STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CAROL BARTZ-BENTZ, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF VETERANS AFFAIRS, Respondent.

Case 1
No. 64123
PA(adv)-54

Decision No. 31485-B

Appearances:

Lester A. Pines and **Nicholas Fairweather**, Attorneys, Cullen Weston Pines & Bach, LLP, 122 West Washington Ave., Suite 900, Madison, Wisconsin 53707, appearing on behalf of Carol Bartz-Bentz.

John Rosinski, Legal Counsel, Wisconsin Department of Veterans Affairs, 30 West Mifflin Street, 8th Floor, Madison, Wisconsin 53707-7843, appearing on behalf of the Department of Veterans Affairs.

FINAL ORDER ON REHEARING

Carol Bartz-Bentz appeals the imposition of a disciplinary discharge from employment with the Wisconsin Department of Veterans Affairs effective October 26, 2004. The parties agreed to the following issue for hearing:

> Whether the Respondent had just cause to terminate the employment of Appellant pursuant to the discipline letter of October 26, 2004? If not, what is the appropriate remedy?

The matter was heard on March 1 and 2, 2005, before Paul Gordon, Commissioner, serving as the designated hearing examiner. The hearing was recorded and an unofficial transcript of the proceedings was prepared. The parties filed post-hearing briefs and supplemented the record with Appellant's Exhibit No. 21. The record was closed by letter of June 24, 2005. The examiner issued a Proposed Decision and Order on November 14, 2005. Written objections were filed and the final date for submitting a written response was December 16, 2005.

The Commission issued a "Final Decision and Order" on April 12, 2006, but subsequently granted Appellant's petition for rehearing "for the purpose of deciding whether the Final Decision and Order contains material errors of fact and law." We have reviewed the parties' arguments and find that while most of Appellant's arguments are without merit, the Final Decision and Order should be revised to show that the Respondent has abandoned an additional allegation underlying its disciplinary action. Nevertheless, we conclude that the Respondent's action of discharging the Appellant should be sustained. Rather than issue a ruling limited solely to the topics raised in the petition for rehearing, we have modified the April 12, 2006 "Final Decision and Order" and are effectively re-issuing it in the modified form.

The Commission has consulted with the hearing examiner. After carefully considering the record, the proposed decision and the objections, the Commission rejects the proposed decision, affirms Respondent's action[1] and dismisses the appeal. The Commission has concluded that the Appellant engaged in substantially more of the misconduct described in the letter of discipline than did the examiner, and that discharge was not excessive discipline. The Commission's analysis is set forth in the Memorandum, below.

The Commission has revised the examiner's proposed findings by reorganizing them, correcting those that were not supported by the preponderance of the evidence, supplementing others with additional relevant information, and deleting language unnecessary to the resolution of the matter. Those portions of the proposed findings that related to abandoned allegations have been deleted. For the reasons set forth below, the action of the Respondent is affirmed. The Commission makes and issues the following

FINDINGS OF FACT

1. Appellant has been employed by Respondent since November of 1982, and prior to the disciplinary action that is the subject of this appeal was an Occupational Therapist (Therapist) at the Wisconsin Veteran's Home (WVH) in King, Wisconsin. WVH is a 749-bed skilled nursing facility for Wisconsin's military veterans. Its residents are commonly referred to as "members." The population at WVH is generally frail and susceptible to harm or injury. The WVH campus includes four primary nursing homes ranging in size from 160 to 205 beds. Couples who are relatively independent can live in one of 14 cottages that are also part of the campus. All services for the cottage members are provided by WVH. There are other buildings on the grounds.

[1] The key basis for the Commission's decision is our conclusion that the Appellant misappropriated five pieces of equipment that she had purchased using State funds. The Appellant engaged in additional misconduct alleged in the letter of discipline, strengthening the Commission's conclusion that discharge is the appropriate degree of discipline. The Commission does not address the separate question of whether the additional misconduct, standing alone, would have provided just cause for discharge.

2. Among the services supplied to WVH members is occupational therapy. The goal of occupational therapy is to help individuals achieve their maximum level of independence when engaged in whatever activities of daily living are age-appropriate.

3. WVH's Occupational Therapy (OT) Department is located in McArthur Hall. The department has a large central area with smaller rooms and offices on two sides. It includes numerous closed shelving and drawer units, some of which serve as room or area dividers. There is a 5½ foot by 5½ foot janitorial closet with a floor sink in the corner of one of the rooms. Various OT equipment, supplies and office equipment are kept throughout the OT department. OT services are provided to members in McArthur Hall as well as in other residence halls and cottages. Various pieces of occupational therapy equipment and assistive devices are provided to members for their use in the department and at their individual places of residence.

4. At all relevant times, Christine Wrolstad served as the Deputy Commandant at WVH. From 1984 until the disciplinary action that is the subject of this appeal, Appellant served as the supervisor of the OT department and was classified as a Supervising Therapist 1. Appellant supervised two Certified Occupational Therapy Assistants (hereafter referred to as Therapy Assistants or, in some quoted materials, as COTAs). During the relevant time period, these positions were filled by Jolie Bestul and Robyne Bestul, who became sisters-in-law in October 2004.

5. Appellant's supervisor was Dr. Paul Drinka, the WVH Medical Director. Drinka provided very little direct supervision to Bartz-Bentz. Susan Voeks, the Coordinator of Clinical Services, also reported to Dr. Drinka who was in turn supervised by Deputy Commandant Chris Wrolstad.

6. Dr. Drinka prepared Appellant's annual performance evaluations. Prior to 1995 the evaluations usually did not include an overall rating, but indicated Appellant met her performance standards and contained numerous positive comments. From 1995/1996 through 2000/2001 the Appellant's overall rating was "above satisfactory." For 2001/2002 and 2002/2003 the overall rating was "exceptional." Prior to the action that is the subject of this appeal, Appellant had never been disciplined by Respondent.

7. Until approximately 2000, WVH had provided internships to one or more OT students from Fox Valley Technical College. Appellant worked with Ann Jadin of the Technical College to arrange the internships. The student interns would spend much of their time interacting with the two Therapy Assistants.[2]

[2] The Commission has deleted some additional information found in the Proposed Decision relating to how Ms. Bartz-Bentz and Ms. Jadin perceived the internship program, because the topic was peripheral to the matter at issue.

8. By the Fall of 2003 the relationship between Appellant and the two Therapy Assistants had deteriorated. In December, before the Therapy Assistants had become sisters-in-law, Appellant prepared one or more drafts of a letter asking her superiors to consider moving one of the Assistants out of the department in order to split them up. Before Appellant sent the letter, and while she was on vacation in December, the Therapy Assistants saw a draft on Appellant's desk and read it. The Assistants submitted their initial complaint about Appellant's conduct shortly thereafter. Appellant never actually sent the letter.

9. Shortly after receiving the Assistants' complaint, Respondent commenced an investigation relating to the Appellant. The investigation included meetings with Ms. Bartz-Bentz on January 22, January 30, February 11 and April 15, 2004. Respondent placed Appellant on administrative leave with pay on or about February 1, had her return to work on February 23 but temporarily assigned her duties outside of the OT department, and finally discharged her on October 26, 2004.

10. As reflected in a memo to Commandant Wrolstad of January 25, 2004, Appellant also raised concerns about the Therapy Assistants' conduct and work performance.[3]

11. As part of her duties as a Supervising Therapist, Appellant ordered supplies and equipment for general use by the staff of the OT department. Appellant had the authority to purchase items under a certain dollar limit by using a State-assigned purchasing card. More expensive items had to be processed through a more formal procedure. WVH budgets for purchasing certain items during a specific year, but also has maintained a wish- list in the event funding becomes available. The detailed paper trail for each item that Appellant purchased included her signature.

12. WVH has an inventory control system to keep track of much of the equipment it purchases. However, equipment arriving in boxes was sometimes not opened until final delivery to the requestor. The inventory system included placing prominent yellow tags on valuable items. WVH also has a practice of etching "WVH property" or "WVH" on any purchased items that are viewed as susceptible to being stolen. Respondent occasionally conducted inventory surveys to account for the items that had been tagged.

13. Appellant used her purchasing card to make the following purchases that are at issue in this matter:

a. Laminator for $226.26 in March 2000;
b. Stopwatch for $73.11 in July 2001;
c. Talking food scale for $77.36 in January 2002;
d. Stopwatch for something less than $79.80 in June 2002; and.
e. Stopwatch for $72.21 in May 2003.

[3] The Commission has deleted more specific information found in the Proposed Decision relating to the contents of the memo because the topic was peripheral to the matter at issue.

14. Upon Appellant's request, WVH purchased the following items for the OT Department:

a. Portable Hand CPM (continuous passive motion) machine for $3329 in April 2001; and
b. Winsford Electric Self-Feeder for $3153.59, including shipping costs, in May 2001.

15. The automatic feeder and continuous passive motion machine remained in their original packaging in Appellant's office or an adjacent room for nearly 3 years and were never used. When, as part of its investigation, Respondent sought to locate the talking food scale and the three stopwatches, Appellant never produced them.[4]

16. In January 2002, one of the member couples who lived in a WVH cottage desired adaptive equipment in order to safely use their bathtub. A bathtub chair (which has all four legs resting on the floor of the tub) and a tub bench (which spans the top of the tub rim and is supported by legs both within and outside the tub) are two distinct forms of adaptive equipment for use with a bathtub. One of the Therapy Assistants had met with the couple and subsequently asked Appellant to order them a tub bench. Appellant ordered the equipment and it was received by the OT department shortly thereafter but it was not delivered to the couple.[5] As part of its investigation of Appellant, Wrolstad asked her if OT had a tub bench and where it might be. Appellant said she was not aware that OT had a bench. Appellant and Wrolstad then searched the OT department on January 22, 2004 for various equipment, including the tub bench. During the search, Wrolstad asked Appellant what was in a large box near a chair in one of the OT rooms. Appellant started to move the box and responded that it was empty. Wrolstad thought it seemed to contain something, directed Appellant to open it, and discovered the tub bench inside. The bench had remained in the OT Department from the time it was delivered in 2002 until Wrolstad discovered it in January 2004.

17. Wrolstad then directed Appellant to evaluate the couple to see if they still needed a tub bench. In the interim, the couple had used their own funds to purchase a bathtub chair. Appellant visited the couple but chose not to provide them with the bench. Appellant wrote a note to Wrolstad relating to Appellant's visit to the couple.[6] In other documentation that she did not provide to Wrolstad, Appellant's notation about the visit referenced a tub "chair" and indicated the couple had no need for additional adaptive equipment to get in and out of the tub.

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[4] The proposed decision indicated that Appellant purchased the stopwatches in order to make portable assessment kits. Appellant was the only witness who offered testimony on this point but she had also stated, inconsistently, that she made one of the stopwatches available to the two Therapy Assistants. The Commission has deleted the conclusion from the findings because of the absence of supporting evidence and because a finding on this point is unnecessary.

[5] The proposed decision stated that, after the bench had been ordered, the couple contacted one of the Therapy Assistants in an attempt to track it down. There is no evidence of such a contact that is not hearsay. Hence the Commission makes no finding to that effect.

[6] The record does not provide a basis for determining the precise content of the note.

18. Appellant purchased the laminator in March of 2000. Approximately one week after the machine was delivered to her, a WVH staff member asked about a laminator and Appellant denied that the OT Department had one. It was not located on WVH premises when Appellant and WVH officials first looked for it in McArthur Hall on January 22, 2004, even though Appellant had said that it would be in the room next to her office. The Therapy Assistants were not present during this search of the OT department. Ms. Wrolstad told Appellant that if she did not locate the laminator, she should report it as stolen. The next day, January 23rd, Appellant delivered the laminator to Commandant Wrolstad's office, in Stordock Hall. The laminator was cold to the touch when it arrived at Wrolstad's office, did not have a property tag and had not been etched to show it was WVH property. Appellant claimed she had found the laminator in the OT Department's janitorial closet, one of the places in the department that had not been searched on January 22nd.[7] Even though the laminator had been used before it was returned on January 23rd, there is no credible evidence that it had been used for a task relating to WVH functions.

19. Peggy Krause, a Nurse Clinician, is the Health Insurance Portability & Accountability Act (HIPAA) compliance official at WVH. In early 2003 she began training employees, including Appellant, about various privacy aspects of HIPAA including key inventory and control. Those receiving training also learned they could be disciplined for violating HIPAA requirements. Part of HIPAA compliance is to control access to areas that contain patient treatment information and this directly relates to issuing and control of the keys to those areas.

20. On February 19, 2003, Appellant received an e-mail relating to facility keys. It provided, in part:

> Part of meeting HIPAA is controlling access to rooms. This directly relates to the issuing and control of keys used by employees, volunteers and contractors. In order to better know who has keys in their possession we need to conduct a review of all employees throughout the Home.
>
> I need your help. I would like each . . . designated supervisor to review all keys possessed by their employees. While doing this review it is important to check what the keys are for and if the keys are needed for employees to complete their job duties. If keys are not needed, are duplicates or cannot be identified, they need to be returned to the Physical Plant Office.
>
> If there are questions concerning this issue, please let me know. . . .

[7] The proposed decision included a finding that the "Appellant found the laminator" in the janitorial closet. For the various reasons explained in the memorandum portion of this decision, the Commission does not find Appellant's testimony credible on this point. The proposed decision also included language relating to the frequency that the Therapy Assistants used the janitorial closet. The evidence on this point is relatively vague and a finding is unnecessary.

Respondent's policy is that only those employees who need access to a particular room should have keys to the room.

21. As requested, Appellant completed the key inventory form which was in the format of a spreadsheet, with the initial column entitled "Employee Name." Appellant listed her own name as well as the names of the two Therapy Assistants in the "Employee Name" column. She provided the key control numbers and the rooms that were accessed by each of 3 keys that she identified for each Assistant. She listed only two keys next to her own name. In April 2004, many months after Appellant had responded to the e-mail directive, Respondent discovered an envelope containing 32 additional keys on a bookcase in Appellant's office. The envelope also contained a copy of the February 19, 2003 e-mail. Appellant was aware that the keys remained in her office after she completed the key inventory but she did not list them on the inventory or turn them in to the Physical Plant Office. The 32 keys included master keys to the entire first floor of McArthur Hall, which includes the WVH mental health office and contains numerous documents that contain health information protected by HIPAA. Appellant had no legitimate reason to retain any of the 32 keys in the envelope.[8]

22. OT staff evaluate the members and maintain records of their evaluations. During the investigation of her conduct, the Therapy Assistants indicated that Appellant did not complete the evaluations she was supposed to perform. When asked, Appellant told Respondent she completed about one evaluation daily. Ms. Voeks reviewed the relevant records and confirmed that Appellant performed the evaluations as she had said.

23. By letter of October 26, 2004, Respondent discharged Appellant for violating WDVA Work Rules C.1, A.1, A. 4, and A. 5. The letter[9] states, in part:

> You are hereby notified that, pursuant to the authority vested in me by the Department of Veterans Affairs, you are being discharged from employment effective immediately. This action is being taken based on your violation of WDVA Work Rules.

[8] The corresponding finding in the proposed decision stated that "Appellant assumed she only needed to account for actively used keys." While the statement is consistent with Appellant's testimony, the Commission does not credit Appellant' testimony. Appellant was unable to provide any basis why she might have reached such a conclusion and such a conclusion would have been inconsistent with WVH policy and with the clear directive in the e-mail to return unneeded keys to the Physical Plant Office.

[9] The Commission has italicized those paragraphs of the letter of discipline that contain allegations abandoned by the Respondent.

C. 1. "Stealing, unauthorized or improper use, neglect, possession, removal or destruction of state-owned, leased or another person's private property, equipment, materials or supplies including, but not limited to, vehicles, telephone or cellular phone, pagers, electronic communications systems such as computers, software, e-mail, fax or internet, or mail service, including the unapproved salvaging of waste or discarded materials." This violation is evidenced by:

1. your misappropriation of equipment (laminator, stopwatches, talking scale), purchased by you for the OT department. You were unable to account for, produce, or provide a reasonable explanation of the use/nonuse, or whereabouts of these pieces of equipment,

2. your purchase of a Continuous Passive Motion machine (6/30/01, for $3335) and an Auto-Feeder (6/30/01, for $2895) in FY01 at a total cost in excess of $6000, which during the investigation we realized neither of which had ever been used with any member or even taken out of their original packaging to see if they worked;

A.1. "Disobedience, insubordination, inattentiveness, neglect, or refusal to carry out written or verbal assignments, directions or instructions." This violation is evidenced by:

1. your failure to supervise Certified Occupational Therapy Assistants (dating back a minimum of two years) as required by Chapter OT 4 of the Wisconsin Statutes and the Standards of Practice of the American Occupational Therapy Association. According to the COTAs [Therapy Assistants] under your supervision, you did not initiate all evaluations. You frequently passed the written physicians' orders directly to the COTAs, expecting them to initiate and complete the evaluation. You did not prepare all initial plans of care or revise and/or upgrade plans of care, assigning or allowing the COTAs to do it. You did not complete all monthly re-evaluations of all members on active caseload, assigning or allowing the COTAs to do so. You did not have direct contact in the form of re-evaluation or therapy with all members on active caseload at least every two weeks;

2. your failure to abide by administrative directives as issued by Peggy Krause, WVH Privacy Officer to account for and surrender all keys to areas that contain protected health information as regulated by HIPAA and well-published sanctions ranging from verbal warning to termination of employment;

3. your failure to follow a directive given by Christine Wrolstad, Deputy Commandant during the meeting of January 22, 2004 not to speak to anyone about the investigation as evidence[d] by follow-up investigation with individuals which confirmed the same; and

4. your negligence in failing to provide adequate service to two members who were in need of a tub transfer bench, resulting in a situation where a fall could have had life-threatening consequences.

A.4. "Falsifying records or providing false information to the public, other state agencies, or to employees responsible for record keeping." This violation is evidenced by:

1. your habitual failure to accurately document your testing procedures and your arbitrary modification of test results after obtaining your own equipment, which you then entered into residents' medical records. Such adjustments are a falsification of the medical record, and result in falsely representing progress due to OT intervention;

2. your failure to accurately report time duration and content of purported continuing education activities; by providing information that conflicted with inservice and statement documentation, and

3. your closing of the Occupational Therapy department of November 21, 2003 with no notice to member help who work for OT and then claiming that you worked these hours on your TAC form.

A.5. "Failure to provide truthful, accurate and complete information whenever such information is required by an authorized person." This violation is evidenced by:

1. your failure to provide accurate and truthful information when asked what was in a large cardboard box behind a recliner in the Occupational Therapy Department. Upon immediate inspection by the Deputy Commandant, a tub bench was found which had been part of the investigation and about which you had denied any knowledge;

2. failing to provide verbal responses as directed and offering only shrugs in response to questions during the investigatory process meetings on January 22 and 30, 2004;

3. denying on January 30, 2004 during an investigatory meeting that you had left work early the day before and insisting on January 29, 2004 to Dr. Susan Voeks that the clock in OT said 3:30 when you left;

4. claiming to have attended inservice training sessions for which there is not documentation of your attendance;

5. claiming two hours of continuing education credit for a 15 minute finger-stick blood draw to check cholesterol during a WVH health fair on January 23, 2003;

6. claiming that WVH inservice training qualifies as continuing education for purposes of maintaining a Wisconsin license as an Occupational Therapist. The list of continuing education activities which you provided included inservice presentations for which we have no record of your attendance, were not specific to occupational therapy, and/or were not approved for continuing education by the American Occupational Therapy Association or any recognized related professional organization.

7. claiming the same inservice in different reporting periods on more than one occasion;

8. giving conflicting reports during the January 22 and January 30, 2004 meetings on your whereabouts when you were observed leaving and returning to campus during work hours on January 9 and January 15, 2004, while representing yourself as working in one of the resident care buildings;

9. claiming in the investigatory meeting that you provide close supervision of COTAs, that you're "Right on top of them, I guess. Probably doing it with them." You further claimed, "I go over every evaluation point by point. I sit down with them and go over every one," which is contrary to information provided by the COTAs; and

10. your false statements regarding the members who needed a bath bench, as described by Christine Wrolstad, Deputy Commandant during the predisciplinary meeting;

> On 1/23/04 Carol left me (Chris Wrolstad, Deputy commandant) a note that she'd been to the W_____[name redacted for privacy reasons] cottage and stated, "they already have a bench/seat." This was false information.
>
> In the week after receiving this report, I checked with Mrs. W_____ and explained the difference between a tub bench and tub chair, asking her if she'd talked to the OT recently. She said neither she nor her husband had been asked about a bath bench and that it would be "wonderful" for them because of her fear of falling with her cervical instability and impending neck surgery.

At the predisciplinary meeting on September 15, 2004, you were given the opportunity to present any additional information, for us to consider in coming to a decision regarding this matter. Your only response of substance followed our delineation of the ways in which you failed to adequately supervise the COTAs. You stated that you had been performing your duties for 21 years and during that time had had a minimum of five program surveys per year, one of them from the Veterans Administration (VA), and had never been told that there was anything wrong. When asked if they had specifically reviewed these supervisory processes, you said you didn't know what they were looking for.

We have reviewed these statements with the surveying agencies. The VA has only been in the OT Department one time in the last 10 years and their survey process only addresses the provision of services to residents, not the supervisory relationship between the OT and the COTA. The State Bureau of Quality Assurance surveys, which account for the other four surveys per year, have never included visits to the OT Department and only rarely review the OT services. Their area of responsibility is determining whether the nursing staff is executing care recommendations provided by the therapies. Furthermore, the BQA surveyors do not in any way evaluate the supervision of COTAs by the OT. In summary, our investigation of your statements reveals that the survey process is not relevant to your failure to abide by the requirements of the state statutes with respect to providing adequate supervision of the COTAs. Your failure to abide by these statutory requirements negatively affects WVH-King in that it jeopardizes the care of the members and ultimately increases the organization's liability regarding the care provided by the COTAs. Claiming multiple on-site surveys as proof of the approval of your supervisory processes has shown that you have once again provided false information meant to mislead management into thinking that your practices are justifiable.

One of the incidents mentioned above in which you were observed to have provided false information was your failure to adequately account for and surrender keys in response to HIPAA mandates. This is an egregious work rule violation. The WVH Privacy Officer has documented her meetings with you during which you were to provide a detailed audit of all facility keys held by you or your staff. Pursuant to that audit, you signed documents saying that you had accounted for all keys and collected any if access was no longer needed. You were present at an inservice in which you were told that sanctions shall be applied against any staff member who violates the facility's privacy policies and that these sanctions ranged from a verbal warning up to and including termination of employment. Despite the direct, personal training by our Privacy Officer, group training, and repeated warnings about the consequences of failing to follow privacy policies, you knowingly retained 32 keys, some of which provided access to areas holding protected health information for which you had no business need to retain. These actions subjected the WVH to unnecessary liabilities including monetary damages.

Management conducted several investigatory meetings in January, February and April regarding these issues. There has been an exhaustive investigation of the many allegations that were brought forth. Despite the fact that the misconduct occurred over a number of years, the staff that you supervised only recently brought these allegations forward. They were reluctant to do so for fear of retaliation.

You have been found to have violated the work rules listed above. The information you provided throughout this process was considered, but it does not mitigate disciplinary action. Conversely, your actions in these instances are considered extremely egregious and your failure or refusal to cooperate with this investigation by not answering questions, providing false and misleading information and/or incomplete answers has aggravated the situation. Your attitude in failing to take responsibility for any of your actions and your lack of remorse is particularly troublesome. As a supervisor in a professional health care capacity, management must be able to trust that you will perform your job duties to the highest professional and ethical standards at all times. This expectation is inherent in the employment relationship and is essential for the effective functioning of your position and the Therapy services we provide. Furthermore, our actions have a direct impact on the welfare of the clients entrusted to our care. Because we can't trust you to perform like a professional with honesty and integrity being paramount to the professional role you hold, we also cannot trust you to care for the vulnerable population at WVH-King. It is our opinion that your negligence seriously jeopardized the health and welfare of the veterans who reside at WVH. The frequency and scope of your misconduct, combined with repeated failure to provide complete and accurate information has caused a breach in the trust inherent in your position as a medical professional and in the employee/employer relationship. Furthermore, your credibility as a health care professional within the field and your credibility as a supervisor have been irreparably damaged. While lesser levels of disciplinary action were considered, they were not deemed to be an appropriate response. Discharge is an appropriate response given the nature, frequency, and volume of the violations.

This decision was arrived at after an extremely lengthy and intensive investigation. The length of the investigation was due to the number and scope of offenses involved. The investigation was also impeded by your non-responsiveness and evasive behavior as well as the intervening lawsuit allegations, which included your request for a federal preliminary injunction. I am satisfied, however, that a thorough investigation was completed which indicates misconduct of such magnitude that termination is warranted.

24.[10] Respondent's work rules contain the following statement:

> Except for serious or repeated offenses, disciplinary action taken shall be for the purpose of correcting conduct. Positive prevention of misconduct is the goal, not punishment. It must be recognized, however, that since each case is different it is impossible to prescribe a specific penalty for a particular offense. There are certain situations which must result immediately in outright dismissal; others may warrant penalties of lesser severity.

25. Appellant violated work rule C.1. by misappropriating three stop watches, a talking food scale, and a laminator.

26. Appellant violated work rule C.1. by improperly using and neglecting state-owned property when she purchased a continuous passive motion machine valued at $3335.00 and an auto-feeder valued at $2895.00 in 2001 and did not use the equipment or make it available to members, or even take the items out of their original packaging.

27. Appellant violated work rule A.1. by failing to abide by administrative directives to account for and surrender all duplicate, unneeded or unidentified keys to areas that contain protected health care information as regulated by HIPAA.

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[10] In her petition for rehearing, Appellant contends that the Commission inaccurately explained its action to delete a finding of fact that had been found in the proposed decision. The deleted finding read:

> 19. In the course of reaching a conclusion to discharge the Appellant, the matter was reviewed by Bradl[e]y Czebotar, who is employed by Respondent as the Director of the Bureau of Administrative Services. He reviewed the records of the investigation along with recommendations from the administrators at WVH and, ultimately, made the decision on the discipline. He considered, among other things, Appellant's work tenure, performance and lack of disciplinary action, even though those specific considerations are not contained in the letter of discipline that is set out above.

In its Final Decision, the Commission explained the deletion in the following footnote:

> [11] The Commission has deleted an additional finding that explained the process followed by Respondent's Director of the Bureau of Administrative Services before he reached the decision to discharge the Appellant. The topic is peripheral to the matter at issue.

Appellant contends that rather than being peripheral, the finding "speaks directly to Respondent's abandonment of the majority of claims against Bartz-Bentz." Despite Appellant's contention to the contrary, there is nothing in Finding 19 of the proposed decision that relates to the abandonment of certain claims. The language in the finding indicates the examiner intended to show that the Respondent had, in fact, considered the factors of "work tenure, performance and lack of disciplinary action" in the decision to issue Appellant a letter of discharge. While these are highly appropriate factors for the employing agency to consider when setting the level of any discipline, the issue before the Commission is not whether Mr. Czebotar actually thought of these factors. The question before us is whether, at hearing, Respondent established just cause for the discharge action.

28. Appellant violated work rule A.1. by ordering a bathtub bench in 2002 for two members and failing to supply it to them.

29. Appellant violated work rule A.4. by lying about the contents of a box containing a bathtub bench.

30. The above work rule violations tended to significantly impair the performance of the duties of the position, the efficiency of the group with which Appellant worked, and the operation and efficiency of WVH as a whole.[11]

31. In February 2005, after Appellant's discharge, Respondent discovered that the OT department's video camera contained a videotape that was recorded by Appellant's husband in June and August 1996 and showed Appellant's children on their first day of school. The camera had been purchased in 1991. In 1996 or 1997, during an effort to inventory OT equipment, Appellant said someone was borrowing the camera and that it would be returned the next day.[12]

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

CONCLUSIONS OF LAW

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

2. The Respondent has the burden of proof.

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[11] The proposed decision included the statements that no physicians or nurses had complained about WVH's OT services, members had suffered no harm or injury due to OT activities, and none of Appellant's measurements or chart entries had been demonstrated to have been inaccurate. The Commission believes this somewhat overstated the evidence. While as a general matter, Ms. Wrolstad had not received specific complaints about harm to members, it requires another step to conclude that no harm occurred. The reference to measurements and chart entries relates to an allegation that the Commission has determined to have been abandoned.

[12] The proposed decision also included a finding related to complaints initiated by Respondent about Ms. Bartz-Bentz before the National Board for Certification in Occupational Therapy (NCBOT) and the Wisconsin Department of Regulation and Licensing. The NCBOT complaint was dismissed in April 2005 because the Board concluded that the underlying dispute did not fall within the "clear scope" of its authority. While there was a significant overlap between the complaints to NCBOT and the allegations of misconduct found in the letter of discipline, the Commission declines to place any weight on the Board's conclusion, because there is little information of record that indicates how the Board went about reaching its conclusion and because the Respondent had not based its discharge decision on a loss of OT licensure.

3. Respondent has sustained its burden as to the above-noted work rule violations. Respondent has not sustained its burden of proof as to any other work rule violations alleged in the October 26, 2004 letter of discipline.

4. There is just cause for discharging the Appellant.

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

ORDER

The Respondent's action of discharging the Appellant is affirmed and this matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 9th day of August, 2006.

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

Department of Veterans Affairs (Bartz-Bentz)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter is before the Commission as an appeal of a decision to terminate Ms. Bartz-Bentz's civil service employment as an Occupational Therapist and as the supervisor for the OT Department at the Veterans' Home at King, for the extensive list of reasons set forth in a letter of discharge dated October 26, 2004.

In an appeal of a disciplinary matter, the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. 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. COM., DANE COUNTY CIRCUIT COURT, 81-CV 5669, 4/23/84; JACKSON V. STATE PERSONNEL BOARD, DANE COUNTY CIRCUIT COURT, NO. 164-086, 2/26/79. The underlying questions are: 1) whether the greater weight of credible evidence shows the employee committed the conduct alleged by the employer 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. DEL FRATE V. DEPARTMENT OF CORRECTIONS, DEC. NO. 30795, (WERC 2/04); 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); DEL FRATE, ID.; BARDEN V. UW, CASE NO. 82-237-PC (PERS. COMM. 6/9/83).

I. Did Appellant engage in the alleged misconduct?

Respondent did not pursue many of the allegations of misconduct that were listed in the letter of discipline. For unspecified reasons, DVA chose to abandon numerous allegations and relied solely upon the contentions[13] that Ms. Bartz-Bentz:

- Misappropriated a laminator, stopwatches and a talking food scale ("Stealing, unauthorized or improper use, neglect, possession, removal or destruction of state-owned . . . property")
- Purchased, but did not use, a continuous passive motion machine and an auto-feeder ("Stealing, unauthorized or improper use, neglect, possession, removal or destruction of state-owned . . . property")

[13] The list is derived from an analysis of the evidence presented at hearing as well as the arguments made in Respondent's post-hearing briefs. As noted below, the list is reduced further by Respondent's failure to address one of the allegations in both its post-hearing brief and its response to the petition for rehearing.

- Failed to account for and surrender facility keys as directed ("Disobedience, insubordination, inattentiveness, neglect, or refusal to carry out written or verbal assignments")
- Failed to supply a bathtub bench to two members ("Disobedience, insubordination, inattentiveness, neglect, or refusal to carry out written or verbal assignments")
- Adjusted test results in medical records without documenting the procedures and adjustments ("Falsifying records or providing false information")
- Lied about the contents of a box containing a bathtub bench ("Failure to provide truthful, accurate and complete information whenever . . . required")
- Falsely reported that two members "already have a bench/seat" ("Failure to provide truthful, accurate and complete information whenever . . . required")

These remaining allegations are addressed below.

A. Purchased Items

It is undisputed that Ms. Bartz-Bentz used WVH funds to purchase a laminator, three stopwatches, a talking food scale, a continuous passive motion machine and an auto-feeder. Bartz-Bentz had the authority to use a State-issued credit card for purchasing some of these items, but the motion machine and the feeder were sufficiently expensive to go through Respondent's more formal purchasing procedures.

i. Laminator

The parties have offered dramatically different theories regarding Appellant's use of the laminator. Respondent contends that after she had purchased the laminating machine, Ms. Bartz-Bentz misappropriated it for her personal use, did what she could to cover-up her misconduct and only returned the machine when she learned that her employer was looking for it. Bartz-Bentz takes the position that she only used the machine for legitimate WVH purposes, that it disappeared for a period of up to six months and that it reappeared on the floor of a janitorial closet where she discovered it on January 23, 2004.

Quite understandably, DVA was unable to produce any witnesses who observed Appellant actually using the machine for a purpose unrelated to the operation of WVH. Respondent built its case on a variety of circumstantial evidence elicited from several witnesses. Appellant based her version of events relating to the laminator largely on her own testimony.[14] Her credibility is a key to the Commission's analysis of the laminator allegation and the Commission's conclusion as to Appellant's credibility is central to resolution of the

[14] Appellant's husband testified that he had never seen Appellant with the laminator and it was never in their home.

case as a whole.

As explained below, we find discrepancies within the Appellant's version of events and inconsistencies with other evidence of record. In addition, the Appellant has not supported her own testimony with certain evidence that one would reasonably expect if her version of events had been accurate.

The record shows that even though the laminator was delivered to the Appellant early in 2000,[15] she never informed her OT co-workers, the Therapy Assistants, that a laminator had been obtained or that the equipment was available for them to use. Appellant testified that she simply "wasn't thinking" about any uses that the Therapy Assistants might have made of a laminator. However, the Commission has no reason to believe that any legitimate use that the Appellant might have for the laminator would be any different than the use the Therapy Assistants would make of the same piece of equipment. Bartz-Bentz acknowledged that the two Assistants periodically used clear contact paper as a protective cover for schedules they prepared for individual patients. Why was Bartz-Bentz unable to draw the connection and tell the Assistants that the Department had a laminator for their use? There were even signs within the OT Department covered with clear contact paper, but none that had been laminated. If the machine had been around since it was purchased in March 2000, why had the Appellant chosen not to use it for signs within her own department? In addition, within approximately a week of the laminator's arrival, Appellant was overheard to deny that the OT department even had such a machine.[16] Ms. Bartz-Bentz has not offered any reasonable explanation why she would make such a statement. In addition, Appellant could offer no reasonable explanation why the Therapy Assistants would have *never* seen the laminator around the OT department during the four years after it was delivered.

Appellant also lacked an explanation for the absence of any property tag on the machine. She testified that she would have followed the standard procedure at WVH and made sure a property tag was affixed to the laminator shortly after she received it in 2000. However, the identifying information was not applied to the laminator until approximately four years later, after it was returned by Appellant to Ms. Wrolstad around mid-day on January 23, 2004. While the absence of the tag was consistent with an effort by Bartz-Bentz to camouflage the fact that it belonged to WVH, she did not offer a reasonable explanation that was consistent with her claim that she used the machine for WVH projects.

Ms. Bartz-Bentz was unable to provide any supporting evidence to her claims that she used the laminator for making signs to help members find their way around the facility, and

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[15] Appellant has not disputed that she received the laminator at this time.

[16] Robyne Bestul testified that she overheard this conversation between the Appellant and another employee. Ms. Bestul's testimony would not be considered hearsay because it is an admission by a party and was offered not for the purpose of establishing that the OT Department had no laminator, but to establish what Ms. Bartz-Bentz said, i.e. that she denied OT had a laminator just a week or two after one had arrived.

that she made the signs upon individual requests by unspecified "nursing staff." Respondent

was unable to locate any laminated signs that Appellant produced for the facility over the 4-year period. The Commission expected that the Appellant would be able to point out several of the signs or offer a reasonable explanation why she was unable to do so. The Commission also expected Bartz-Bentz to recall the names of some of the nurses who had supposedly asked her to produce any signs. If Bartz-Bentz was telling the truth when she testified how and why she used the laminator, she had a very strong incentive to offer one or more of the signs as an exhibit and present evidence from nurses who had asked her to make the signs. She did not do so.

There is a litany of improbabilities relating to Appellant's claim that she found the laminator in the OT janitorial closet on January 23, 2004. As part of its investigation of possible misconduct by Appellant, Ms. Voeks took numerous electronic photographs of Appellant's office and some adjacent OT department storage areas after work on January 21. The next day was the first investigative meeting with Bartz-Bentz and Ms. Wrolstad told her that the agency was interested in finding the laminator. Appellant said that the machine, which is approximately 2½ feet long and 8 or 9 inches wide, was in the room next to her office and that she had used it most recently about six months earlier. After the meeting, Ms.Voeks, Ms. Wrolstad and the Appellant visited the OT Department and Wrolstad asked to see the laminator. Bartz-Bentz pointed to a tall bookshelf in the room next to her office but the machine was not there. She said she didn't know where else it might be so Wrolstad made a cursory look through a few of the cabinets and, at Appellant's suggestion, checked the department's storage area in the basement. One room that was not examined on the 22nd was a janitorial closet. Wrolstad underlined the importance of locating the laminator when she told Bartz-Bentz that if she did not find it, she should report it as stolen. Wrolstad promptly followed up with an e-mail to Bartz-Bentz, directing her to look carefully around the OT Department.

Around noon of the next day, January 23rd, Appellant carried the laminator to Ms. Wrolstad's office in a separate building. The machine was very cold to the touch upon delivery. Ms. Bartz-Bentz testified that she had looked in several places that morning and found the laminator on the floor of the janitorial closet. While she testified that she had been very concerned about the missing machine, she was nevertheless unable to recall what time she found it or what she did with the laminator immediately thereafter. In contrast, one of the Therapy Assistants who was in the OT department on the morning of January 23rd, testified that Appellant did not appear to be engaged in any sort of a search that morning.

Some additional light can be cast on the validity of Appellant's statements about the missing laminator by considering the evidence of record relating to the plastic envelopes, or pouches, that encapsulate a laminated document. The Commission believes it is reasonable to expect that these laminating supplies would be stored in a location close to the laminator. It also would have been reasonable for Appellant to have pointed out the laminating supplies to

Wrolstad and Voeks on January 22nd once it became apparent that the laminator was not in the

location she had initially indicated. However, she chose not to mention the pouches. She was not asked to produce the pouches until the next investigatory meeting, which was held on January 30. She was able, by that date, to show Ms. Wrolstad that the pouches were on a bookshelf in her office. However, photographs of the same area showed that the pouches had not been stored on the bookshelf on January 21 and Bartz-Bentz has failed to provide any explanation for the discrepancy. In fact, Appellant offered conflicting testimony that she kept the pouches in her desk. Whether the pouches were stored on the bookshelf or in her desk, either location would have been inconvenient if the laminator was stored in a separate room as Bartz-Bentz had stated on January 22. It seems improbable that these items would not be kept together and the record provides no explanation.

There are simply too many problems with Appellant's testimony regarding the laminator, and too much missing evidence, to accept her explanation of how she used the device. Respondent engaged in an extensive investigation of Appellant's conduct and was unable to produce any evidence to corroborate her statements that she stored the laminator in the OT Department and used it for projects related to her responsibilities at WVH. Respondent has established that Bartz-Bentz ordered the laminator, never told anyone she had obtained it, was the only person who used it, denied its existence, couldn't produce it, couldn't produce examples of its use, and couldn't identify anyone at WVH who had asked her to laminate something or who had even seen the machine between its 2000 delivery date and when it reappeared on January 23, 2004. The preponderance of the evidence shows that the Appellant misappropriated the laminator.

The proposed decision suggested Appellant had "established a competing circumstantial case" that the Therapy Assistants had planted the laminator in the janitorial closet as part of an effort to undermine their supervisor. The proposed decision concluded that Respondent had failed to satisfy the employer's burden of persuading the fact-finder that "Appellant stole, removed, misappropriated or used the laminator for personal reasons" because "the record does not set up an irreconcilable fact situation where either the Therapy Assistants or the Appellant must be believed in order to explain the finding of the laminator in the janitorial closet on January 23rd." Contrary to the perspective taken in the proposed decision, we believe that the testimony of the Therapy Assistants and of the Appellant is so incompatible that a credibility determination is demanded and that merely saying there could be a set of facts, no matter how implausible, that would accommodate the testimony of both the Therapy Assistants and the Appellant is an inadequate basis for rejecting the constellation of circumstantial evidence of misconduct established by Respondent. An important part of the Appellant's contention that she had purchased and used the laminator for the benefit of WVH before she found it on the floor of the janitorial closet is that, upon the request of some nurses, she had used the laminator to produce signage for individual members. Respondent could not come up with any evidence corroborating Appellant's assertion but also could not provide direct

evidence disproving it. Under these circumstances, it is Appellant's burden to provide some reasonable support for the defense she asserts.[17]

Ms. Bartz-Bentz would have the Commission discount the testimony provided by both Therapy Assistants because of their antagonistic relationship with Appellant.[18] We agree the record establishes that Appellant and the Assistants did not get along, but we do not believe there is a basis for rejecting their testimony. The Assistants' testimony was not damaged on cross-examination and did not exhibit any internal inconsistencies. Appellant suggests that the unreliability of the Assistants' testimony is supported by the fact that they had raised an allegation about the number of evaluations that Appellant performed which was contradicted by the Respondent's investigation. Ms. Voeks testified that her review of Appellant's records over a 7-month period in 2003 showed that the Appellant averaged about one evaluation/re-evaluation per day, and Ms. Wrolstad testified that she had verified the inaccuracy of Assistants' claim. However, there is no clear description of the allegation raised by the Therapy Assistants that had caused Respondent to check Appellant's records.[19] Without any

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[17] The dissent suggests that is unfair to expect Bartz-Bentz to be able to produce any evidence to support her defense because Respondent had ordered her to stay away from the OT Department. Bartz-Bentz's testimony is that she was told by Wrolstad not to discuss the laminator with anyone at WVH. Wrolstad testified that she told Bartz-Bentz to stay away from the OT Department. The directive did not prevent the Appellant from informing Ms. Wrolstad where the laminated signs would most likely be found or from identifying someone else who would have seen the signs or have asked her to make one. There is no indication that Appellant ever attempted to throw any light on the disappearance of the laminator, the stopwatches or the scale.

[18] The Appellant reiterated this contention in her rehearing request. While Appellant suggests that the Therapy Assistants had both motive and opportunity to misappropriate equipment and to blame Bartz-Bentz, Appellant failed to provide evidence that the Assistants actually engaged in any misappropriation. Appellant implies that the Assistants may have hidden the laminator in the janitorial closet, where Appellant found it after conducting her own search. While the record does not completely rule out that possibility, an examination of all the circumstances renders it too implausible for us to accept. First, the Assistants would have had to have been quite lucky and quite prescient to have discovered a hiding place in the department that happened not to have been searched or photographed by management on January 21 and 22 when they went through the department looking for the laminator. There is no reason to find that either Assistant had been aware of those searches or their scope. In contrast, the Appellant was well aware of the areas searched and in fact suggested certain areas. Under her theory, she did not think to search the closet until the next day. Second, the Appellant may be suggesting that the laminator could have been in the closet for some period of time, perhaps weeks or months, without Appellant seeing it there, since Appellant seldom entered that room. It strains credulity, however, that an item of the laminator's size would not have elicited the concern or the attention of the custodial staff (if not others), occupying an obvious and sizeable portion of the closet floor. We also note that the hearing examiner did not accept this theory as plausible, either, and in fact found both Therapy Assistants to be credible witnesses.

[19] Ms. Voeks estimated that the Appellant completed "about one" evaluation or re-evaluation per day. An e-mail exchange between Ms. Voeks and Ms. Wrolstad indicates that one of the Therapy Assistants thought Appellant's production was "more like once weekly" but there is no indication whether this reference included only those evaluations authored by Appellant or if it also included either re-evaluations or the evaluations prepared by the Assistants that were only reviewed by Appellant. The Therapy Assistants did not testify on this point.

information setting forth the Assistants' accusation, we cannot conclude that it was the kind of deliberate falsification that would undermine their general credibility, rather than, for example, an exaggeration or the unfounded impressions of subordinates about how much work their supervisor performed.[20]

ii. Stopwatches

Like the laminator, the three stopwatches that were purchased for the OT department between 2001 and 2003 would have some utility to a person without any OT responsibilities. Unlike the laminator, the stopwatches were never produced by Ms. Bartz-Bentz. When Ms. Wrolstad first questioned her about the stopwatches, Appellant stated that she had given one of the watches to the Therapy Assistants. After Ms. Wrolstad had conferred with the Assistants and confirmed they had never received any of the watches and had never been told that the OT department had received additional stopwatches, Bartz-Bentz changed her story and said that, while she may not have given one to the Assistants, it was for their "area." Appellant never accounted for the fact that the Assistants would not be in a position to use a new stopwatch if she had never told them that one was available.

Elsewhere in her testimony, Ms. Bartz-Bentz contends that the three watches must have become part of separate evaluation/testing kits she created. She testified that she needed "to be able to grab [a kit] so that I could go to the different nursing care buildings and do the evaluations that I needed to do." However, the Appellant was unable to locate any of the kits when given the opportunity to do so, even though it was clearly in her best interest to try to locate all of the missing equipment. If, as Bartz-Bentz contended, she had made up these kits

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[20] The dissenting opinion also argues that the Respondent ignored Ms. Voeks' conclusion and drafted the letter of discipline to include a claim, subsequently abandoned, that Appellant did not perform the number of patient evaluations she was supposed to perform. The Commission believes this reference is to the first claim relating to work rule A.1. The claim reads:

> [This violation is evidenced by] your failure to supervise Certified Occupational Therapy Assistants (dating back a minimum of two years) as required by Chapter OT 4 of the Wisconsin Statutes and the Standards of Practice of the American Occupational Therapy Association. According to the COTAs [Therapy Assistants] under your supervision, you did not initiate all evaluations. You frequently passed the written physicians' orders directly to the COTAs, expecting them to initiate and complete the evaluation. You did not prepare all initial plans of care or revise and/or upgrade plans of care, assigning or allowing the COTAs to do it. You did not complete all monthly re-evaluations of all members on active caseload, assigning or allowing the COTAs to do so. You did not have direct contact in the form of re-evaluation or therapy with all members on active caseload at least every two weeks;

While the claim relates to the general topic of whether Appellant fulfilled her responsibilities to conduct OT evaluations of the patients, there is no indication that it is inconsistent with Ms. Voeks' conclusion that Appellant signed off on an average of one evaluation per day rather than a much lower number. Accordingly, we do not read the letter of discipline to make the unsupportable allegation to which the dissent refers.

for her own use, so she would have ready access to them, it is difficult to understand why it

would be hard for her to recall where even one of the kits might be. In addition, she never explained why she would have had reason to use more than one kit to perform her work. The watches disappeared after Appellant ordered them on a State purchasing card. Appellant could not account for them and her explanations changed over time, undermining her credibility.

iii. Talking food scale

Appellant purchased a talking food scale in January 2002, another item that would be useful to someone who had no OT responsibilities. Two years later, she told Ms. Wrolstad that she didn't recall the purchase. When she received the item, Appellant had to list it on a spreadsheet that was sent to the inventory clerk. The clerk could then place a property tag on the item and etch identifying information onto it, if it was something that might be susceptible to being stolen. Instead of describing the item more completely on the spreadsheet, Appellant merely identified it as a "scale" and it was never marked by the inventory clerk.

Appellant acknowledged that a talking food scale was purchased so that it could be provided to a member within the facility and not to be kept in the OT department. However, she could not remember the resident for whom she purchased the item. The Therapy Assistants never saw the scale nor used it, and the Appellant was unable to locate it during Respondent's investigation.

Like the other items, the Respondent showed the talking food scale was delivered to the Appellant but was not inventoried.[21] Respondent could find no evidence that it was ever used for legitimate purposes within WVH and Appellant was not only unable to produce the talking food scale, she failed to offer any evidence tending to support a reasonable explanation for its disappearance. The rather unique nature of a talking food scale should have been enough to tweak the Appellant's memory if she had, in fact, provided the device to a WVH member.

Given Appellant's overall lack of credibility and her failure to produce any evidence to counter the allegations relating to the laminator, the scale and the three stopwatches, Respondent's circumstantial evidence was sufficient to satisfy its burden to show, by a preponderance of the evidence, that Bartz-Bentz misappropriated all of this State-owned equipment.

In support of her rehearing request, the Appellant suggests that the Commission has improperly shifted the burden of proof to Appellant (to show what happened to the equipment)

[21] Evidence showed that WVH policy and practice was to inventory "pilferable" equipment such as the laminator, stopwatches and the unusual scale. The fact that none of these items had been inventoried according to normal practice is additional circumstantial evidence that they were misappropriated by Bartz-Bentz, who both ordered and received them.

rather than leaving the burden on the Respondent (to show that the equipment was not on

WVH grounds). If the Appellant is suggesting that the employer should have conducted a room-by-room search of the entire 749-bed facility, including each of the four primary nursing homes, the 14 cottages and every one of other buildings on the WVH campus, including all their closets, we believe that notion of the employer's burden is unreasonable in light of the circumstances. Bartz-Bentz was the person who decided what equipment to purchase for the OT Department. She made the purchases, received the equipment and had a responsibility to have it inventoried. She also controlled where the equipment was stored, controlled who could use it and controlled how and to whom it was distributed. She acknowledged receiving the stopwatches and the talking scale, but she did not have them inventoried, could not produce them when asked and stated that she did not know what had happened to them. On the other hand, the employer produced the two witnesses who, except for Appellant, were in the best position to have seen the equipment if it was either stored in the Department or had been used elsewhere in the facility. They testified they had never seen the equipment and specifically denied Appellant's suggestion that she had made one of the stopwatches available to them. We believe that this evidence satisfied Respondent's burden of proof. As part of the investigation, Respondent also photographed storage areas in the Department and gave the Appellant a full opportunity to provide a lead toward recovering the equipment or at least someone in the facility who had used or seen it. The Appellant failed to offer any lead for the Respondent to pursue, nor could she offer any explanation for that failure. By establishing a set of circumstances that placed reasonable suspicion upon the Appellant, and only the Appellant, the Respondent produced sufficient evidence to satisfy its burden of "a preponderance of credible evidence" in this proceeding. The Appellant had every opportunity to counter the inferences from the Respondent's evidence by supplying a plausible explanation for what happened to the equipment she had ordered, received, and been responsible for. The Appellant's inability to offer any reasonable defense is itself evidence of her culpability, upon which the Respondent may rely to establish just cause.

iv. Continuous Passive Motion Machine and Auto-Feeder

Appellant does not dispute that because of her efforts, Respondent purchased a continuous passive motion machine and a Winsford electric self-feeder in June of 2001 at a combined cost of over $6,000.00. She also does not dispute that she did not use either piece of equipment for member or OT services and did not even remove them from their original packaging. Bartz-Bentz admitted to Ms. Wrolstad that active or hands-on therapy is preferable to passive motion and, as a consequence, the Therapy Assistants would not use the passive motion machine.

In her role as the supervisor in the OT department, Ms. Bartz-Bentz was authorized to obtain equipment for OT purposes. It was her responsibility to care for the property that she controlled. Her performance evaluations indicated that maintaining inventory of OT equipment

was one of her major job objectives. Her actions of pursuing the purchase of this expensive equipment coupled with her failure to use the equipment once it was delivered neglects WVH's

interest in the property and in having members served with all available resources. While it is true that thousands of items have been purchased for the OT Department over the years, the number of purchases does not absolve Appellant of her responsibility to keep track of and use the equipment that is purchased. Appellant's failure to utilize this very expensive equipment for two and one-half years neglected WVH's interest in its property and its interest in having members and staff served with available resources.

v. Video Camera

In its post-hearing brief, Respondent contended the Appellant "violated Work Rule A.5. and C.1. by lying about her personal use of a video camera to record her daughter's activities during the summer of 1996." However, the video camera was not a subject raised or referred to in the letter of discipline and Wrolstad herself testified that the video camera was not a subject of discipline. Thus, matters surrounding the video camera provide no basis for discipline. Misconduct for which an appellant has not been charged in the letter of discipline cannot serve as the basis for discipline. POWERS V. UW, CASE NO. 88-0029-PC (PERS. COMM. 5/10/90), AFFIRMED BY DANE COUNTY CIRCUIT COURT, POWERS V. WIS. PERS. COMM., 90 CV 3023, 2/12/91. Thus, the Commission declines to address Respondent's allegation relating to the video camera as an additional basis for the imposition of discipline.

Respondent also argues that Appellant's willingness to lie about her personal use of the camera relates to the question of her general credibility. The Commission believes that other aspects of Appellant's testimony are sufficient to establish her lack of credibility and we do not rely on the evidence relating to the video camera.

B. Other Allegations

i. Keys

The evidence at the hearing also satisfied Respondent's burden to show that Appellant did not comply with very specific administrative directives to account for and surrender duplicate, unneeded or unidentified keys to the facility. The keys provided access to areas of WVH that contained protected health care information which is subject to HIPAA regulations.

The e-mail to Appellant (set forth in Finding 20) very clearly explained that the goal of the key inventory was to identify all of the keys providing access to WVH, including the keys held by all of the facility's employees. Appellant was responsible for reviewing the keys in the possession of OT department employees. She was directed to return duplicate, unneeded and unidentified keys to the physical plant office and to list and identify the remaining keys held by each employee. She completed the inventory form by listing several keys for each of the three

OT employees, the two Therapy Assistants as well as herself. She returned the form but failed to either inventory or return 32 keys that she kept in her office, even though she was aware of them.

After Ms. Bartz-Bentz began her administrative leave, the envelope containing the 32 keys was discovered in her office. Ms. Wrolstad asked Appellant about the keys during the investigative meeting on April 15. Bartz-Bentz repeatedly responded that she felt she only had to account for keys that left the facility with an employee. During her testimony at hearing, Appellant offered a somewhat different explanation when she stated she had only inventoried those keys that were "actively in use" and said she placed the other keys into the envelope in her office. She was unable to provide any explanation why she would have understood that only those keys actively in use were encompassed by the inventory. The written directive to inventory the keys contained language clearly explaining to Appellant that the goal of the exercise was to return unneeded and duplicate keys to the Physical Plant Office. She had also received training which explained that only absolutely necessary keys were to be retained by staff in order to comply with HIPAA requirements.

Appellant did not seek any clarification of the inventory directive. Her conduct provided her with unnecessary access to private health information in many different locations in WVH and provided similar access to anyone who might find the keys on the shelf. Her failure to inventory and return the 32 keys was a refusal to carry out a written assignment and was both disobedient and insubordinate and her statements about the keys, both during the investigation and during the hearing, tend to further undermine her credibility.

ii. Allegations Relating to a Bathtub Bench

Respondent has pursued several distinct allegations of misconduct by Ms. Bartz-Bentz relating to a bench that sits over the edge of a bathtub and is designed to provide safer access in and out of the tub.

One of these allegations, arising under Work Rule A.5, is that Appellant failed to provide truthful, accurate and complete information when Ms. Wrolstad and the Appellant were looking for equipment in the OT Department. Wrolstad asked Appellant what was in a large box in one of the offices. Appellant grabbed the box and pulled it forward before she said the box was empty. Wrolstad was confident that the box contained something so she directed Bartz-Bentz to open it, which exposed the bench that Wrolstad had specifically asked about during the investigatory meeting held a short time earlier.

Appellant never offered an explanation why she told Wrolstad that the box was empty. The Commission has little choice other than to conclude that she was lying in an effort to undermine Respondent's investigation of her conduct. Had Ms. Wrolstad not insisted on

opening the box, Appellant's lie would have derailed the investigation of the tub bench.[22]

Respondent also contends that Appellant was insubordinate or neglectful when she failed to supply the bathtub bench to a cottage couple and inaccurately reported to Ms. Wrolstad in 2004 that the couple already had a bench. There is no dispute that Appellant purchased a tub bench and that it was delivered to the OT department early in 2002, shortly after a Therapy Assistant had discussed the topic of tub safety with a couple residing in a WVH cottage.[23] Even though the bench had been ordered specifically for the couple, it never reached them and remained in the department, unused, for two years.[24] The couple ended up purchasing, at their own cost, a chair that rested entirely within the tub. There was obviously a delay between the date the bench was delivered to Appellant and the point in time at which the couple concluded that they should purchase their own piece of adaptive equipment. The Commission believes that the delay reflected neglect by the Appellant in terms of meeting the couple's safety needs.

Because the tub bench was still in its box at the time of the investigatory search in January of 2004, Wrolstad directed Appellant to evaluate the couple at that time in terms of whether they still needed a tub "bench." Appellant visited the couple and found that in the intervening two years they had purchased the tub chair. Appellant wrote a note to Wrolstad to confirm her visit. Respondent claims that information found in Appellant's note was false. However, the note is not of record and there is no clear testimony reciting the language that Bartz-Bentz used when she wrote it. Without evidence of the content of the note, this allegation of misconduct is unsupported.

iii. Adjustments to measurements

The Appellant raised various arguments in her Petition for Rehearing relating to the

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[22] The proposed decision and order suggested that Appellant's statement that the box was empty was only "technically" a false statement, and that it was "as much a mistake as an intentional rule violation." The Commission disagrees and believes Ms. Bartz-Bentz intentionally decided not to tell the truth about the box.

[23] While the record includes copies of invoices for other equipment that serves as the basis for the imposition of discipline, there is no exhibit documenting the date the bench was ordered. Despite the absence of such an exhibit, Ms. Bartz-Bentz was clearly responsible for purchasing the equipment for the department and she also was responsible for reviewing the Therapy Assistant's evaluation for the couple who were to receive the equipment, even if Appellant did not write the evaluation herself. Hence, it is reasonable to infer that Appellant was aware – actually or imputably – that the couple needed the bench and to infer that she ordered it to meet their needs.

[24] The proposed decision would have read the letter of discipline to only address Appellant's failure to provide the bench to the couple in 2004, rather than both in 2002 as well as 2004. The Commission finds the language of the letter ("negligence in failing to provide adequate service to two members") to be broad enough to include both years.

Commission's conclusion, reflected in Finding of Fact 29 in the April 12, 2006 "Final Decision and Order," that she "violated Work Rule A.4. by adjusting test results without documenting the adjustments in medical records." One of her arguments is that this allegation of misconduct had been abandoned by the Respondent.

The conduct, while the subject of testimony at hearing, was not mentioned in Respondent's initial post-hearing brief. Respondent also failed to mention the allegation in either of two subsequent submissions, despite the fact that on two separate occasions, Appellant argued that the agency had abandoned the claim.[25] Given these circumstances, the Commission must agree that the allegation has been abandoned.

II. Is some discipline warranted?

It is self-evident that the violation of five separate work rules by a supervising employee in a patient care setting, where the misconduct includes matters involving patient confidentiality and care, misappropriating state equipment and being untruthful to higher level management, will tend to impair the performance of the duties of the employee's position or the efficiency of the group within which she works. See ENGLAND V. DOC, CASE NO. 97-0151-PC (PERS. COMM. 9/23/98). Respondent has established just cause for the imposition of some level of discipline.

III. Was the action of discharging Appellant excessive discipline?

As already noted, the Commission must consider 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 when considering the severity of the discipline to be imposed. SAFRANSKY V. PERSONNEL BOARD, 62 WIS.2D 464 (1974)[26]

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[25] In her initial brief as well as in her petition for rehearing, Appellant contended that DVA had abandoned the claim.

[26] Some prior cases suggest that another mandatory consideration is the number of incidents cited in the letter of discipline compared to the number for which the employer has successfully shown just cause. REIMER V. DOC, CASE NO. 92-081-PC (PERS. COMM. 2/3/94). The Commission agrees that the employer's failure to establish some of the conduct that served as a basis for a suspension or demotion will typically have a proportional mitigating effect in terms of the excessiveness question when the discipline decision is being reviewed by the Commission. However, a discharge need not be reduced to a demotion or suspension where the employer has established just cause before the Commission for only some of the allegations enumerated in the discharge letter. The question before the Commission is whether the misconduct established at hearing provides just cause for discharge and, as discussed below, we find that the five claims, viewed alone, are sufficient. The dissent suggests that the credibility of the Respondent's witnesses is undermined by the fact that Respondent abandoned so many of the claims that were listed in the letter of discipline. There are many reasons that Respondent might have decided not to pursue all of the original claims: certain witnesses may not have been available, the evidence could have been weak, or the Respondent may have decided to minimize the length of the hearing by focusing on some,

The letter of discipline alleged nineteen separate violations of Respondent's work rules. The agency has only pursued six but has sustained its burden to show that Appellant engaged in the misconduct encompassed by five of those six claims. Appellant's misconduct had a significant tendency to undermine the efficiency of the operations of the OT department and WVH.

> The Work Rule that is relevant to the use of state-owned property reads:
>
> C.1. Stealing, unauthorized or improper use, neglect, possession, removal or destruction of state owned, leased or another person's private property, equipment, materials, or supplies including, but not limited to, vehicles, telephone, or cellular phone, pagers, electronic communications systems such as computers, software, e-mail, fax or internet, or mail service, including the unapproved salvaging of waste or discarded materials.

Appellant misappropriated a laminator, three stopwatches and a talking scale, all of which were purchased with State funds for the benefit of the members of WVH. The State and WVH have an interest in having resources like these used by its employees in the provision of OT services to members. The equipment was not available for serving WVH members, and its absence had a negative effect on the provision of services within the facility.

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rather than all, of the claims. The most telling evidence in this regard is Mr. Czebotar's consistent testimony that he believed the most serious allegations against Bartz-Bentz were: 1) theft/misappropriation and 2) the evasive or misleading information she provided during the investigation. While this may not constitute proof that DVA chose to pare down its hearing presentation to address only the most serious allegations listed in the discharge letter, it is certainly enough to overcome the inference Appellant seeks to draw, i.e. that DVA was forced to abandon claims

because it was unable to muster the evidence to support them. It would be an even greater stretch to discredit the testimony of several of the employer's witnesses simply because of a separate decision that was subject to the discretion of its counsel. In her petition for rehearing, Appellant contended that it is both patently unfair and a denial of due process if an employing agency is allowed to proceed at the post-disciplinary hearing on only some of the claims set forth in the letter of discipline. Appellant appears to suggest that an agency, confronted with an absent but necessary witness for just one of fifty separate allegations of misconduct, must withdraw its disciplinary action rather than defend it on the basis of the remaining forty-nine claims. While, as noted above, an agency is prohibited from adding allegations to a letter of discipline without re-issuing it, the Commission is unaware of any precedent that prevents the agency from pursuing its case on only a subset of the listed allegations. Appellant has failed to cite any legal authority for her due process argument and there has been no explanation in terms of how her ability to prepare or present a defense was somehow prejudiced by Respondent's failure to offer evidence relating to each of the claims. Respondent obviously took a very significant risk that the Commission would find those claims pursued (and established) to be insufficient to support the level of discipline that was imposed. Nevertheless, we decline to automatically penalize the Respondent when the record does not reasonably indicate that the Respondent's motives were devious or otherwise inappropriate. Appellant also advances the contention that DVA added specious allegations of misconduct against her in an effort to coerce a resignation. While Respondent presented Appellant with an option of resigning rather than face a disciplinary action, the record does not support a finding that Respondent unsuccessfully attempted to coerce her to resign.

Purchasing equipment without using it consumes budgeted revenues without any benefit. It was a misuse of state funds to purchase the continuous passive motion machine and automatic feeder at a cost in excess of $6,000 and then let the equipment languish for nearly three years. Appellant instigated the purchase of this equipment and it was also the Appellant who had control of the equipment but failed to put it into use. Appellant's actions had a negative impact on the OT Department and the efficient operations at WVH. There may be a

level of shared responsibility between a department supervisor such as Appellant and those responsible for overall inventory control at WVH, but this does not excuse Appellant from her responsibilities. The equipment was not used for the benefit of a generally frail member population. The staff of the OT department has not obtained the benefit of using the equipment to perform duties more efficiently. Because DVA has limited funding to purchase OT equipment, the action of purchasing the continuous passive motion machine and the automatic feeder prevented the OT department from obtaining other, more useful, equipment having a similar purchase price.

Appellant is a supervisor with a particular level of trust and responsibility given to her by her employer. She is also in a position of authority with respect to her subordinates, the Therapy Assistants. Here, there was a deteriorating relationship between Appellant and the two Therapy Assistants she supervised. Appellant's misappropriation of some equipment and her failure to use and account for other equipment set a bad example for her subordinates (DEL FRATE V. DEPT. OF CORRECTIONS, DEC. NO. 30795, WERC, 2/04) and presumably contributed to the deteriorating relationship. It allowed employees who were already unsatisfied with Bartz-Bentz to make claims against her which can only have the effect of further straining the relationship between supervisor and subordinate and undermine the efficient operation of the OT department and WVH as a whole.

The Work Rule that is relevant to carrying out work assignments reads:

> A.1 Disobedience, insubordination, inattentiveness, negligence, or refusal to carry our written or verbal assignments, directions or instructions.

Appellant was clearly directed to return unneeded keys held by OT employees and to inventory the department's remaining keys. WVH has an interest in complying with HIPAA requirements and minimizing unnecessary access to medical information about its members. The members have corresponding interests. Appellant did not make any inquiry or seek clarification of Respondent's directives, nor did she comply with the directives when she did not inventory or return the 32 keys. A failure to account for and surrender the keys exposes the WVH to allegations of HIPAA violations. Appellant's conduct had a negative impact on WVH and tended to significantly impair its operations.

Appellant also purchased a tub bench for a specific couple at WVH but never passed it on to the members. Her negligence directly influenced the relative safety of the couple when

they used their tub. At some point after the OT Department failed to produce the tub bench for their use, the couple was sufficiently concerned that they used their own funds to purchase a bath chair.[27]

Respondent's Work Rule requiring truthfulness reads:

> A.5. Failure to provide truthful, accurate and complete information whenever such information is required by an authorized person.

When Ms. Wrolstad asked Bartz-Bentz whether the OT Department had a tub bench and where it might be, Appellant indicated she was unaware of a tub bench in OT. The two started looking for various equipment, including the bench. When Appellant came across a box that contained the bench, Appellant told Wrolstad that it was empty. Appellant intended to conceal the existence of the tub bench and to hinder Respondent's effort to investigate her misconduct. Had she succeeded, it is likely that her behavior would have affected the course of the investigation and caused Respondent to expend additional resources on the issue.

In addition to considering the weight of Appellant's misconduct and the degree to which it would tend to impair the operation of the facility, the Commission gives due weight to Appellants' more than 20 years of service to WFV without prior discipline. We also recognize that Appellant's recent performance evaluations were quite positive and were not indicative of the misconduct established at hearing. Evidence of DVA's disciplinary actions toward other employees could tend to either support or undermine the Respondent's discharge decision. However, there is nothing in the record to show Respondent's reaction to arguably comparable conduct by other DVA employees.

We note that there is no absolute requirement under the civil service code for progressive discipline (ALFF V. DOR, CASE NOS. 78-227, 243-PC (PERS. COMM. 10/1/81), AFFIRMED BY DANE COUNTY CIRCUIT COURT, ALFF V. PERS. COMM., 82-CV-5489, 1/3/84, AFFIRMED BY COURT OF APPEALS DISTRICT IV, 11/25/85) and the work rules involved in the present case provide that "there are certain situations which must result immediately with outright dismissal." Application of progressive discipline is consistent with the goal of educating an employee about management's expectations. Important aspects of Appellant's misconduct were intentional, and progressive discipline has significantly less application to instances of intentional misconduct. The combination of the nature and the extent of Appellant's improper conduct, as established by the Respondent, is one of those situations.

Prior decisions that have been issued pursuant to the authority found in Sec. 230.44(1)(c), Stats., have addressed discipline imposed for related, if not comparable, conduct. In EFT V. DHSS, CASE NO. 86-0146-PC (PERS. COMM 11/23/88); REHEARING DENIED, 1/12/89; AFFIRMED BY DANE COUNTY CIRCUIT COURT, EFT V. WIS. PERS. COMM., 89CV644,

[27] A bath chair would address the question of safety *within* the tub, while a tub bench, which is what Appellant had ordered for this couple but not given them, is designed to assist a person in moving safely in and out of the tub.

5/10/90, the demotion of an employee from a position as office supervisor was upheld where the record supported charges of insubordination, inattention and/or negligence in carrying out assigned duties, misuse of case service funds, behavior unbecoming a state employee and the failure to provide accurate, complete and/or timely information to supervisors. The appellant in EVRARD V. DNR, CASE NO. 79-251-PC (PERS. COMM. 1/22/80) had violated DNR purchasing regulations and had consumed and had permitted his employees to consume small amounts of

coffee and cookies. However, supervision of camp employees was only about 15% of his work time, he had a record of 10 years of continuous promotions and good performance and the evidence did not sustain most of the claims of misconduct found in the letter of discharge. The agency's discharge action was reduced to a 30-day suspension. Finally, in ENGLAND V. DOC, CASE NO. 97-0151-PC (PERS. COMM. 9/23/98), the discharge decision was affirmed where the appellant was responsible for supervising a textile operation within a prison and he had given some gloves to various individuals for their personal use. The appellant had been disciplined for prior similar conduct.

Ms. Bartz-Bentz's misconduct is wide-ranging. She has misappropriated State property as well as neglected to make any use whatsoever of other, very expensive property. She failed to perform a very specific assignment, thereby exposing the facility to potential penalties under federal law. She failed to serve the members of the facility and lied to her superiors. While the Commission has no rigid equation available for deciding whether discharge is excessive, Appellant's multiple violations of three separate work-rules, some involving serious questions of trust and integrity, are sufficient to justify that result, particularly for an individual holding a supervisory position with little day-to-day oversight.

Of the multiple violations, the most important in terms of justifying the termination of Appellant's employment are her actions in misappropriating a laminator, three stop watches and an unusual food scale. It is difficult to envision a set of circumstances where this conduct alone would not be sufficient just cause for discharging an employee. Any set of duties at the facility that Respondent might assign to Ms. Bartz-Bentz would place her in a position that would continue the agency's exposure to similar misconduct. Also of substantial gravity is Ms. Bartz-Bentz' negligence in ordering some very expensive equipment, in particular the continuous passive motion machine and the electric self-feeder at a cost of approximately $6000, and then failing to use the equipment to assist members. Respondent also satisfied the burden of showing that Appellant engaged in other actions that violated the work rules which, if viewed as a group, would independently provide a basis for disciplining the Appellant.[28] Given these circumstances, Respondent's disciplinary action is affirmed.

As part of her rehearing request, Appellant suggests that actions taken by management employees at WVH and in the agency's central office are evidence that discharging Bartz-Bentz is excessive discipline: 1) "Brad Czebotar's [Director of DVA's Bureau of Administrative Services, which includes the agency's human resources responsibilities] clear reluctance to

[28] The Commission declines to address the question of whether these other actions, if viewed alone, would support discharge rather than some lesser discipline.

agree to terminate Bartz-Bentz reveals that the Respondent did not have the necessary evidence to support such a drastic level of discipline"; 2) "[A]llegations were added in order to persuade [Czebotar] to approve the discharge." Appellant's statements arise from the delay between January 22, 2004, when DVA held its first investigative meeting with Bartz-Bentz, and October 26, 2004, the date of the letter of discharge. Numerous factors resulted in the delay, but neither of the reasons identified by Bartz-Bentz actually played a role. The exhibits show

that the range of the allegations of misconduct played an important role in the duration of the investigation. Respondent conducted investigative meetings with Appellant on January 30, February 11 and April 15 as new allegations arose. An entire category of allegations relating to whether Appellant had complied with the requirements for maintaining her credentials as an occupational therapist was intentionally left out of the discharge letter. Respondent forwarded those allegations to Wisconsin's Department of Regulation and Licensing. Czebotar also testified that the discipline focused on alleged work rule violations rather than on what he appeared to characterize as Appellant's "performance" as a supervisor. Another factor in the delay was the lawsuit filed by Bartz-Bentz against WVH and Ms. Wrolstad in approximately May of 2004. Counsel at the Department of Justice representing the agency advised Czebotar to "slow down the [disciplinary] process." Scheduling problems served as another cause for delay. WVH staff sent a memo to Czebotar on May 17 recommending discharge. Documents collected during the investigation were attached for his review. Czebotar prepared a list of follow-up questions on June 1 and Wrolstad responded to the questions on June 10. By then, summer vacations and other absences meant that Czebotar was unable to meet with the key WVH decision-makers until after summer. In summary, DVA was operating under the cloud of pending litigation, was relying on the advice of legal counsel to slow down the process, and had to wait for months to arrange a final meeting before issuing the discharge letter. These are hardly circumstances that indicate DVA lacked confidence in the level of discipline warranted by Appellant's alleged misconduct.

The Commission's assessment of the appropriate level of discipline in the matter is reflected in the following testimony by Mr. Czebotar:

> I was very aware of Ms. Bartz-Bentz's tenure with the Department. I was also aware of her performance evaluations being at a minimum, satisfactory. I was also aware that there was no disciplinary action . . . in her file on record. And I had to weigh that against the information that came forward. And as I had indicated previously, I was looking at the issues of theft and the unauthorized use of State property as well as the uncooperative, unresponsive, evasive, misleading and . . . and untruths that were told during this entire process. And I had to weigh that in, in regards to her tenure, performance and lack of disciplinary action. And I came to the conclusion that the only way that we could prevent such actions from reoccurring would be through discharge. We have in our disciplinary guidelines that theft and the unauthorized used of State property warrants consideration of termination. And as I was evaluating this, there were three things that I was considering. One is the employer/employee relationship. The trust and confidence that we place in our employees to . . . to

act appropriately. We do not have the resources to oversee employees' every movement. We have to entrust them that they are doing the right things, the appropriate things and acting in accordance with our. . . our work rules. That trust . . . that confidence, was destroyed, based on those actions. . . . It was exacerbated by the misleading statements, the untruths that she provided. There was no credibility in regards to the information she was providing. I looked at

it then from our work environment standpoint, and said, "What is the population that we're dealing with?" We're dealing with a vulnerable population and I had to consider the potential impact that could exist. If we have an employee who is willing to take such actions against her employer, that possibility certainly existed with the members that we serve here at the Home. And then I also looked at it from the perspective that we're not only employees of the Department of Veterans Affairs in the King Home. We're also State employees. And there's a . . . there's a public trust that we . . . that we have in that capacity. And I think the . . . those actions diminished the . . . trust and respect that . . . we would have, that would be called into question by, by the taxpayers, based on those actions. And I would only look at what has happened just recently in terms of the . . . impact of employees who are involved in using State cars for personal business or cell phones for personal business. In those three areas, how do I prevent and insure that those activities don't reoccur? The only conclusion I came to was termination. A lesser penalty would not, would not . . . provide the assurances necessary in my mind that this would not again take place.

Dated at Madison, Wisconsin, this 9th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Department of Veterans Affairs (Bartz-Bentz)

DISSENTING OPINION OF COMMISSIONER PAUL GORDON

I dissent from those parts of the majority decision that find Appellant misappropriated items, was neglectful in providing services to the cottage couple, and lied about the box with the tub bench, as well as with the level of discipline. I concur with those parts of the majority decision which find just cause to discipline her for her conduct relating to the keys, passive motion machine and auto feeder.

In an appeal of a disciplinary matter a respondent must show by a preponderance of credible evidence that there was just cause for the discipline. 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. PERS. COMM., DANE COUNTY CIRCUIT COURT, 81-CV-5669, 4/23/84. The burden of proof in such an appeal is assigned to the employer/respondent. I believe there is insufficient evidence for the Respondent DVA to meet this burden for several of the allegations that are relied upon by the majority. My conclusions on those topics, in turn, affect whether the level of discipline imposed is excessive.

Adjustments to measurements

In response to the Appellant's petition for rehearing, the majority opinion was revised to reflect the conclusion that DVA ultimately abandoned its allegation that Bartz-Bentz had adjusted OT test results without documenting the adjustments in patient medical records. I agree that this allegation has been abandoned. Nevertheless, the record in this matter includes certain evidence relating to the allegation and warrants additional comment.

Respondent's evidence on this point consists of the testimony of Christine Wrolstad who is not an Occupational Therapist and is not qualified to render opinions on matters to a reasonable degree of probability in the field of occupational therapy. No experts testified on behalf of Respondent so there was no competent evidence that the measurement adjustment was not generally acceptable within the profession, that the measurements, and thus the records, actually contained false information, or that OT record-keeping requires the therapist to record any measurement adjustments. No patient records were introduced as evidence to show any false information or incorrect measurements. There was no showing of any false representation of progress (or lack of progress) due to OT intervention, as referenced in the discharge letter. The only other evidence on the point was the testimony of Appellant herself who, needless to say, did not testify that her measurement calculations were not an acceptable method for completing patient's occupational therapy records, that any of the information in the records was actually false, or that measurement adjustment calculations must be reflected in the record. These conclusions are not matters of generally recognizable fact, nor do they comprise established technical or scientific facts. There simply is no evidence that Appellant's measurements and calculations were not made in a proper manner or that her methodology provided false information in the patient records on matters of occupational therapy measurements, let alone proof of that to a reasonable certainty.

Bathtub bench

The majority opinion states: "Respondent also contends that Appellant was insubordinate or neglectful when she failed to supply the bathtub bench to a cottage couple and inaccurately reported to Ms. Wrolstad in 2004 that the couple already had a bench." The majority then finds the Appellant was neglectful when she did not provide the tub bench to the couple when it first arrived at the OT department. The couple proceeded to obtain a tub chair. There is no evidence as to when they obtained it, or that it was not meeting their needs. The couple did not testify. The Therapy Assistants did not testify about this issue. The length of time, if any, in which the couple did not have the tub chair after a bench was ordered, has not been established. The allegation in the letter of discipline of "negligence in failing to provide adequate service to two members who were in need of a tub transfer bench" was not proven because the evidence of record does not show that the couple actually needed a transfer *bench*. No one other than Appellant testified about actually evaluating the couple in terms of either a tub chair or bench. At the time of her evaluation, the couple already had a tub chair that was meeting their needs. There is no evidence they needed a bench as opposed to a chair. There is no evidence that Appellant failed to provide a needed tub transfer bench or that she was insubordinate by not providing one.

The majority also notes:

> A bath chair would address the question of safety *within* the tub, while a tub bench, which is what Appellant had ordered for this couple but not given them, is designed to assist a person in moving safely in and out of the tub.

The field of occupational therapy encompasses scientific, technical and specialized knowledge. While the common law and statutory rules of evidence are not binding on the Commission, the "basic principles of relevancy, materiality and *probative force* shall govern the proof of all questions of fact." Sec. 227.45(1), Stats. (Emphasis added). Section 227.45(3) allows the Commission to take official notice of "any generally recognized fact or any established technical or scientific fact" but requires notification to the parties and an opportunity to object before the official notice may become effective, a procedure not followed here.[29]

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[29] The official notice provision was addressed on a related set of circumstances in BETLACH-ODEGAARD V. UW-MADISON, CASE NO. 86-0114-PC-ER (PERS. COMM. 12/17/90). In that case, an applicant for a job as a food service worker was rejected because of her significant vision impairment. The job entailed reading menu cards on food trays that were moving on a conveyor belt, and to then place the appropriate food on the trays. One of the applicant's witnesses, a vocational rehabilitation counselor, testified that enlarging the menu might be a reasonable accommodation to permit the applicant to work on the tray line. The employer, which had the burden of persuasion on the issue of accommodation, failed to offer any expert testimony in response. In its objections to the proposed decision, the employer suggested that the option was absurd because with her 20/200 vision, the applicant would need each tray to have a menu that was more than 3 feet by 8 feet in order to read it. The Commission characterized the employer's position as arguably plausible but refused to take official notice, indicating that "the implications of complainant's 20/200 vision with respect to the question of menu enlargement involves a technical, specialized field, and the premise for respondent's contention is outside the realm of a 'generally recognized fact,' and there has been no foundation in the record of what the 'established technical or scientific facts' are."

There is no evidence to support the conclusion that the majority is drawing. This is a matter of OT expertise. No OT specialist or anyone else testified or rendered any opinions critical of Appellant as to moving safely in and out of a tub with either a bench or a chair as an assistive device. Only Appellant testified and that was to the effect that the chair met the members' needs for getting into and out of the bathtub.[30]

Misappropriation of the laminator, stopwatches and food scale

The majority finds that Appellant misappropriated three stopwatches, a talking food scale and a laminator but does not explain how, when or where the misappropriation occurred. It is clear from Wrolstad's testimony that she believed Appellant stole these items which would explain the use of the word "misappropriation" in the letter of discipline. The majority does not state whether these items were stolen, improperly used (and, if so, how they were used), removed or destroyed in order to violate Work Rule C.1. The burden of proof that is on the Respondent is to show, to a reasonable certainty, that the alleged misconduct occurred. With Appellant's continued employment after 22 years of otherwise exemplary state service in the balance, the majority opinion fails to specify just how the Appellant misappropriated these items.

Another disturbing aspect of the majority's decision is the willingness to rely on Appellant's inability to substantiate her explanations as evidence to support the claim that she misappropriated these items for her personal use and to undermine her credibility:

> An important part of the Appellant's contention that she had purchased and used the laminator for the benefit of WVH before she found it on the floor of the janitorial closet is that, upon the request of some nurses, she had used the laminator to produce signage for individual members. Respondent could not come up with any evidence corroborating Appellant's assertion but also could not provide direct evidence disproving it. Under these circumstances, it is Appellant's burden to provide some reasonable support for the defense she asserts. . . .

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[30] I agree with the majority opinion that the allegation Appellant provided false statements regarding the January 23, 2004 note about the bench/seat is unsupported. Moreover, Appellant has fallen victim to the use of inexact language. This has to do with the reference in Appellant's note that the cottage couple "already have a bench/seat," while the actual OT chart refers to the couple having a "chair." The Respondent alleges that Appellant's variation in words provided false information. Ms. Wrolstad herself used the term "bench" in her official complaint to NCBOT and based that statement on a report from one of the Therapy Assistants. (Exhibit 14, P. INV-38.) Wrolstad even intermingled the words "chair and bench" in her testimony. (Tr. 63) In other words, Wrolstad and the Therapy Assistant may use the term "bench" when describing the equipment in the members' cottage, but Appellant, who actually used the accurate term "chair" in the medical record, may not use the ambiguous phrase "bench/seat" in a note without being accused of making a false statement. Moreover, the note itself is not in evidence.

> Given Appellant's overall lack of credibility and her failure to produce any evidence to counter the allegations relating to the laminator, the scale and the three stopwatches, Respondent's circumstantial evidence was sufficient to satisfy its burden to show, by a preponderance of the evidence, that Bartz-Bentz misappropriated all of this State-owned equipment.

The majority is shifting the burden of proof to the Appellant to show she did not misappropriate the items. This shift requires her to produce evidence disproving the Respondent's circumstantial case, i.e. that at one point these items were in the OT department under Appellant's direction and control yet were not visible on January 21, 2004 during a cursory search. Respondent could not show they were not misappropriated by someone else. Did Appellant steal these items? While Respondent argued as much, there is a substantial difference between misappropriating property and merely losing track of it. The record clearly shows the latter but not the former. Ms. Bartz-Bentz has distributed OT equipment for more the 20 years throughout a facility that now numbers 749 beds. The more than 100 photographs of record that depict the rooms comprising the OT department show a messy area with numerous shelves, drawers, cabinets, benches and other storage places. It would be amazing if some items could not be located in the OT department or elsewhere in the extensive WVH facility.

The Respondent placed a heavy responsibility on Appellant to obtain evidence during the investigation to support her explanations, and criticizes her for failing to produce it. The record shows that at the same time, Wrolstad had directed her to stay away from the OT department and not to discuss the laminator. Respondent's letter of discipline even alleges insubordination for the

> failure to follow a directive given by Christine Wrolstad, Deputy Commandant during the meeting of January 22, 2004 not to speak to anyone about the investigation as evidence[d] by follow-up investigation with individuals which confirmed the same. . . .

It is fundamentally unfair to deny Appellant access to the OT department and to everyone at the Veterans Home and then to use her inability to produce evidence more than a year later as a reason to attack her credibility and, consequently, to use it as further evidence of misappropriation.

In at least two other respects the Respondent's case against Appellant suffers from its own credibility issues, so much so that it is impossible to conclude that Appellant is any less credible than the evidence presented against her. The Respondent alleged no less than 19 different incidents of work rule violations, all with supporting factual contentions. Yet even by the majority's view, 13 of those allegations have been abandoned. For most, if not all, of

those claims, there was no evidence at all produced at the hearing. The basis for the allegations in the letter of discipline is the investigation that was conducted by Wrostad, Voeks, and others. Wrolstad and Voeks both testified about the investigation. In other words, Respondent has made multiple claims, allegations and assertions without producing any supporting evidence, whatsoever. Does that mean that Wrolstad and Voeks are lying or are not credible? If we do not draw that conclusion, then why should we consider Appellant to be not credible because she did not produce evidence that explained what happened to the laminator, stopwatches and food scale? The majority is holding Ms. Bartz-Bentz to a double standard.

The other credibility problem with Respondent's allegations goes to some of the key facts relied upon in the circumstantial case against Appellant for misappropriation. Those credibility issues involve, not surprisingly, the Therapy Assistants. The record is clear that the Assistants alleged the Appellant was only performing one patient evaluation per week rather than a much higher number that would be consistent with the number of members being served by the department. Susan Voeks raided Appellant's records, analyzed them, and found that the Appellant was correct in her contention that she performed at least one per day. Clearly the Therapy Assistants were wrong on this point and the evidence contradicts their allegation. Holding the Assistants to the same standard as Appellant means their testimony cannot be considered credible when they stated they had not seen or used the laminator in OT since its original delivery, that someone had asked Appellant if the OT department had a laminator, and that they had not seen or used the stopwatches or the food scale.

Given the above, I believe that termination of employment is an excessive level of discipline.

I agree with the majority opinion in terms of the other equipment that was purchased but not used and on the matter of the keys. For the above reasons and for the reasons discussed in the Proposed Decision, I dissent in part and concur in part.

Dated at Madison, Wisconsin, this 9th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/
Paul Gordon, Commissioner

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