He then paced in front of the door about five or six times, ostensibly looking at a folder but actually observing Ashley D.

11. On the same day, when both Ashley D and her mother were in the mother's office, Grohmann stood immediately outside the office door, in the middle of the hall, with his back towards the wall. As Ashley D and her mother attempted to walk out of the office, Grohmann did not move and they had to pass extremely close to him. Ashley D had to turn sideways in order to avoid touching him.

In addition to the 11 allegations set forth in the "Summary of Findings," the hearing record includes substantial evidence relating to Grohmann's conduct toward other female employees on other occasions. Respondent offered evidence about these other incidents for the purpose of "establishing a pattern of behavior." Brief, p. 28. This evidence also related to the various warnings that Grohmann allegedly received during the course of his employment. However, the disciplinary actions that are being reviewed by the Commission were imposed solely for the 11 allegations of misconduct listed in the disciplinary documents. 9/

9/ As indicated in the Findings of Fact, the sole description of the alleged misconduct in the one-page letter of discipline is the sentence that reads: "The details concerning these actions are outlined in the attached Summary of Findings and Investigatory Interview transcripts." The "Summary of Findings" is a four-page, single-spaced memo prepared by Susan Canty that is quoted at length in the foregoing Findings of Fact. The first transcript, of an investigatory interview of Mr. Grohmann on August 27, 2002, is 14 pages in length, typically with 33 lines on each page. The second transcript is 21 pages and typically has 50 lines per page. Together, the two transcripts reflect approximately 1500 lines of testimony. The letter of discipline refers both to the "Summary of Findings" and to the two transcripts, and there are general references in these documents to other conduct of Mr. Grohmann. Respondent has never sought to list its specific allegations of misconduct in this matter in any other manner. In its post-hearing brief (at 28, footnote 2) Respondent stated: "The [demotion], although cognizant of his actions dating back to 1999, was imposed on Grohmann for the more recent incidents occurring in 2002, especially the [Tami D, Ashley D, and Aura B] incidents." In the materials that Respondent has submitted after the proposed decision was issued, the Respondent has not contended that the proposed decision misstated or understated the allegations. The Commission also notes that the Appellant appeared pro se in this matter and an effort to extend the scope of the allegations beyond the 11 items would raise due process concerns. Under these circumstances, the Commission declines to expand the scope of alleged misconduct to any matter other than those specified above.

The dissent states that its major disagreement with the Commission lies in the majority's narrower view of the scope of the allegations. We do not concur in this articulation of the nature of our disagreement. First, as noted in the preceding paragraph, the Respondent itself does not rely upon a broader scope of allegations, a point that the dissent does not address. Second, even if the Respondent had tried to rely upon broader allegations than the 11 listed above, we would likely have found many of them either irrelevant as having already been addressed by the Respondent (e.g., the Debra B and Angie H incidents of 1999), inadequate to constitute misconduct given Grohmann's immediate and appropriate response thereto (e.g., the Lori P shoulder-touching incident), or insufficiently supported by the record (e.g., the alleged Angie H "shoulders" incident). Many of these incidents are discussed in the Findings of Fact and attendant footnotes and/or elsewhere in the Memorandum. Accordingly, while we find it unnecessary to respond to every factual assertion in the dissent, we do not agree that a broader view of the allegations would have affected our decision in this case.

On the contrary, we see the disparity between the majority and the dissent as lying primarily in very different perspectives about the nature of the just cause standard, the significance of the Respondent's burden of proof, and the importance of due process considerations. As discussed more fully in the text, above, both the "just cause" standard and due process principles require the Respondent to specifically identify the incidents upon which it has based its discipline. While we agree with the dissent that such specificity can be satisfied by documents accompanying the disciplinary letter, merely accompanying a letter of discipline with a set of materials (especially of the length and ambiguity of those here) does not satisfy the specificity requirement. The dissent goes further and relies upon incidents mentioned in the various summaries of witness statements included in the Susan Canty investigative report (Resp. Ex. 3) - even though that report itself is not appended to the letter of discipline (Resp. Ex. 4) and nothing in the letter of discipline can reasonably be interpreted to incorporate that report by reference. More importantly, the investigative report does not itself contain any findings or allegations by the Respondent, but merely restates what various witnesses have said. It is not appropriate to hold Grohmann responsible for rebutting every assertion made in a witness statement, where the Respondent itself has not specifically adopted the assertion as its own allegation or identified it as an incident it intends to pursue as a charge of misconduct. We are mindful that charges like those at issue here carry heavy emotional content and may permanently blight the accused emloyee's reputation and career. We are also sensitive to the fact that the charges carry emotional content for the accusers, all of whom were relatively young and subordinate to Grohmann. However, the Commission's responsibility in this case is to apply the just cause standard to the imposition of discipline against a state employee with permanent status in class and our focus is on Grohmann's statutory rights. The burden of proof is on the Respondent. The statute gives Mr. Grohmann an opportunity to respond coherently and meaningfully, rather than on an ad hoc basis, to allegations that actually led to his discipline.

Finally, we have a fundamentally different view than does the dissent about the nature and culpability of the conduct attributed to Grohmann. As addressed in the text of our Memorandum, we view Grohmann's proven conduct as facially ambiguous and perhaps unconscious or habitual, though, with proper notice, it could become discourteous or insubordinate. Unlike the dissent, we see no evidence of intentionally offensive behavior designed to intimidate. To constitute misconduct, especially sexual harassment, the Respondent would have had to show that Grohmann had been specifically advised that his manner of sitting, walking, entering offices, and so forth were reasonably perceived by specific employees in specific situations as offensive, thus giving him a meaningful opportunity to curb such behaviors.

B. Evidentiary rulings

Over the course of the hearing, the examiner admitted Respondent's exhibits 1 through 4 into the record, including one over Mr. Grohmann's objection. Those exhibits were relied upon by the examiner as a basis for a number of the conclusions reflected in the proposed decision. Although Grohmann has not specifically asked the Commission to overturn the evidentiary rulings, the Commission will explore the topic on its own initiative.

Four documents were admitted into the record as Respondent's exhibits:

> Exhibit R 1 is a memo dated May 23, 2002, from Mr. Baumbach to legal counsel for Respondent, asking for direction in conducting an investigation into Mr. Grohmann's conduct.
>
> Exhibit R 2 is a letter dated August 16, 2002, from an attorney representing Aura B, written in response to Mr. Baumbach's request that Aura B provide information describing her contacts with Mr. Grohmann. The letter relates her descriptions of those contacts.
>
> Exhibit R 3 consists of a cover letter dated August 22, 2002, from Susan Canty to Respondent's legal counsel, transmitting the report of Ms. Canty's investigation that resulted from Tami D's complaint about Mr. Grohmann. The attached report consists of a 9-page summary of various interviews conducted by Ms. Canty during her investigation, including 7 interviews of persons who did not appear as witnesses at the hearing in this matter. The report also includes copies of numerous documents relating to the investigation, including: 1) e-mail correspondence between Grohmann and Ms. Radcliffe as well as Grohmann and Lori P; and 2) documents apparently prepared by Deb B, Angie H, Lori P, Kerrie K and Sara B describing their contacts with Grohmann.
>
> Exhibit R 4 is the letter of discipline and the documents that were attached to that letter when it was issued to Mr. Grohmann.

When Mr. Grohmann objected to the admission of Exhibit R 3 on hearsay grounds, Respondent argued that the report fell within the scope of the "business record" exception to the hearsay rule as provided in Sec. 908.03(6), Stats. The hearing examiner overruled the objection and allowed the report into the record for the purpose of establishing the truth of the statements made by the interviewees. In doing so, the examiner noted that he would prefer to hear directly from the persons whose statements were set forth in the report. The other three exhibits were also admitted into the record without limitation on their use for establishing the truth of the information found in the documents.

The examiner's ruling to admit these exhibits for the purpose of establishing the truth of the matters asserted was incorrect. While the Commission is not bound by hearsay rules in contested case hearings convened under Sec. 230.44, Stats., Mr. Grohmann did not have an opportunity to cross-examine many of the persons who made the statements reflected in these documents. 10/ There was no showing that these individuals were unavailable to testify, STATE V. MCFARREN, 62 Wis. 2d 492 (1973), and Grohmann was harmed by his inability to ask questions of the interviewees or authors in order to establish the reliability of the information found in the documents. ELLIS V. DHFS, Case No. 99-0066-PC-ER (Pers. Comm. 7/15/03). While some of the other documents were apparently prepared by hearing witnesses, testimony from those individuals did not establish the accuracy of all the information found in the documents.

10/ As provided in Sec. PC 5.03(5), Wis. Adm. Code, which applied to this proceeding: "Hearsay evidence may be admitted into the record at the discretion of the hearing examiner . . . and accorded such weight as the hearing examiner . . . deems warranted by the circumstances."

The Commission rejects the examiner's rulings and declines to rely on these documents to establish the truth of the matters asserted therein. This conclusion is reflected in the Findings set forth above as well as in this Memorandum. The Commission declines to ground its findings on uncorroborated hearsay. VILLAGE OF MENOMONEE FALLS V. DNR, 140 WIS.2D 579 (CT. APP. 1987).

C. Application of the burden of proof to the individual allegations

As noted above, the Respondent has the burden of persuasion in this matter and must show, by a preponderance of the credible evidence, that there was just cause for the decision to suspend and demote Mr. Grohmann. The initial aspect of this burden is to establish that he committed the conduct alleged in the letter of discipline.

Mr. Grohmann acknowledges that during a meeting with two other OJA employees, Yvonne H and Lynn S, on August 13, 2002, he told Aura B something to the effect of: "Well, you live on my way home and I could just stop by your house," so "I could just drop work off." Hence we concur that the conduct occurred as alleged. [Allegation 1]

Respondent also contends that Mr. Grohmann sometimes sat "inappropriately close" to Aura B when he went into her work area to speak with her. [Allegation 2] Despite her central role in this allegation, Aura B never testified during the three day hearing. Since Mr. Grohmann has denied the conduct, Respondent's burden can only be satisfied through the testimony of other witnesses who were in a position to observe. One such person was Lynn S who was an officemate for a portion of Aura's employment at OJA. She testified that while

Grohmann (Aura's supervisor) spoke with Aura in her work area every two or three days, she (Lynn) never saw him sit down when doing so. Another witness who offered testimony that was arguably related to this allegation was Lori P. She observed at least one meeting between the two in Aura's cubicle in August 2002 and she commented on "the way [Grohmann] would sit in his chair and present himself towards [Aura]" but failed to otherwise describe the distance between the two. This nebulous statement is hardly sufficient to establish that Mr. Grohmann sat "inappropriately close" to Aura B, in light of the contrary testimony of both Mr. Grohmann and Lynn S.

Respondent next contends that Grohmann also stood inappropriately close to Aura B, sometimes in such a way that when she turned around while in her office chair, "his crotch area was positioned inappropriately close to her (5 or 6 inches)." [Allegation 3] Once again, Mr. Grohmann denied the alleged conduct and Aura B did not testify. Lynn S, who as Aura's officemate was in a location to observe their interactions, never saw Grohmann stand too close to Aura B or otherwise behave inappropriately. Respondent has failed to establish that Grohmann occasionally stood within Aura B's personal space.

The next allegation relates to the pose that Mr. Grohmann often assumed when he sat. Respondent contends he often sat with his legs spread as far apart as possible so that his genitals were "clearly displayed through his clothing" and that his hands occasionally brushed against his crotch area. [Allegation 4] Grohmann acknowledged that he sometimes sat with his legs apart and his hands folded in his lap. His description was supported by that of Linda Miller who testified that he often sat at the edge of a desk or table with his legs apart. However the aspects of this allegation with sexually offensive connotations were not established by Respondent, and the most that can be found on this record is that Mr Grohmann often sat with his legs apart and with his hands in his lap.

Respondent contends that on one occasion Mr. Grohmann, in an "excited and agitated" state, entered Aura B's workspace for the sole reason of commenting that he had observed her "run from her car down the hill to the office building and that due to the light tan color of her shoes, he had assumed that she was running barefoot. [Allegation 5] Aura B, obviously a key witness to the nature of this conversation, did not testify. Donna D, who at one point worked in a cubicle adjacent to that of Aura B, testified that she once overheard Grohmann tell Aura something to the effect of: "I saw you walk in today, you were late. Your shoes got wet because it was raining. You looked cute running down the street." This version of the conversation is less consistent with the allegation than the version of events acknowledged by Mr. Grohmann. Grohmann said he had been looking out his office window when he noticed someone running into the building, even though it was not raining, and then realized it was Aura B. He admitted that later the same day he told her, "I saw you running into the office and it almost looked like you were running barefoot." Grohmann does not dispute that Aura wore beige shoes that day or that she was late to work. Grohmann denied blushing or giggling during this brief conversation and there is no evidence he was either excited or agitated. Grohmann's description of his comment as an "icebreaker" to a discussion he had with Aura B

on another topic is also unchallenged on this record. The Commission concludes that the only statements by Grohmann that are both alleged by Respondent and established at hearing were that he had seen her running into the office and it looked like she was barefoot.

Respondent next contends that as part of the same conversation, Grohmann also told Aura B that he had "watched her get her mail at her house on several occasions." [Allegation 6] Mr. Grohmann acknowledged that at one point during her employment, he told Aura that he saw her get her mail as he drove past her house on his drive to work. This is consistent with Donna D's testimony but Respondent has not established that this comment was ever repeated by Grohmann or that it was made during the same conversation as Allegation 5.

Respondent contends that on April 17th, Mr. Grohmann stood so close to Tami D that she was forced to move in order to avoid touching him [Allegation 7] and that he then failed to move out of the middle of a doorway so she had to carefully squeeze by in order to avoid touching him. [Allegation 8] Both events allegedly occurred while Deb D was also present. While both Deb D and Tami D testified at the hearing, neither provided any testimony identifying any events on April 17th and Mr. Grohmann denied the alleged conduct. The Commission therefore finds on this record that Respondent has not sustained its burden as to these two allegations. 11/

11/ The record contains testimony from certain female OJA employees that they became uncomfortable because Grohmann sometimes positioned himself within their "personal space" or did not move out of their way when they wished to move past him. As set forth in Finding 3 above, we have found that some female employees had this perception. However, Allegations 7 and 8 refer to specific and discrete incidents which, had they been recounted in testimony, would likely have been given additional context, such that Mr. Grohmann might recall the incident itself or an incident that could have been interpreted thus by Deb D and Tami D, which in turn would have allowed Grohmann a meaningful opportunity to respond. While the dissent appears willing to conclude that the alleged April 17 incident occurred simply from general testimony that some employees believed Mr Grohmann invaded their personal space in other circumstances, due process concerns make us unwilling to draw that conclusion, absent evidence directly on point.

Finally, Respondent contends that Grohmann walked unnecessarily close to Ashley D on April 25th so that their clothes touched [Allegation 9], that he then paced in front of Tami D's office door five or six times and feigned looking at a file while Ashley was sitting inside [Allegation 10], and that, after Tami D joined her daughter, Grohmann blocked egress to them both, forcing Tami to say "excuse me" and Ashley to hug the wall in order to get around him. [Allegation 11] Mr. Grohmann did not even recall having met Ashley. The Commission notes that the record only supports a conclusion that Grohmann passed no more than twice in front of Tami D's office door while Ashley was inside. We note that the hallway in question is the only available passageway for Grohmann to access other locations from his office. There also appears to be a conflict in the testimony of Ashley D and her mother that

should be noted. Ashley said that when she left her mother's office to go to lunch, she "went, like, up against the wall because there was no other way for me to get around him." In her own testimony, Tami D stated that after she had excused herself to pass by Grohmann she saw her daughter "hugging" the door frame and hallway. She asked Ashley, "What was that about?" Ashley said "I didn't want to brush into him" and her mother's response was that she "really didn't think anything of it." This response is consistent with an unnecessarily exaggerated exit by Ashley, possibly engendered by her mother's warnings about Grohmann, rather than a response mandated by a significant blockage of the exit by Grohmann. In terms of the other aspects of Allegations 9, 10 and 11, the Commission will assume that the Respondent has sustained its burden, because this conclusion does not alter the ultimate disposition of the case.

In summary, the Commission finds that the Respondent has satisfied its burden of proof that the conduct occurred as alleged in Allegations 1 and 9 and in certain aspects of Allegations 4, 5, 6, 10 and 11.

2. WAS SOME LEVEL OF DISCIPLINE WARRANTED?

Having determined that Mr. Grohmann engaged in at least some of the conduct described in the October 3rd letter of discipline, the next step is to determine whether his conduct warranted the imposition of discipline. We find that the greater weight of the credible evidence does not establish just cause to impose discipline.

Mr. Grohmann is accused of violating the following OJA work rules:

1) Insubordination, failure or refusal to follow the written or oral instructions of supervisory authority in carrying out work assignments;

2) Discourtesy in dealing with office employees . . . ; and

3) Sexually harassing a person of the . . . opposite gender, including but not limited to . . . unwelcome sexual advances . . . or deliberate verbal . . . conduct of a sexual nature that substantially interferes with an employee's work performance or creates an intimidating hostile or offensive work environment.

A. Insubordination claim

In order to find that Mr. Grohmann was insubordinate, the employer must establish that there was a directive or policy in effect, that he had (or should have had) knowledge of the directive and that he knew or should have known under an objective test that the directive prohibited the conduct in question. LARSEN V. DOC, Case No. 90-0374-PC, Case No. 91-0063-PC-ER (Pers. Comm., 5/14/92). Respondent takes the position that Grohmann should have known that his conduct was inconsistent with certain directives he had received from management regarding his interactions with female OJA employees.

It is undisputed that, on more than one occasion, Executive Director Baumbach commented to Mr. Grohmann about his relationship with one or more of the women in the office. However, the parties disagree about both the number and content of those conversations. The Commission has carefully reviewed the record on this topic in the context of the Respondent's burden of proof and in light of the dissent's assertion that sufficient warnings had been given. As explained more fully in the above findings, the record establishes that Respondent had provided Grohmann with periodic advice to "be careful" around women in the office. However, Baumbach gave only one vague but arguably relevant directive prior to the conduct in question. In their meeting on July 22, 1999, Baumbach warned Grohmann not to approach either Debra B or Angie H directly, but to go through their supervisors. During the same meeting, Baumbach told Grohmann to be careful not to invade employee's personal space and not to act in a manner that might generate charges of sexual harassment. This meeting occurred nearly three years prior to the conduct that served as the basis for discipline and the comments have to be considered in context: a situation where a particular employee (Debra B) believed that Grohmann had taken an unreciprocated social interest in her and another particular employee (Angie H) believed that Grohmann, who was not her supervisor, was inappropriately monitoring her computer usage. In that context, the directive to observe personal space would be interpreted by a reasonable employee to refer to the two women who had complained and the specific conduct of which they complained. Baumbach provided no further specification of the conduct Grohmann was to avoid. In addition, Baumbach acknowledged that, prior to the incidents giving rise to this case, he had never told Grohmann that particular conduct was improper. Under these circumstances, the statements that were made by Baumbach during the July of 1999 meeting were inadequate to serve as a "directive" that Grohmann ignored when he engaged in conduct described in the few allegations that remain from the letter of discipline. In addition, merely telling an employee not to engage in sexual harassment when sexual harassment is already prohibited by the employer's existing work rules is not a new directive that is appropriately the basis for a claim of insubordination.

Thus the only aspect of Baumbach's "warnings" that provided Grohmann with any guidance on how he was to act so as to serve as a directive was that he was to contact Debra B and Angie H only through their supervisors. Angie H stopped working for OJA in December of 1999, Debra B left in January of 2000, and none of the remaining allegations listed in the letter of discipline suggest that Grohmann acted inconsistently with this directive. Therefore, none of the conduct that Respondent was able to establish at hearing and that was specified in the letter of discipline was insubordinate. 12/

12/ While Baumbach told Grohmann not to act in a way that might generate a sexual harassment claim, the subsequent filing of such a claim would not, by itself, provide the basis for a finding of insubordination. Just cause for discipline would not exist under those circumstances unless the employer could establish that there was adequate support for the claim of sexual harassment.

B. Discourtesy claim

The second work rule invoked by Respondent covers "discourtesy in dealing with office employees." In order to show discourtesy or rudeness, Respondent would have to establish that Mr. Grohmann intentionally engaged in conduct that would be considered rude by a reasonable person similarly situated. ARNESON V. UW, Case No. 90-0184-PC (Pers. Comm., 2/6/92). (In dicta, the Personnel Commission concluded that even though an employee clearly suffered "fears or anxieties" as a consequence of the appellant's conduct, there would only be a violation of a work rule prohibiting threatening and intimidating conduct if the conduct was deemed intimidating or threatening to the "average reasonable similarly situated employee.")

As to the verbal conduct, Grohmann's conduct was not inherently discourteous. His comments that he could "stop by" Aura B's home or "drop off" some work there [Allegation 1], that she appeared to be running barefoot [Allegation 5] and that he had seen her pick up her mail [Allegation 6] are all comments that are innocuous on their face and fall within the scope of normal conversation between employees in an office setting. There is no evidence that, at some time before he made these comments, Aura B had informed Grohmann that some of his statements had made her uncomfortable. Nor is there other evidence that would support a conclusion that Grohmann was aware that he was offending Aura B. The discourtesy claim thus fails as to all three of these allegations.

The issue is more difficult with regard to some of Grohmann's alleged physical misconduct. As to the complaint that Grohmann sometimes sat with his legs apart and his hands in his lap [Allegation 4], sitting in this manner is not uncommon among men nor inherently rude, and no one had ever advised him that his habit was inappropriate or that it caused them discomfort. His conduct on April 25th, walking twice past the doorway when Ashley D was in her mother's office and examining one or more files while standing outside the office, may have seemed sinister to Ashley, given the rather vivid but inaccurate warning her mother had given her about Grohmann. However, it is not inherently offensive, and the Respondent has not established that it was actually improper.

As noted earlier, Grohmann had no choice but to pass by Tami D's office when exiting his own office. We have assumed for purposes of this decision that Ashley's perception was accurate insofar as she testified that Grohmann was unnecessarily close to her when passing in the hallway, so that his clothing brushed against her, and that later he stood in the hallway so close to Tami D's doorway that Tami and Ashley could not comfortably exit on their way to lunch. Certainly this conduct would be discourteous so as to justify discipline if the record supported a finding that Grohmann intentionally had occupied more space than necessary. The record supports no such finding. 13/ Rather, the Commission concludes from this record that Grohmann was genuinely unaware that he was perceived as standing or passing too closely or failing to move when appropriate. Grohmann is a large individual and the hallways and office space in question are relatively small. Behaviors that fall within such a nebulous realm as "invading personal space" could be the basis for discipline, if they are of a type that could

reasonably be perceived as discourteous and if they have been verified to have actually

occurred. However, in this nebulous and subjective realm of behaviors, the employer has a duty to clearly notify the employee of specific behaviors that should be curbed. By analogy, an employee who wears strong perfume may be offending other "reasonable" employees, and employees who congregate and chat outside another employee's work station may truly distract and annoy that employee. Like "invading space," these are vague and subjective standards of conduct that could not warrant discipline without preliminary and specific notice or directives. Accordingly, even assuming that Ashley D's perceptions were accurate that Grohmann invaded her personal space, the Commission does not find that his conduct warrants discipline for discourtesy under the circumstances present here. 14/

13/ The dissent believes that Grohmann received sufficient negative feedback over the years to realize that he was making some women uncomfortable in terms of personal space and touching. This assertion appears to be based upon the 1999 complaints from Debra B (that he touched her shoulder once and her back once and stood too close to her), the 1999 complaint from Angie H that Grohmann was reading her e-mail over her shoulder, and the 2000 complaint from Lori P that she did not like him touching her shoulder. (The dissent also relies on (1) the second alleged Angie H "shoulders" incident that we do not find was the subject of any "counseling" by Baumbach; and (2) the 2002 warning that Baumbach gave Grohmann, which, as we have stated earlier, is not a "prior" warning since it followed the conduct that forms the basis for the allegations in this case). Each of these discrete incidents and their contexts are described in Findings 7, 8, and 11, above. As explained in our opinion, we agree that Grohmann realized he had made Debra B, Angie H, and Lori P uncomfortable, though we do not attach a sexual connotation to the incidents. Of crucial importance to us, however, is the fact that Grohmann responded appropriately once each incident was brought to his attention. There is no allegation that he touched Lori P or any other employee after Lori's 2000 e-mail. The closest allegation relates to "brushing against" Ashley D, conduct that is quite different. Given that Grohmann was in daily supervisory contact with numerous female subordinates, we do not think it reasonable for the dissent to conclude that Grohmann must have "realized" from these few, relatively minor, and substantively disparate incidents that he was widely regarded as routinely invading other people's personal space or that his sitting style made some other employees uncomfortable, much less that he continued to do so intentionally in order to intimidate the women.

14/ At page 16 of the memorandum that accompanied the proposed decision, the Examiner asserted that "[t]he record also supports a finding that Mr. Grohmann was discourteous to other employees at OJA." The memorandum further asserts that Mr. Grohmann's explanations for his comment to Aura B during the August 27, 2002 investigatory meeting supported the Respondent's conclusion that Grohmann had made a "calculated attempt to upset" Aura B at the August 13th meeting. The Commission disavows this conclusion and analysis. First, the Examiner implies that Grohmann's comments regarding his statement were somehow inconsistent with each other, but we see no such inconsistency. Second, the Examiner (and the dissent) rely upon a statement Grohmann made as recorded in a transcript of his interview by the Respondent on August 27, 2002 as evidence that he deliberately upset Aura B. The interview transcript in fact provides no support for that conclusion. In describing what occurred at the meeting on August 13, Grohmann relates his comment, Aura's leaving the meeting, and Aura's subsequent angry outburst at him in the hallway. He then states, "Of course I don't like people to hate me but that sort of thing turns out – I actually anticipated that she might walk out – it wasn't a surprise but [inaudible] issue it was a terrible surprise." Grohmann's explanation of this comment is perfectly plausible, i.e., that the meeting was about how Aura's unfinished projects would be completed after she left, that Aura had refused to complete the work

herself because she was unhappy with the pay Grohmann had offered her to do so, and that she had generally been in a bad mood that day prior to the meeting. This is reasonably viewed as an explanation why Grohmann

anticipated she might walk out. Without knowing the content of the "inaudible" portion of the transcript, something no witness claimed to know, it seems likely that Grohmann's remark about the "terrible surprise" referred to the harassment or disciplinary charges that were the outcome of the "issue," and not to the fact that Aura B had walked out.

C. Sexual harassment claim

The final work rule cited in the letter of discipline relates to sexual harassment. "Sexually harassing a person of the . . . opposite gender, including but not limited to . . . unwelcome sexual advances . . . or deliberate verbal . . . conduct of a sexual nature that substantially interferes with an employee's work performance or creates an intimidating hostile or offensive work environment." In its post-hearing reply brief, Respondent correctly notes that it is not required to prove that Mr. Grohmann "committed sexual harassment or created a hostile work environment as defined and analyzed under WFEA [Wisconsin Fair Employment Act] standards." (Emphasis in original, footnote omitted.) In contrast, it is the Respondent's burden to show, by greater weight of the credible evidence, that Grohmann's conduct violated Respondent's work rule, given the language found in the rule. Respondent has written its rule quite broadly by providing some general examples of sexual harassment and then specifying that the improper conduct is not limited to those examples. Nevertheless, conduct that is not attributable to sexual attitudes but occurs, for example, simply as a consequence of personality differences, does not violate the Respondent's work rule.

The Commission considers it appropriate to apply the harassment work rule in the context of all of the allegations that remain after the first stage of its analysis, rather than isolating each allegation from the others. Single incidents should not be viewed in a vacuum because "what may appear to be legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other incidents." KANNENBERG V. LIRC, 213 Wis. 2d 373, 391 (Ct. App. 1997) (citation omitted).

Mr. Grohmann made three comments and engaged in three forms of physical conduct that should all be considered in the context of Respondent's claim that he violated the work rule prohibiting sexual harassment. The comments were that he could "stop by" Aura B's home or "drop off" some work there [Allegation 1], that she appeared to be barefoot on her way into the office [Allegation 5] and that he had seen her when she had picked up her mail at her home [Allegation 6]. Grohmann's physical conduct was sitting with legs spread and hands in his lap [Allegation 4] and, on April 25th, brushing against Ashley's clothes [Allegation 9] and impeding the egress of both Tami and Ashley [Allegation 11].

It is helpful to consider Grohmann's conduct in light of some of the other information established at hearing. There were rampant and unfounded rumors at OJA relating to Mr. Grohmann (Finding 10) that would have predisposed OJA employees to find fault with his

conduct. Aura B was already distressed when she came into the meeting on August 13, and she had reason to be antagonistic toward Grohmann because of two recent decisions he had

made about her work status and her rate of pay as an LTE. According to Lynn S, who was present during the meeting on August 13th, Aura should not have considered Grohmann's comment that day as offensive. Grohmann had reason to know where Aura B lived because he had received a call from the landlord to confirm that she was employed at OJA. Grohmann's normal route to work took him past Aura's house; it was not as though Grohmann made any changes to his routine in order to be in a position to observe her house. In this context, Grohmann's statements cannot reasonably be construed to carry the sexually harassing innuendo that some employees may have perceived, especially in light of Respondent's burden of proof.

Ashley D's reaction to Mr. Grohmann must also be considered in context with the advance information her mother had given her, including an inaccurate rumor. The information was sufficient to make Ashley jittery and the Commission believes it had an effect on the way that Ashley perceived Grohmann's conduct.

It is unclear which conduct the dissent believes to have been of a "sexual nature," thus transgressing the sexual harassment policy, as opposed to conduct that was "intimidating" or discourteous. The dissent concentrates on the conduct having been unwelcome, which we do not dispute. The dissent acknowledges that sexual harassment must satisfy an objective "reasonable person" standard, but then focuses almost exclusively on the perceptions some witnesses articulated that Grohmann's sitting posture or failure to respect "personal space" could have seemed sexual. In fact, the record is exceedingly thin, even in terms of such subjective perceptions, that any of Grohmann's conduct was sexual in nature. Many men sit with their legs apart and hands in their laps – a location that could also be referred to as their "crotch" or "groin." We do not doubt that this could offend some women, but nothing on this record supports a conclusion that Grohmann would know that anyone was offended by this, since he had never been told and it is not intuitively obvious. Several female witnesses testified that they saw nothing unusual in Grohmann's manner of sitting or moving through the office. As to touching, even assuming that all touching incidents to which the dissent refers occurred and legitimately figured in the discipline, the record is utterly devoid of evidence that any of that touching was reasonably perceived as sexual. Accordingly, assuming some women did perceive sexuality in some of Grohmann's behaviors and granting that such perceptions can be "considered," FLUHR V. JAMES MAGESTRO, DDS ERD CASE NO. 199552715 (LIRC, 4/1/99), this record is far from sufficient (especially given the Respondent's burden of proof) to demonstrate that such perceptions were objectively reasonable.

Given all these circumstances the Commission is satisfied that Mr. Grohmann's conduct did not constitute sexual harassment and did not violate Respondent's policy.

The Respondent has failed to sustain its burden to establish that Mr. Grohmann's conduct justified the imposition of discipline.

This decision is being issued on an interim basis to allow for the possible submission of a motion for costs pursuant to Sec. 227.485, Stats. Notice of this process will be provided separately.

Dated at Madison, Wisconsin, this 11th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

OFFICE OF JUSTICE ASSISTANCE (Grohmann)

Dissenting Opinion of Commissioner Paul Gordon

I would affirm the hearing examiner's findings: 1) that Mr. Grohmann engaged in the conduct described in the letter of discipline and 2) that his conduct violated OJA work rules and tended to impair the performance of the duties of his position, the efficiency of the group with which he works, and the operation and efficiency of OJA as a whole. I would modify the examiner's conclusion and reduce the discipline to a 30-day suspension, rather than a 10-day suspension and demotion.

The majority opinion limits its review to the 11 allegations set out in the Summary of Findings and fails to consider other matters referenced during the investigatory interviews as reflected in the transcripts of those interviews. This approach is inconsistent with the letter of discipline which states that the details concerning these allegations are outlined in the "attached Summary of Findings and Investigatory Interview transcripts." The transcript of Grohmann's September 12, 2002 investigatory interview indicates Baumbach convened this second interview in order to supplement information obtained by Ms. Canty during her investigation, the results of which were described in her 10-page report dated August 22, 2002. Ms. Canty's report summarized each of twelve interviews she had conducted as part of her investigation and many of those interviews included allegations of inappropriate conduct by Grohmann. Appellant not only acknowledged the existence of the report during his September 12th interview, his comments strongly suggest he had the report in front of him while he was speaking. He also commented during his interview that he had been waiting a long time to respond to the report. Under these circumstances, all incidents of misconduct described in the Canty report are clearly part of the allegations and were clearly known to Appellant prior to the imposition of discipline.

Information shown to have been communicated to or known by the employee may be considered when determining the sufficiency of notice provided by the employee's letter of discipline. The letter of discipline may refer to documents outside the letter which may then supply the details of the allegations. FAUBER V. DEPT. OF REVENUE, Case No. 82-138-PC (Pers. Com., 8/21/84); HESS V. DNR, 79-203-PC, (Pers. Comm. 12/4/79); ANAND V. DHSS, Case No. 82-136-PC, (Pers. Comm. 3/17/83); FINNEGAN V. STATE PERSONNEL BD., CASE NO. 164-096, 7/19/79, DANE CO. CIR. CT., AFFIRMING FINNEGAN V. DEPT. OF LOCAL AFFAIRS AND DEVELOPMENT, PERS. BD. CASE 77-75, 6/16/78. The purpose of the notice of discipline is to inform the employee of the nature of the charges so that he can adequately prepare his defense. Therefore, a reasonable standard to apply in disciplinary notice cases is whether the notice is sufficiently specific to allow the disciplined employee to prepare a defense. BENTS V. COMM. OF BANKING, Case No. 86-0193, (Pers. Com. 5/28/87). The notice here, which by reference includes the entire Canty report, provided that specificity to Grohmann.

I acknowledge that not every allegation found in the attachments to the letter of discipline was adequately supported at hearing, in part because some of the persons who voiced the allegations to Ms. Canty never testified before the Commission. Those particular

portions of the Canty report are properly excluded from the Commission's consideration as unsubstantiated hearsay. However, several of the witnesses who testified acknowledged having made the statements attributed to them in the Canty report, thereby providing a non-hearsay basis for findings on those topics. Those portions of the report were properly admitted into evidence by the examiner.

I believe that the credible testimony of several witnesses, as supplemented by documentary evidence that was attached to the Canty report, is sufficient to establish that Appellant engaged in the following behavior: intentionally touching female co-workers, encroaching upon their personal space, obstructing doorways and hallways and brushing against a female in an office hallway, sitting with legs spread apart and standing unannounced and immediately behind other female employees. Because I consider the notice of discipline to extend beyond the 11 allegations described by the majority and because of my different conclusions on witness credibility and on the extent of the warnings and directives that were provided to Grohmann prior to the date of much of his misconduct, I would reach substantially different conclusions than those set forth in the majority opinion.

Appellant touched at least four different women inappropriately and without their permission. According to the testimony of Debra B, who was considered a credible witness by the examiner, Grohmann touched her on her shoulder more than once. She informed Linda Miller that the contact made her uncomfortable and Miller subsequently told Appellant that he was making Ms. B uncomfortable. Later, on June 1, 1999, Grohmann touched Debra B's back with his finger. Once again, the contact upset Ms. B and she complained to her superiors. Angie H, who as a child had been sexually assaulted by her stepfather, testified credibly that on an occasion in mid-1999 Appellant was behind her and placed both of his hands on her shoulders while she was typing. Grohmann's action was sufficiently upsetting to Ms. H that she began to cry, complained to her superiors about the contact and left work early. Late in August 2000, Appellant put his hand on Lori P's shoulder and let it linger. Ms. P, who was also deemed credible by the examiner, informed Grohmann by e-mail that his action was intolerable and then spoke with Baumbach and a union representative about the misconduct. Tami D confirmed that Appellant had placed his hand on Lori P's shoulder, and that Ms. P reacted by covering her face with her hair and trying to disappear. In 2002, Grohmann changed his direction when he was walking down an office hallway so that he turned toward Ashley D and brushed against her as he continued down the hall. I credit Ms. D's very credible description of the events on that day.

Appellant frequently stood so close to at least four female employees that he invaded their personal space which, in turn, caused them discomfort. Within a couple of months after Debra B started working at OJA in May 1999, Appellant began standing within inches of her. During the summer of 1999 he periodically entered her office, walked around the front of her desk to her chair and stood immediately next to her. On at least one of these occasions, July 7, 1999, he stood so close to her that she was forced to lean away from him and over her desk. By comparison, everyone else who came into Debra B's office stayed in front of her desk. Even when she reacted to Grohmann's conduct by taking a backward step, he responded by

taking another step towards her so that he remained in her personal space. Appellant stood within six inches of Lori P on several occasions in 1999. When Grohmann was in Ms. P's office area in February of 2000, he positioned his foot on an adjacent table so she was unable to turn her chair. Just a month before he placed his hands on Angie H's shoulders, Appellant periodically stood immediately behind and inappropriately close to her. Deb D told Baumbach in the fall of 1999 and later during the spring of 2000 that Appellant made her uncomfortable because he positioned himself so close to her.

Four witnesses credibly testified that Appellant would fail to move aside when he stood in the middle of the exit path from their offices or cubicles. This had the effect of either blocking the women's passage from the enclosed area or making it difficult for them to avoid some physical contact with Grohmann. Deb D was uncomfortable with the way Appellant positioned himself in her doorway throughout her first 3½ years at OJA. She described situations when Grohmann failed to step aside even though her co-workers had made it obvious they wished to leave. Deb D sometimes simply remained in her office rather than dealing directly with Grohmann's stance in the middle of her doorway. Donna D encountered similar conduct by Grohmann right from the start of her employment in June of 2001. Within two months she complained to her supervisor that he made her uncomfortable and she made a similar complaint to Baumbach in January or February of 2002. Lori P's credible testimony was that Grohmann would stand in the entry to her cubicle with one arm on the cubicle partition and the other on a bookcase. She had to turn sideways and duck under one of his arms to extricate herself from her cubicle. The Canty report indicates that on April 17, 2002 Tami D had to squeeze by Grohmann to leave a room without touching him. The next week, she had to angle her body when she left her office because of Appellant's position immediately outside the door. Ms. D testified that it was commonplace for Appellant to stand in a location that forced her to alter her path in order to move past him.

Debra B, Tami D, Deb D and Ashley D all noted that Appellant periodically ignored them when he stood or walked in the middle of office hallways, which had the effect of forcing them to re-position themselves and turn sideways in order to avoid contact with him.

It was not unusual for Appellant to enter female employees' work areas unannounced and from a point outside the employee's field of vision. He would then remain standing immediately in back of the employee without calling attention to his presence. Quite understandably, and as confirmed by the testimony of Angie H, Lori P, Donna D and Deb D, this made many women in the office uncomfortable. Lori P told Linda Miller. Ms. Miller also informed Appellant that Debra B was very uncomfortable whenever he entered her work area without making himself known. Grohmann's conduct ultimately caused several of the women in the office to put up mirrors or pictures with reflective glass so they would know when he was standing behind them.

Appellant acknowledged that he often sat at meetings with his legs spread apart. He blamed his sitting position on the fact that he is tall and lanky. I fail to see a cause and effect relationship between Appellant's seated posture and his height. Four women, Deb D,

Donna D, Ms. Miller and Lori P, verified that Grohmann's sitting position made them uncomfortable. Sometimes Grohmann accentuated his body position by leaning back in his chair and placing his hands in his groin area.

Appellant denied engaging in much of the above conduct and offered different versions of some of the events. For example, he contended he merely touched Debra B between her shoulder blades with his fist and only tapped Lori P on the shoulder. I perceive Debra B and Lori P to be the more credible witnesses and believe their description to be more accurate because they were consistent, they had nothing to lose or gain by a particular result and they had not complained about misconduct by other men in the office. In contrast, Appellant admitted during the second investigatory interview that he was aware he had encroached on Debra B's personal space. He admitted he had touched Debra B, Angie H and Lori P, and he acknowledged that touching anybody would be a "technical" violation. He admitted entering employee workspaces without announcing himself, but suggested he was merely waiting to say something until there was a break in the employee's activity. This might be an explanation for one or two incidents but is not a viable rationale for conduct observed by numerous women and repeated over the course of several years.

I believe the greater weight of the credible evidence established that during the period from mid-1999 to August 2002, Grohmann regularly stood in the personal space of other employees, blocked doorways, failed to appropriately accommodate their passage in the halls, sat inappropriately with his legs spread apart and stood immediately behind women without announcing his presence and without good reason.

I see no evidence of any factual basis for Appellant's theory that the women's allegations arose from a self-fulfilling prophesy. Many of the women testified they were not warned about Appellant before they began noticing his inappropriate behavior.

Nor do I find persuasive Appellant's contention that he did not intend to convey anything sexual by his conduct. Intent is not an element in this matter. Whether Grohmann did or did not have any sexual connotation in mind does not alter the fact that he engaged in intimidating conduct that made several women in the office uncomfortable and the women perceived it to be sexually motivated. As explained below, I believe it is appropriate to consider the subjective perceptions of those on the receiving end of Appellant's behavior.

The other Commissioners consider Appellant to be more credible than Baumbach in terms of assessing whether Baumbach ever told Appellant not to touch anyone and the number of times Grohmann was warned about invading his co-workers' personal space. I find Baumbach more credible on these issues. His warnings were in response to specific complaints he had received and the existence of those complaints is confirmed by the victims who made them. I do not believe that Baumbach was indifferent to the women's numerous grievances. In addition to Baumbach, several other OJA employees made their dissatisfaction with Grohmann's conduct known to him. Ms. Miller told him that Debra B was very uncomfortable when he entered her work area unannounced as well as when he placed his hand

on her shoulder. Ms. Radcliffe exchanged a series of e-mails with Grohmann in which she explained that Angie H was uncomfortable because he was looking over her shoulder. Ms. Radcliffe noted that Baumbach was aware of Ms. H's concerns. Lori P sent another e-mail to Grohmann after he put his hand on her shoulder and said his conduct was unacceptable. Then in mid-2002, Baumbach told Grohmann not to be alone with women. When Appellant contends he was still unaware he was making others uncomfortable or contends he was never warned to stop touching other employees and never told to respect their personal space, he asks that overwhelming evidence to the contrary be ignored.

Appellant's misconduct was not limited to how and where he positioned his body. Grohmann commented to Aura B on August 13, 2002 that since her residence was on his way home, he could just stop by her house after work to ask questions or deliver paperwork. Her physical reactions to Appellant's comment show that Aura B was greatly upset by it. Other employees at the meeting acknowledged that the comment would be upsetting to Aura B. Appellant testified that because of a prior conversation with Aura B, he knew that she did not want to be called and that she wanted to be paid more for any work she performed after leaving her regular employment setting. Appellant chose to make the comment to her about stopping by her house anyway.

Appellant's misconduct, beginning in 1999 and involving numerous women at OJA, constitutes just cause for imposing discipline. In my opinion, Grohmann's conduct violated each of the three work rules that were cited in the letter of discipline, relating to insubordination, discourtesy and sexual harassment.

I would find that the Appellant was insubordinate. After he touched Debra B in mid-1999, he was warned by Baumbach and told not to touch his co-workers and to respect their personal space. Appellant subsequently placed his hands on the shoulders of Angie H. Baumbach repeated the previous warning. Appellant ignored both of Baumbach's warnings when he allowed his hand to linger on the shoulder of Lori P. Grohmann also ignored the directives relating to his co-workers' personal space. He continued to position himself so that he was inappropriately close to several female employees in their work areas and continued to approach women from behind and from outside of their field of vision. Appellant should have known, under an objective test, that his conduct violated these work rules. He was the only OJA employee who made others uncomfortable by touching and invading personal space. No witness experienced this type of conduct from any of the other males in the office.

When addressing the second element of the just cause analysis,

> one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. SAFRANSKY V. PERSONNEL BOARD, 62 WIS. 2D 464, 474, 215 N.W.2D 379 (1974) (citation omitted)

Grohmann's insubordinate conduct caused substantial dissatisfaction and disruption within OJA. Deb B was so upset after Grohmann touched her that she had to leave the workplace for the remainder of that day. Angie H cried and had to be consoled by other employees. Part of the reason Ms. H stopped working at OJA was because of Grohmann's behavior. In addition, several employees made arrangements to have lengthy meetings with Grohmann interrupted by a phone call. All of these reactions were prompted by Grohmann's misconduct and they all interrupted the legitimate business of the agency.

The same conduct that violated the insubordination work rule also constituted discourtesy by Grohmann in his interactions with his fellow OJA employees. Touching people without their permission, impeding their movement, standing so close to them that they need to back away or lean away, and sitting with legs spread apart are all discourteous actions that had negative consequences on OJA work performance.

Appellant also violated the work rule regarding sexually harassing a person of the opposite gender. This work rule is not limited to sexual advances and includes conduct of a sexual nature that substantially interferes with work performance and creates an "intimidating, hostile or offensive environment." Grohmann's actions were directed toward younger females who occupied less powerful positions. I find it appropriate to consider his actions of both touching Debra B and infringing on her personal space in the context of Appellant's unsuccessful efforts to initiate a social relationship with her. Angie H had been sexually assaulted as a child and was particularly concerned about contact with a man, so she was quite upset when Grohmann placed his hands on her shoulders. Physical contact can have several connotations, sexuality being one of them. Gratuitous physical conduct can be offensive even if it is not construed as a sexually motivated caress. See, AMIN V. DHSS, Case No. 81-171, (Pers. Comm. 3/17/83). The hearing included several witnesses, including some called by Grohmann, who felt Appellant's behavior could be interpreted in a sexual way and either did, or could, create discomfort. As noted in the proposed decision, the subjective perceptions of the person who is the brunt of the unwanted gender-based behavior is an important factor in assessing sexual harassment cases under the Wisconsin Fair Employment Act. FLUHR V. JAMES MAGESTRO, DDS (LIRC, 04/01/99). In dicta, the Personnel Commission has noted that in determining whether an employee's conduct was threatening or intimidating, thereby violating a work rule, the Commission should apply an objective standard, i.e., whether the actions would be deemed threatening or intimidating to the average similarly situated employee. ARNESON V. UW, Case No. 90-0184-PC, (Pers. Comm. 2/6/92).

When considering issues involving sexual harassment cases, the Personnel Commission has looked to other jurisdictions addressing similar work rules. In order to violate the work rule, the conduct must be unwelcome. The U. S. Equal Employment Opportunity Commission is charged with administering federal statutes and regulations which are similar to the work rules involved here, such as 29 C.F.R. Sec. 1604.11(a), which prohibits sexual harassment and defines sexual harassment as "unwelcome … verbal or physical conduct of a sexual nature…." This is essentially the same language as the work rule here, which refers to ". . . unwelcome sexual advances. . .or deliberate verbal …conduct of a sexual nature…." In

reviewing an action under the federal law, the Eleventh Circuit provided a general definition of "unwelcome conduct" in HENSON V. CITY OF DUNDEE, 682 F.2d 897, 903 (11th Cir. 1982): the challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." In this case, none of the women solicited or incited Appellant's conduct and several of them considered the actions to be undesirable or offensive. Violations of sexual harassment rules have previously been found to impair the efficiency of the work group. HARRON V. DHSS, Case No. 91-0204-PC, (Pers. Comm. 8/26/92).

Additional statements of Appellant, both describing his management style and his interactions with other employees, further support the conclusions set forth above.

> Certainly I could do some things that—unconsciously, I suppose—that make people uncomfortable and I think...I think I do but it just doesn't have anything to do with sexual harassment. I think that...I think—and I—cause I've certainly been told this by people closer to me that I'm kind of intimidating. Uh...and I guess I can see that. And there's people that would be uncomfortable around me. . . .
>
> Now, I—I certainly don't mean to intimidate people but I think that a firm management hand is what is need [sic] here and not somebody that they think they can push around....
>
> They don't see a positive role for management. They don't respect management. And yet that's not how business gets done, I mean, we've got to have management that sets priorities, that assigns the resources and if everybody is going to do that, we don't have—we have disarray. We have chaos.
>
> So, I think that I do portray that kind of a management style. I just do not believe that it's conveyed as anything sexual. And—and I [inaudible] said [inaudible] I don't think anybody reading this would say that it's sexual either. [September 12, 2002 interview transcript, pp. 12-13]

In response to a point in the same interview about being careful, Appellant explained how he saw certain matters twisted against him:

> You know—you know I don't expect you to agree with what I am saying but I truly cannot—I can—I can say that maybe I do something unconsciously. I—I know this intimidation thing—I don't want to overrate it—but that kind of a presence—and I know that is there...but I actually don't...I don't regret that. [September 12, 2002 interview transcript, p. 19]

Based upon all of the above I would find that Appellant's conduct was intimidating and that he was aware it was intimidating. Particularly telling is the testimony of Deb D, who

admitted she had not told Appellant she was uncomfortable around him. She explained that these events had occurred when she was younger and less assertive.

Appellant admits that his management style can be intimidating. Given his repeated conduct of touching, invading personal space, impeding movement in doorways and hallways, and sitting with one's legs spread apart, Respondent has established an environment that was offensive, intimidating and hostile. CF., ARNESON V. UW, Case No. 90-0184-PC, (Pers. Comm. 2/16/92) (allegation of one incident). I believe it is a violation of the work rule prohibiting sexual harassment.

I would find that Appellant's conduct violated all three of the cited work rules and that it tended to impair the efficiency of Respondent's workplace.

However, I would modify the level of discipline because I believe that under the SAFRANSKY/BARDEN test, demotion is excessive. Given Appellant's longstanding and exemplary work record, the absence of any prior discipline and the generally accepted view that he was an effective manager, I believe a more progressive disciplinary approach is warranted. An important goal when imposing discipline is to effectuate the correction of employee misconduct. Here, in the absence of prior discipline, the corrective aspect of discipline has not had an opportunity to take effect. I am unconvinced that Appellant should not be allowed to supervise or to manage programs after his discipline. An appropriate level of discipline in this case would be a suspension of 30 days, the maximum length of suspension permitted under Sec. 230.34(1)(b) Stats. Prior Personnel Commission decisions are consistent with such a result. A 12-day suspension without pay was upheld for a supervisory employee who kissed another employee on the neck under circumstances which would have lead a reasonable person to believe that he engaged in unwelcome physical conduct of a sexual nature. The offending employee had previously been suspended for 5 days due to similar behavior. HARRON V. DHSS, Case No. 91-0204-PC, (Pers. Comm. 8/26/92). In Appellant's case there were several women who received unwelcome physical contact, were treated discourteously and were intimidated. The insubordination and misconduct occurred over 2½ years. This justifies a longer period of suspension than was imposed in HARRON. A 30 day suspension is not as severe as discharge, the level of discipline that was imposed where an employee had violated three work rules and received previous warnings. ENGLAND V. DOC, Case No. 97-0150-PC, (Pers. Comm., 9/23/98).

Dated at Madison, Wisconsin this 11th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/
Paul Gordon, Commissioner

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