STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LINDA SWENSON, Appellant,

vs.

President, UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 61
No. 70259
PA(adv)-195

Decision No. 33351

Appearances:

Steven C. McGaver, Gimbel, Reilly, Guerin, Brown LLP, Two Plaza East, Suite 1170, 330 East Kilbourn Avenue, Milwaukee, Wisconsin, 53202, appearing on behalf of Linda Swenson.

Joely Urdan, Associate Director and Senior University Legal Counsel, University of Wisconsin-Milwaukee, Department of Finance and Administrative Affairs, Post Office Box 413, Milwaukee, Wisconsin, 53201-0413, appearing on behalf of the University of Wisconsin System.

DECISION AND ORDER

On October 18, 2010, Appellant Linda Swenson filed a timely appeal of Respondent's decision to terminate her employment. The matter is properly before the Wisconsin Employment Relations Commission pursuant to Sec. 230.44(1)(c), Stats. The Commission designated Stanley H. Michelstetter as the examiner and he conducted hearings on April 7 and 11, 2011. The parties, by counsel, submitted post hearing briefs and the examiner issued his proposed decision on January 12, 2012. Respondent filed timely objections to the examiner's proposed decision on the merits and Appellant filed objections to that portion of the examiner's proposed decision denying an award of attorney's fees.

The Commission has reviewed the record in this matter, including a complete transcript, and consulted with the examiner regarding credibility issues. The parties' written arguments have also been reviewed and considered. Based upon its considered review, the Commission issues the following

FINDINGS OF FACT

1. Respondent University of Wisconsin System is an agency of the State of Wisconsin which operates the University of Wisconsin – Milwaukee (UW-M). Respondent operates the UWM Police Department (herein "Police Department"), which provides police and security services at and around the University of Wisconsin – Milwaukee. The Police Department is headed by a Chief of Police.

2. Appellant Linda Swenson (hereinafter "Swenson") was an employee of the UWM Police Department holding the rank of Lieutenant. Swenson had been with the Police Department since 1991.

3. As of June 2010, Patrol Lieutenant Swenson was the highest ranking officer below the Chief of Police, Michael Marzion. The former chief of police, Pamela Hoderman, had been demoted to the rank of lieutenant and replaced by Marzion in March of 2009.

4. In October of 2009 Marzion issued a written warning to Swenson as a result of a scheduling error she made.

5. In March of 2010 Swenson received a "meets expectations plus" evaluation from Marzion. The evaluation included positive comments about Swenson's potential.

6. On June 7, 2010, Marzion met with Swenson regarding potential discipline that might be warranted based upon several incidents. Swenson appeared at the meeting with legal counsel.

7. The conduct that was subject to the investigation included:

   a. Swenson telling a sergeant to deliberately leave things "undone so the Chief won't look much further" on an upcoming inspection;
   b. failure to follow directions from the Chief regarding training of sergeants;
   c. failure to follow instructions regarding vehicle inspection duties;
   d. failure to adequately schedule coverage.

8. Marzion had initially contemplated a five-day disciplinary suspension but reduced the suspension to three days for the conduct referenced in Finding of Fact 7.

9. Swenson did not appeal the three-day disciplinary suspension and served it on June 7-9, 2010. The suspension notice included reference to the fact that further disciplinary action could lead to termination.

10. On June 10, 2010, Marzion informed Swenson by e-mail that he would like to meet with her at the start of her shift on June 12. His intention was to "discuss the discipline" and his "expectations" of Swenson.

11. Swenson appeared for the meeting, which lasted about twenty minutes. Marzion attempted to lay out his expectations and have a discussion with Swenson. Swenson, on the advice of a friend, remained silent throughout the meeting. (Tr. 202) She sat with arms crossed and appeared angry. (Tr. 152) After fifteen or twenty minutes, Marzion ended the session reasoning that nothing could be accomplished. (Tr. 152) Marzion did provide Swenson with written instructions to develop a written improvement plan. Marzion then left the building.

12. Swenson returned to her office and after a minute left and went to the women's restroom located across the hall from her office.

13. Swenson remained in the restroom for about 20 to 30 minutes during which time she was sobbing. She also vomited when she first entered the restroom.

14. While Swenson was indisposed, officers on duty were addressing multiple problems which required supervisory involvement. Several officers were involved in a confrontation with an individual on the Locust Street bridge that resulted in the individual being pepper sprayed with injury, which in turn involved the Milwaukee Fire Department. While that fracas was ongoing multiple fire alarms in a thirteen-story campus building were occurring with only one very new officer available to respond. Additionally, another officer was occupied with attempting to assist a motorist.

15. The dispatcher attempted to reach Swenson using her office telephone. Swenson did not respond. Swenson also did not respond to radio traffic regarding the various incidents. It was customary for supervisors to respond to radio traffic. (Tr. 51)

16. Swenson always carried her radio and command staff always had their radios on. (Tr. 36, 231, 209, 225) The police radio was considered the first line of police communications. (Tr. 125)

17. From 4:20 p.m. when Marzion left until 6:00 p.m. Swenson was the only supervisor on duty.

18. Swenson provided no supervision during the period from 4:20 p.m. until 6:00 p.m. Swenson did not answer the phone call from the dispatcher and did not have her radio on her person while in the bathroom. Swenson stated that she did not hear the calls. (Tr. 216-217)

19. At about 7:00 p.m., Swenson did speak with the dispatcher and indicated she was going outside. She placed two personal calls and sought personal advice from former Chief Hoderman (who was on vacation in Wyoming) and a former employer. Swenson was upset and crying during those phone conversations. (Tr. 212)

20. Chief Marzion began an investigation of the events in response to a phone call from the dispatcher. He attempted to meet with Swenson as part of the investigation on June 15.

21. Swenson did not meet with Marzion. She went on a medical leave based upon a claim of work-related mental stress. (Tr. 216)

22. Swenson returned from leave on September 14 at which point she met with Marzion and offered her explanation of the events that occurred on June 12. (Tr. 216-217)

23. On September 15, Swenson was notified by mail that her employment was terminated for failing to supervise and "acting with extreme negligence in the performance" of her duties.

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Sec. 230.44(1)(c), Stats.

2. Respondent University of Wisconsin has the burden to demonstrate that there was just cause for the imposition of discipline and for the degree of discipline imposed.

3. Respondent has demonstrated by a preponderance of the evidence that Appellant violated work rules and failed to perform her supervisory responsibilities.

4. There was just cause for the decision to terminate Appellant.

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

ORDER[1]

Respondent's decision is affirmed and the appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of March, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

I dissent

Judy Neumann /s/
Judy Neumann, Commissioner

[1] Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The content of that letter are hereby incorporated by reference as a part of this Order.

University of Wisconsin System (Swenson)

MEMORANDUM ACCOMPANYING FINAL DECISION AND ORDER

We are asked to review an examiner's proposed decision concluding that Lt. Swenson, a 19-year veteran of the UWM Police department, was terminated without just cause. The decision to discharge Lt. Swenson from her employment is based upon an incident that took place over twenty to thirty minutes shortly after the start of her shift on June 12, 2010. Swenson was discharged for failing to exercise her supervisory responsibilities during that half-hour period on the day in question. There is no dispute that Swenson failed to perform her responsibilities. The focus of this case is the question of whether surrounding events are sufficient to mitigate (or completely excuse) the failure to perform that resulted in the termination. The examiner concluded that these circumstances excused Swenson's misbehavior. We disagree and conclude that Swenson's conduct was sufficiently adverse to provide just cause for her discharge.

Events Leading to Neglect of Duty Issue

On June 7, 2010, Marzion held an investigatory meeting with Swenson which resulted in her receiving a three-day disciplinary suspension for four separate incidents in which she "misused or neglected supervisory responsibilities." There was no dispute over the discipline and she was represented by counsel during the interview. The suspension included the customary warning that further discipline, including potential termination, would follow in the event of further misdeeds.

After serving the suspension Marzion requested that Swenson meet with him at the start of her next regularly scheduled shift. Swenson attended the meeting but elected to remain silent with her arms crossed. She did not respond to questions or otherwise communicate during the 15 to 20 minute meeting. With no discourse, Marzion ended the meeting after laying out his expectations going forward. Swenson says Marzion told her "he had intended to fire" her and that he had wanted to fire her for the previous discipline. Marzion denies making that statement. The notion that Marzion would inform Swenson that he "wanted to fire her" is simply incredible. First of all Swenson's "discussion" with Marzion was totally one sided. She chose to say nothing. Why would Marzion tell her he intended to fire her and in the same conversation discuss her future and his expectations? Why require her to put together a performance improvement plan if he intended to fire her? Even if he intended that result, why tell Swenson?

While Swenson denies being told she would be in charge on the day in question, she acknowledges it was "possible". As a practical matter, she indicated that if she had been aware of the incidents, she would have taken charge. Swenson does not contend that her failure to take charge was based upon a belief that some other supervisor could handle it. There is no dispute about the balance of the events at the meeting.

Following the Meeting

Swenson left the meeting and went to her office for a minute and then went to the bathroom where she threw up and spent the next twenty minutes sobbing. While in the bathroom, the events set forth in Finding 14 were taking place and the dispatcher was unable to contact Swenson. As the supervisor on duty (and second in command of the department) her involvement in the various incidents was needed. Had Swenson taken a radio with her to the bathroom she would have been aware of the incidents. Had she responded to the telephone call she would have been in direct contact with the dispatcher.

Chief Marzion, exercising his judgment, determined that Swenson's neglect of duty together with her prior history warranted discharge. The decision was not implemented for over three months as Swenson was on medical leave for alleged incapacitating mental stress arising out of the work place.

The examiner took a two-step approach in concluding that Swenson should be excused from her lapse in performance. On one hand he found that Swenson's emotional state was such that she was incapacitated and therefore unable to perform her duties. Secondly the examiner concluded that others were to blame for Swenson's actions (and inactions) which should excuse her misdeeds.

The first issue is easily disposed of. There is no dispute that Swenson was in the bathroom for up to one-half hour sobbing and that she threw up. Clearly she was emotionally upset to the point that two hours after the incident she was crying during a personal telephone call to a co-worker. The examiner concluded that because of this emotional state Swenson was "involuntarily incapacitated". There is no competent evidence to support this conclusion. Likewise there is no evidence to support the conclusion that Swenson could not hear the telephone ring while she was in the bathroom because of her emotional state. Marzion testified without contradiction that the telephone in Swenson's office could be heard in the women's bathroom. Likewise, Dispatcher Bowers also testified that Swenson's desk phone could be heard in the women's bathroom which was located "right across" from her office. Swenson herself obviously could not explain why she did not hear a telephone ring, leaving us with no basis to conclude that her emotional state affected her ability to hear a phone. The examiner's holding is simply speculation.[2]

The examiner chose to blame Marzion for Swenson's emotional state, implying that he intentionally aggravated Swenson. That finding is unsupported in the record and in fact contrary evidence suggests that it was Swenson who behaved inappropriately. We believe that it was fully appropriate for Marzion to counsel Swenson about his expectations going forward

[2] See e.g. "(I)t is not likely Appellant would have heard the phone ring while she was crying."

in their relationship as employer and employee. After all Swenson was a long term professional employee and at that time second in command at the department. Indeed Marzion may well have been subject to criticism for not conducting such a session. Rather than discussing what was obviously a serious matter, Swenson choose to sit in silence with an apparent defiant attitude. Marzion also explained that two part time captains would be hired to replace Marzion (who had been promoted to Chief from the Captain position) and that one of the individuals would occupy Swenson's office. The examiner concluded, without evidence, that Swenson "could reasonably have inferred that she was going to be forced out of employment." The filling of an existing vacant full-time position with two part-timers hardly signals an attempt to force someone out of a job. The same is true of an office relocation. Had Swenson elected to speak, she could have inquired of the Chief as to his rationale.

Even if we credit Swenson's version of the meeting, including the alleged reference to preferring termination to the suspension, it is a totally unwarranted inference to suggest that Marzion intended to cause Swenson's emotional reaction. Ironically, the examiner concludes that it was reasonable that Swenson might conclude that she would not have support from the Chief, yet it was Lt. Swenson who was unavailable for those below her in the chain of command. Similarly the examiner's criticism of Marzion for "failing to take supervisory steps to determine if she was emotionally fit to return to duty" is utterly unfounded. The record reflects that Swenson's emotional outburst occurred in the women's bathroom, not in front of the Chief. How one determines whether an employee who refuses to respond to questions is emotionally fit for duty is a mystery. We would place the burden on a nineteen year veteran police officer to determine her own fitness for duty.

Although the examiner suggests that others were at fault for Swenson's failure to respond to multiple events, Swenson herself acknowledges that had she heard the telephone she "would have gone down and I would have taken over the incidents and handled them" notwithstanding her "emotional state". (Tr. 207) The dispatcher was under no duty to search the building for Swenson or use alternative methods after Swenson failed to answer her telephone and did not respond to police radio inquiries. Swenson acknowledged that carrying the radio with her was her normal practice and that it was important "for a supervisor to be in contact with subordinates and to carry a radio with them if there were only one or two supervisors on duty." (Tr. 225) While the normal practice may not have been to require an employee to wear the radio into the bathroom, that presupposes a brief visit. At some point it should have occurred to Swenson to go across the hall to her office to obtain a radio. If she was so "disabled" that she could not handle that task she should have called the dispatcher on her cell phone.

Sadly Swenson lost her job because of a lapse in judgment. Were this a stand-alone incident termination may not have been warranted, but it was not. Her failure to perform her duties occurred the very day after serving a three-day suspension for other lapses in judgment.

Law enforcement personnel are expected to be available to address emergency situations. When a high ranking police supervisor fails to perform her duties because she chose to be unavailable, her subordinates were put at risk and discipline is warranted. Under the circumstances, this discharge was fully warranted.

We turn to the expansive dissent of our colleague and start with a review of our duties under Sec. 227.47, Stats. We and our examiners are there instructed to prepare findings of fact that "shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence." Our Supreme Court has further amplified the responsibilities of administrative agency decision making noting that "no recitation of what evidence was believed and what was rejected was necessary to comply with the elements of due process" and that agencies do not have to "indulge in the elaborate opinion procedure of an appellate court." City of Brookfield v. Milwaukee Metropolitan Sewerage Commission 141 Wis.2d 10, 17, 414 N.W. 2d 308 (1987) citing State ex rel Harris v. Annuity and Pension Bd. 87 Wis.2d 646, 661, 275 N.W. 2d 668 (1979).

The dissent not only fails to follow these directives, the twenty-six page twenty-five findings of fact epistle complete with thirty-nine footnotes reads more like a novel than an administrative decision. Suffice it to say this commission does not sit as some type of super-personnel department designed to substitute our judgment for that of the people charged with that duty. Likewise our role is not that of personnel pardon board charged with "excusing and exonerating" those that fail to perform their job duties. Excusing conduct based upon employees' misapprehensions about their employer's intentions is not within our province.

Swenson receives a positive evaluation from her supervisor and he inquires where she would like to be chief. A harmless inquiry indicating that he believed Swenson was "chief" material. It strikes us that if Swenson believed Marzion was suggesting that she look for work elsewhere she should have taken the initiative and asked him what he meant. Similarly at the meeting following her return to work, rather than sit stonily silent and refuse to respond to inquiries from the Chief she could have stated that she wanted to do a good job and seek the Chief's help in doing so. This is simply common sense communication between a relatively highly placed, long term employee and her superior aimed at improving performance and in doing so opening the door for future opportunities. In an eighty person police agency the Chief needs loyalty from his subalterns.

Our dissenting colleague would excuse that churlish behavior because once again Swenson "interpreted" Marzion's comment as calling for a "confession" and "signifying impending discharge". Never mind that there is no evidence to support these "interpretations" it is in the dissent's mind all about Swenson's feelings and impressions.

The dissent would also "excuse and exonerate" Swenson for her failure to take command as the shift supervisor. Swenson's testimony that she did not know she was in charge is incredible. Marzion testified that he told her she was in charge. She denied being told she was in charge but acknowledged it was possible Marzion told her. (Tr. 229). On the other hand the dissent describes Swenson as being utterly distraught yet perfectly lucid when it comes to remembering she was told she was not in charge. She apparently did not see the posted schedule but she was the employee who prepared the schedules, (Tr. 232), and she had the schedule on her computer. (Tr. 229). Most importantly she knew Marzion left and she was the second ranking officer in the Department. Of course she was in charge of the shift. She acknowledged that even if there were one or two sergeants working it was important for her to have her radio with her and be in communication. (Tr. 225). Swenson was not "involuntarily incapacitated" as the examiner and the dissent conclude. Swenson described what she would have done had she known about the emergency calls as follows:

> "A. I would have gone down and I would have taken over the incidents and handled them.
>
> Q. Even in your emotional state?
>
> A. Yes." (Tr. 207)

Clearly Swenson was <u>not</u> ill or incapacitated. She was in the bathroom for a half an hour having a "good cry."

Our statutory responsibility to the people of the State of Wisconsin is to fairly and objectively evaluate state personnel decisions to insure that just cause exists for disciplinary action and where appropriate sustain the discharge. The public deserves and expects that public employees will perform their duties competently and if they fail to do so that they will be replaced.

This is not a difficult case. Ms. Swenson was the second in command of an 80 person law enforcement agency. An agency larger than a number of county Sheriff's Departments and hundreds of municipal police departments. An agency responsible for the safety of 30,000 plus students, faculty and employees of an urban university located in proximity to a high crime neighborhood. When the taxpayers of this state send their sons and daughters to this university they are entitled to expect that the law enforcement officers will do their best to ensure their safety. What they got from Ms. Swenson was an officer who lied to her Chief and who attempted to mislead him by instructing subordinates to leave tasks undone.

(Tr. 110).[3] When her Chief attempted to assist her, she sat mute like some truculent child unwilling to accept suggestions for improving her performance. Finally she neglected her duties by spending the better part of an hour of paid time either sobbing in the bathroom or sobbing on the cell phone to her friends outside the agency. Again, as previously stated, her dereliction of duty significantly put at risk the safety and security of students and staff.

Dated at Madison, Wisconsin this 22nd day of March, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

[3] The misconduct underlying the three day disciplinary layoff was not disputed by Swenson and we are entitled to treat that behavior as admitted. In many law enforcement agencies that conduct by the number two would have led to immediate discharge. To reiterate Swenson counseled a sergeant to leave tasks undone in order to frustrate Marzion's inspection. (Tr. 110) Swenson also explained her failure to insure that sergeants were adding reports to a data base by telling Marzion she was engaged in time management training with the sergeant's. Id. That was not a true statement. Id. at 111. She also provided inaccurate information regarding her failure to inspect squads. Id Although Swenson had legal counsel with her at pre-suspension meeting she chose not to dispute the merits of the suspension. (Tr. 199) When her legal counsel cross-examined Marzion the Examiner correctly ruled on repeated occasions, that he would not allow Swenson to litigate the prior discipline. (Tr. 191, 193, 194, 195) The dissent's attempts to minimize or ignore the conduct which led to the suspension is misplaced.

University of Wisconsin System (Swenson)

DISSENTING OPINION OF COMMISSIONER JUDITH NEUMANN

The majority and I reach opposite conclusions in this case largely because we have very different views of the facts, which are steeped in credibility determinations to which the majority is dismissive and sometimes oblivious. Because I view the majority's (and in a few ways the Examiner's) Findings to be inconsistent with the evidence and obscure as to credibility, I have found it necessary, though tedious, to set forth my own findings of fact, explain those that depend upon credibility, and explain where and why I deviate from the Examiner's or the majority's in any significant way.[4] I will follow with own conclusions of law and a memorandum explaining why, given my view of the facts, the Respondent lacked just cause to terminate Ms. Swenson.

DISSENTING COMMISSIONER'S FINDINGS OF FACT

1. Respondent University of Wisconsin System is an agency of the State of Wisconsin which operates the University of Wisconsin – Milwaukee. Respondent operates the UWM Police Department (herein "Police Department" or "Department") which provides police and security services at and around the University of Wisconsin – Milwaukee (UWM). The Department is headed by a Chief of Police. At the time of the incidents giving rise to this case, the Department also included two Lieutenants, six Sergeants, some 31 to 40 sworn police

[4]The majority has criticized the length and detail of this dissenting opinion, suggesting that it offends some sort of judicial "directive" to issue short and conclusory administrative decisions. Conciseness is certainly desirable, though hardly required by the cases the majority has cited or any other. What is required by the Administrative Procedure Act, as interpreted by the courts, is that, "If an agency's decision varies in any respect from the decision of the hearing examiner, the agency's decision shall include an explanation of the basis for each variance." This has been interpreted somewhat strictly. See Heine v. Chiropractic Examining Board, 167 Wis. 2d 581 (Ct. App. 1994) (explanation must address each variance specifically and may not be "generic"); Epstein v. Benson, 2000 WI App 195, ¶¶ 33-36, 238 Wis.2d 717 (Ct. App. 2000) (if an agency even subtly alters an examiner's finding and even "implicitly" addresses credibility in doing so, the agency must both explain the deviation and consult with the examiner as to credibility on that point). Regrettably, the majority has deviated from the Examiner's findings in the instant case in many respects, some obvious and some subtle, and has failed to adequately identify or explain those deviations or address explicitly other important credibility determinations. In the following findings, I have tried to include only facts that are material to the discussion that follows and to "recite evidence" only where necessary to explain credibility determinations that pertain to material facts and/or to explain why and where my findings differ from the Examiner's or the majority's. This format has been normative in my substantial experience as an administrative adjudicator. I have also had to clarify the exact sequence of events, muddled to some extent by both the Examiner and the majority, because such precision is necessary to determine which version of events is more likely. That said, my findings of fact and especially my footnotes could have been greatly streamlined had the majority accommodated rather than rebuffed my several efforts to discuss and narrow our factual differences and reach consensus regarding the state of the record.

officers, about 40 non-sworn security officers, and an unspecified number of dispatch and clerical employees. At the time of the hearing, the Department included one full time and one part time Captain, and one Lieutenant who was about to retire.[5] The Captains, Lieutenants, and Sergeants were excluded from the bargaining unit as supervisors.[6]

2. Appellant Linda Swenson was hired on May 20, 1991 by the Police Department and had been continuously employed by the Department thereafter until the termination that is the subject of this appeal. In 2005, she was promoted to the rank of Lieutenant and as of the date of her termination she was the second highest ranking officer of the Police Department. Her principal duties as Lieutenant were to supervise the Sergeants, to create the work schedules, subject to approval by the Chief, for all employees of the Police Department, to coordinate and supervise investigations, internal departmental activities, and meetings, and to promote positive community relations.[7] In June 2010, Appellant normally worked a 12-hour shift from 6:00 p.m. to 6 a.m.[8]

3. The duties of shift supervisor normally fall to a Sergeant, if there is one on duty. If no Sergeant is on duty, the next highest ranked officer who is on duty is the shift supervisor. The shift supervisor ensures that the manpower and other resources of the department are adequate for the tasks at hand and allocated in accordance with departmental priorities. The shift supervisor provides any necessary "hands-on" management of incidents in terms of directing staff and resources. Shift supervisors generally are not expected to respond physically to the scene of incidents, but rather to manage the situation from headquarters. Most Department employees worked a 12-hour shift beginning at either 6 a.m. (day shift) or 6 p.m. (night shift). At least one employee was scheduled to begin each shift an hour earlier so as to ensure continuous coverage.[9]

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[5] The last sentence about the size and nature of the Department is not included in either the Examiner's or the Majority's Findings but is undisputed and supplies helpful context.

[6] The Examiner's Finding of Fact 4 inaccurately stated that the Sergeant position is in the bargaining unit; that Finding is deleted.

[7] The foregoing recitation of the Appellant's primary duties as Lieutenant (as opposed to shift commander) were not referenced in either the Examiner's or the majority's Findings, but the information is not in dispute. It is derived from testimony as well as the content of the Appellant's evaluation form (Ex. C-007).

[8] The Examiner inaccurately found that the Appellant's shift normally began at 4 p.m. The uncontroverted evidence shows that her normal shift during the relevant period of time was 6 p.m. to 6 a.m. Marzion had changed her shift on June 14 so it would begin at 4 p.m. and end at 4 a.m., so that she could meet with him before his shift ended and immediately upon her return from a prolonged absence that had included her three-suspension. The Examiner had also included in his Finding of Fact 2 that, "The start of her shift normally overlapped the end of the Chief of Police's shift by one half hour." I have deleted this statement because it is inaccurate.

[9] Neither the Examiner nor the majority made a finding addressing the content of my Finding of Fact 3, above. The information about supervisory roles is important for understanding the precise nature of the duties the Appellant is alleged to have neglected and therefore the charges against her.

4. The Appellant as Lieutenant and/or shift supervisor was generally required to be in communication with the dispatcher and/or subordinates by hand-held radio, her office telephone, the intra-office public address system, her computer, and/or her personal cell phone. Generally, the Appellant carried her radio and cell phone when outside the headquarters building and also kept it with her when she was the only supervisor on duty, though she was not expected to carry her radio when in proximity of her office or when using the restroom. Generally, if the Appellant was in the building, the dispatcher expected her to respond to her radio, and, if not, would try to reach her by office telephone, by paging her on the PA system, or by cell phone. Appellant uses her hand-held police radio to monitor officers in the field and to communicate with them directly.[10]

5. Prior to Michael Marzion's relatively recent appointment as Chief, the Appellant had been disciplined on only one occasion, a written warning issued about five years before the instant claim arose. The warning was imposed as a routine measure in response to her involvement in a traffic accident while driving a squad car.

6. The Captain position in the Department had been unfilled for some years prior to Marzion's appointment as Captain in or about April 2007. Marzion held the Captain position until he was promoted to acting Chief in March 2009. Subsequent to Marzion's promotion to acting Chief and then Chief, the Captain position again remained unfilled until after the Appellant's termination from employment.[11]

7. For many years prior to March, 2009, the Police Department was headed by Chief Pamela Hoderman. In Hoderman's view, the Appellant was an excellent and highly reliable employee, and Hoderman had been instrumental in the Appellant's successive promotions. [12]

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[10] The Examiner's Finding of Fact 3 and the majority's Findings of Fact 16 and 18 address the factual issue of whether the Appellant was required/expected to have her radio with her at all times. The majority asserts that the Appellant "always" carried her radio and implies in its Finding 18 that she should have had her radio with her in the rest room record, but these assertions have no support in the record. The majority also omits the important fact that other means of communication between dispatcher and officers were readily available and commonly used. I agree with the Examiner that these points are uncontroverted in the record.

[11] The Examiner's Finding 6 was essentially correct, but insufficiently detailed as to the history of the Captain position. The majority's Findings do not address the issue. I believe the issue is significant insofar as it contributes to explaining the fear with which the Appellant reacted after Marzion told her during the meeting on June 14 that he intended to hire two part time Captains, one of whom would move into her office.

[12] I have added the second sentence in order better to reflect the record, which is undisputed on this point. The majority's Findings do not address this issue, which is important to understanding the Appellant's emotional reaction to the June 14 meeting and to determining whether, in light of her overall record, the June 14 incident warranted termination.

8. Marzion was permanently appointed to the position of Chief of Police in January 2010, having replaced Hoderman on an acting basis in March 2009. Hoderman was demoted to Lieutenant, the position she held at the time of the events giving rise to this case. The Appellant held Hoderman in high regard and believed that Marzion had undermined Hoderman in an effort to secure the Chief position for himself.[13]

9. On October 23, 2009, Marzion directed that Appellant ensure that work schedules provide supervisory coverage (Sergeant or above) on all portions of all shifts. Shortly thereafter, the Appellant made a scheduling error that resulted in one shift on October 26, 2009 having no superior officer scheduled.[14] On October 30, 2009, Marzion issued a letter of reprimand to Appellant for this incident.

10. On March 2, 2010, Marzion met with Appellant concerning her annual performance evaluation in which he rated her overall as "meets expectations plus" and did not mark her as deficient in any area. During this meeting, the Chief asked the Appellant where she would like to be chief, which the Appellant interpreted as a suggestion that she look for work elsewhere.[15]

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[13] Finding of Fact 8 merges information from the Examiner's Findings of Fact 8 and 9. The last sentence is adopted in somewhat modified form from the Examiner's Finding 9. Although this Finding is not based upon or derived from any testimony at hearing, it has support in Respondent's Exhibit 115 (R-115), an unsworn statement the Appellant had submitted to the state's Equal Rights Division (ERD) in connection with her complaint in that forum. Technically, R-115 (and R-116, a subsequent statement the Appellant filed at ERD) are out of court statements by a party offered by a party-opponent and therefore not "hearsay." See Sec. 908.01(b), Stats. Since the record contains no information about the purpose for which R-115 and 116 were offered into evidence, nor any reason to believe that the exhibits were admitted for any limited purpose, they may contain assertions that were not offered for their truth and therefore would not be hearsay within the meaning of Sec. 908.01(3), Stats. I also note that the Respondent has not objected to the Examiner's Findings that were based upon information solely contained in R-115 and R-116. Finally, I note that the rules of evidence are not strictly binding, see Wis. Adm. Rules PC 5.03(5), and that findings may be based upon uncontroverted hearsay evidence. This Finding helps illuminate the state of the work place and Appellant's own state of mind at the time she reacted to Marzion's comments during the June 14, 2010 meeting. For these reason, while I normally would be reluctant to base a finding of fact solely upon an out of court statement such as R-115 or R-116, I adopt the Examiner's findings that were based upon the Appellant's statements to ERD.

[14] The Examiner's Finding 10 labeled this error "inadvertent." The parties did not litigate the circumstances of the scheduling error and the Respondent's letter of discipline does not indicate whether or not Marzion believed the error resulting in a lack of coverage was intentional or inadvertent. Hence, I have deleted that adjective.

[15] The Appellant's assertion about this conversation is contained solely in exhibits, specifically R-115 and R-116, and not in testimony. For the reasons discussed in Footnote 10, above, I conclude that R-115 and R-116 are a sufficient basis for the Findings based thereon, even though both parties to the alleged conversation testified at the hearing and neither was questioned about the particular conversation referred to in the Examiner's Finding 11 and my Finding 10, above. I have deleted that portion of the Examiner's Finding 11 that quoted from the evaluation document, as the extensive quotation burdens the findings without addressing any significant factual or legal issue. I have also deleted the last sentence of the Examiner's Finding 11, which stated, "Chief Marzion expects that supervisors under his direction manifest a high degree of loyalty to higher supervision," as I do not find

11. On June 7, 2010, following a meeting with the Appellant at which she was represented by counsel, Marzion issued a notice suspending the Appellant for three consecutive 12-hour shifts (a period the parties generally refer to as "three days") for conduct described in the notice as follows:

> 1. Prior to the May 6, 2010 inspection of the Police Department, you told Sgt. Starch to leave some things "undone so the Chief won't look much further during the inspection." The statement to Sgt. Starch was insubordinate, and your failure to retain documentation proving your preparation leading to the inspection was negligent at best.
>
> Following the inspection of May 6, you informed the Chief that you had conducted walk through inspections of the station and taken notes but when asked for them you said that you had "thrown away" the notes. Your failure to properly prepare the Police Department for inspection was inexcusable for someone of your rank and authority.
>
> 2. When questioned about a pending reports spreadsheet, you responded saying that you worked with the Sergeants on managing the Officers' time, which should lead to reducing the number of pending reports. This proved to be untrue, as investigation indicates that the Sergeants did not receive guidance or training from you in the area of time management. Your statement that there was no pending reports during this period proved to be inaccurate.
>
> 3. On May 31, 2010 (Memorial Day), you allowed all Sergeants to be off duty, stating you would be "on call". You failed to notify the Dispatchers or Officers of your call status, and there was no supervisor on duty for a 24 hour period. When the dispatcher called you at 1:48 a.m., you failed to answer your phone, and did not return his call. This failure of scheduling, and lack of supervisory coverage placed the entire campus community at risk.
>
> 4. It is your responsibility to inspect the Department vehicles to make sure they are in top running order. However, it was discovered that you had not in fact inspected them according to schedule despite having told the Chief that you had. As a Police Lieutenant, you should be monitoring the condition of the Officers, areas and equipment assigned to the Police Department.

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substantial evidence in the record, including R-115 and R-116, from which one could infer that Marzion expected subordinates to employ an unusually high (or any particular) degree of loyalty toward supervisors, or that the Appellant was of the opinion that he had such expectations.

Marzion stated in the notice of suspension that he had considered imposing a five-day suspension but reduced it to three based upon the Appellant's length of service, stated desire to correct the deficiencies, and willingness to improve. In fact, he had considered discharging her for this misconduct.[16]

12. Although Appellant did not agree with Marzion's allegations as set forth in the letter of suspension, she chose not to appeal the suspension and served it on June 7, 8 and 9, 2010.[17]

13. The Appellant's next scheduled shift began on June 14, 2010. Chief Marzion ordered Appellant by e-mail to begin her shift at 4:00 p.m. that day so she could meet with him upon her return to "discuss the discipline and my expectations for you as a Police Lieutenant" at the beginning of her first shift upon returning to work. As directed, Appellant arrived at 4:00 p.m. on June 14 and immediately reported to Marzion's office through a rear entry, without passing through the dispatch area or her own office. At that meeting, among other things, Marzion told her that he had wanted to terminate her employment with respect to the incidents for which she was suspended.[18] He wanted to convey to her that "this wasn't necessarily the end of her career but the start of something good." He stated to her that he was going to fill the position of Captain to replace her as the second in command of the Police Department and that she would be required to vacate her office so that the new Captain could use it. He began to outline his "expectations" from a prepared list of points. The Appellant sat silently during Marzion's comments, with her arms folded across her chest. To Marzion she appeared angry and emotional, so he concluded it "was going nowhere" and ended the

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[16] The last two sentences of Finding 11 have been added because they are supported by testimony at hearing and provide additional context in which to evaluate the parties' conduct. See footnote 18, below.

[17] Neither the Examiner nor the majority has rendered a finding, like that in my Finding 12, above, about whether or not the Appellant disagreed with the misconduct allegations that were the basis for the three-day suspension. It is clear from her testimony at hearing, her statements on R-115 and R-116, and her briefs submitted in this matter, that the Appellant does not agree that she had engaged in the conduct for which she was suspended and that she chose not to appeal the suspension because, in her words, she wanted to "move forward, … get the incident behind me, and just do my job." Neither the facts nor the merits of the three-day suspension were litigated in the instant case and it is not appropriate to render any findings or conclusions about them. An unappealed suspension stands as an incident of prior/progressive discipline for purposes of considering the proper penalty for any subsequent misconduct, but deciding not to appeal a suspension is not necessarily a confession of error on the part of the employee. Here it is somewhat significant that the Appellant disagreed with the allegations, because this contributes to understanding both the Appellant's and Marzion's states of mind during the June 14 meeting where Marzion directed the Appellant, among other things, to prepare a written document "interpret[ing]" the issues that caused this discipline" along with a plan to improve.…"

[18] The foregoing sentence is a crucial finding of fact in this case as it affected the Appellant's state of mind after leaving the meeting. Contrary to the assertions of the Respondent, Marzion did not deny making the statement that Swenson attributed to him. Marzion was never asked that question. Rather, he was asked, "Did you tell Ms. Swenson – or Lieutenant Swenson that you planned on firing her at that meeting?" To which he responded simply, "No." (Tr. at 141). This is Marzion's only testimony on the subject. The Appellant, on the other hand, testified several times and consistently that Marzion told her he had wanted to fire her over the misconduct that led to her suspension. She did not claim that Marzion told her that he had a present desire to fire her, although she "took it that way." (Tr. at 225). The Appellant's interpretation of what Marzion said is a materially different fact from what he actually said.

meeting. He handed her his list of expectations, which included an immediate directive to prepare a "development plan" to include the following:

> 1.) How to build and maintain trust in you and your abilities.
> 2.) The role of the Lieutenant in the day to day management of the Police Dept.
> 3.) Your plan to improve as a leader. To adjust to a new style of leadership within the Dept.
>
> Must have -
> An interpretation of the issues that caused this discipline, as you see it.
> Solid plan to improve
> Timeline and deadline
> Measurable/quantifiable

Marzion then left for the day. It was between 4:15 p.m. and 4:20 p.m.

14. Normally a "day Sergeant" is on duty until 6 p.m. when the night shift begins. On June 14, 2010, the scheduled day Sergeant had taken some leave. Therefore, for at least some portion of the day, Marzion had been the shift supervisor. Between 4:20, when Marzion left, and 6 p.m., when night Sergeant Switala's shift began, the Appellant was the only supervisor on duty and in charge of the shift. The Appellant, however, was not consciously aware of this situation at the time and thought that a Sergeant was on duty.[19]

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[19] I have substantially revamped and expanded the information addressed in the Examiner's Finding of Fact 14, because I attach much importance to the fact that Appellant did not realize she was the only supervisor on duty at the time the two pertinent incidents occurred. As discussed at length in my memorandum, below, the Appellant was discharged for neglecting her duties as shift supervisor and it was the shift supervisor's duty, not the duty of a Lieutenant, to manage the two incidents. For the reasons discussed in the memorandum, the Appellant would not reasonably have been consciously aware of being the shift supervisor between 4:20 and 6 p.m. on June 14, unless Marzion had brought that to her attention, as he testified he did, at the end of the meeting on June 14. The Appellant denied on both direct and cross examination that Marzion had said this to her. The Examiner asked, "You heard the chief's testimony that he told you at the end of the meeting that you were on duty and that you were in charge?" to which the Appellant answered, "I don't believe he said that to me." The Examiner followed up: "So is it possible he did say that *and you didn't hear it*?" (emphasis added). The Appellant responded, "It's possible." Determining whether the Appellant knew she was the shift supervisor requires addressing this potential conflict in testimony, but was not addressed as such by either the Examiner or the majority. The Examiner, however, has indicated in his credibility conferences with us that he generally found the Appellant more credible than Marzion. I would also credit the Appellant's clear and consistent testimony on this point. While she candidly acknowledged the possibility that Marzion may have said this even if she did not hear it, and the majority takes this as some kind of concession on her part, it seems obvious to me that any honest person would have to make the same acknowledgement. This simply enhances her credibility. As to Marzion's testimony, I note that in his termination letter and in his testimony he often exaggerated and overstated the details of the underlying incidents, making his recollection of events less persuasive as to their accuracy. See, e.g., footnote 22, below. There are also plausible explanations, other than one party's prevarication, for the discrepancy in their testimony. Dispatcher Bowers testified that Marzion told her as he was leaving the building at about 4:20 that the Appellant was the only supervisor on duty. It is possible that Marzion unintentionally confused this statement to Bowers with making a similar statement to the Appellant. It is also possible that Marzion mentioned the issue to the Appellant, but that she did not comprehend it, given her agitated state of mind at the time.

15. The Appellant interpreted Marzion's comments, the demand for an improvement plan, and the request for an "interpretation of the issues that caused this discipline, as you see it," to require a "confession" of her wrongdoing in regard to the suspension (which was still within the thirty-day appeal period). She interpreted his reference to having considered firing her for the suspension incidents and his decision to fill the Captain position as signifying an impending loss of employment.[20]

16. After the end of the meeting, the Appellant retrieved accumulated materials from her mailbox and went to her office. As she entered her office, she was suddenly overcome with nausea and emotion and immediately went to the women's rest room near her office, where she vomited and wept uncontrollably for a period of about one half-hour. She did not take her radio with her, in part because she would not normally do so to go to the restroom and in part because of the sudden onset of the illness. The Appellant had her cell phone with her in her pants pocket while in the rest room, but her cell phone did not ring.

17. At 4:36 p.m., Dispatcher Bowers received a radio request for back-up assistance from a patrol officer who, along with a colleague, was in the process of subduing a panhandler who had resisted arrest. The officers eventually pepper-sprayed the panhandler, an unusual level of force for this Department and one that, as a matter of routine, required the City of Milwaukee Police and Fire Departments to be called to the scene. As shift supervisor, Appellant's duties included actively monitoring the situation in order to insure that resources were available and sufficient to deal with the situation and other potential situations. This was not a situation in which the patrol officers would have expected a supervisor to attend to the scene. Appellant did not respond to the radio call because she did not have her radio with her in the restroom and did not hear it in the restroom. Bowers did not attempt to reach the Appellant about this situation.[21]

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[20] Neither the Examiner nor the majority made a specific finding on this point, which, as explained in the memorandum that follows, is crucial to determining whether the Appellant's conduct was culpable and warranted her termination. It is clear from the Examiner's Memorandum that his view of her state of mind is consistent with my Finding 14, above.

[21] It is important to depict accurately each event within the relevant brief span of time in order to fairly evaluate the Appellant's conduct. I have modified the material in the Examiner's Finding 15 in order to conform more accurately to the record. The Examiner inaccurately found that the dispatcher Bowers attempted to reach the Appellant on her office telephone regarding the panhandler arrest incident. It is clear from Bowers' testimony that she did not attempt to reach the Appellant in regard to the panhandler incident, although Bowers may have assumed the Appellant had heard the radio traffic. The majority does not address this important factual issue, but rather makes a general finding as to putative "multiple problems" and also states that "the dispatcher attempted to reach Swenson using her office telephone." In suggesting that there were more than two alleged incidents of misconduct and/or more than one attempt to reach the Appellant, the majority's finding is contrary to all evidence of record. The majority also inaccurately states in its Finding 14 that "Several officers were involved in a confrontation … on the Locust Street Bridge …." In fact, there were only two officers involved with that situation, although Officer Nieman appeared on the scene later, after the suspect had been subdued. The majority also asserts that "Swenson also did not respond to radio traffic regarding the various incidents," without finding that the Appellant heard or could have heard any such radio traffic. The evidence indicates that she neither heard nor could have heard the radio traffic. I have also deleted the following statement from the Examiner's Finding of Fact 15: "She would also have been required to investigate after the call was completed whether the use of force during the call was within Police Department policy." This is not supported by evidence in the record and is contrary to Marzion's testimony. He testified that every use of force requires an investigation and that his practice is to assign this task to a superior officer of his choosing; such investigation would not necessarily be assigned to the supervisor on duty when the event occurred nor would the investigation necessarily take place on the same shift as the occurrence.

18. At 4:49 p.m., dispatcher Bowers was notified of a fire alarm in Respondent's Engineering and Mathematics Building. UWM Police Officer Delrow, whose shift began at 5 p.m., was in the dispatch area in full uniform and ready for duty.[22] After directing that the building be evacuated –a normal practice for a dispatcher – Bowers asked Delrow to respond to the alarm, because the other officers on duty were involved with the panhandler and the locked out vehicle. Officer Delrow needed supervisory approval to start her shift ten minutes early. Bowers called the Appellant on her office telephone for that approval. Although the Appellant normally would be able to hear the office telephone while in the restroom, she did not hear the phone this time.[23] Bowers made no other effort to reach the Appellant, such as by pager, cell phone, or PA system, but instead directed Delrow to respond to the alarm. Delrow investigated the alarm, discovered shortly after entering the building that there was no evidence of a fire, and concluded that the alarm was being activated by dust from ongoing building repairs in the basement of the building and vicinity of the alarm. After resetting the alarm, Delrow permitted the occupants to return to the building. Delrow avoided using the radio to communicate regarding the fire alarm in order to leave the air waves free for the panhandler incident. Delrow returned to headquarters at approximately 5:45. This was not a situation in which the patrol officer would have expected a supervisor to attend to the scene.

19. UWM Police Officer Nieman was in the process of helping a motorist unlock his/her vehicle when he heard the radio call at 4:36 p.m. regarding the panhandler incident. He immediately radioed that he would go to the scene to offer assistance. He sped to the scene, arriving no more than five minutes later or approximately 4:41. By the time he arrived, the

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[22] Marzion, in the letter of termination, exaggerated the situation that Bowers and Delrow faced, writing inaccurately that "Officer Delrow heard the call, got into uniform and responded before her shift was scheduled to begin." Marzion also inaccurately stated that Delrow "was faced with evacuating a fourteen floor building by herself." In fact, it is undisputed that dispatcher Bowers – consistent with normal practice – had directed that the building be evacuated before dispatching Delrow to the scene, that the building had been evacuated by the time Delrow arrived, and that Delrow was already fully in uniform with her patrol car ready before the call came in.

[23] The foregoing sentence is consistent with the Examiner's Finding 16. The majority did not render a finding as such on the point, but stated in its Finding 18: "Swenson stated that she did not hear the calls." The majority's Memorandum suggests they do may not believe the Appellant's testimony that she did not hear her phone. The majority dismisses as "speculation" the Examiner's finding that Appellant did not hear the phone because of her crying. Further the majority states that "there is no evidence to support the conclusion that Swenson could not hear the telephone ring while she was in the bathroom because of her emotional state," and further that, "Swenson herself obviously could not explain why she did not a hear a telephone ring, leaving us with no basis to conclude that her emotional state affected her ability to hear a phone." In making these statements, the majority completely ignores the Appellant's sworn testimony that she did not in fact hear her telephone ring. This is a crucial issue. The Appellant's culpability for the alleged misconduct would be significantly greater if she heard her telephone and never responded or inquired about it even after leaving the bathroom. That said, it is important to render a finding about whether or not she testified truthfully that she did not hear her phone, although it is not necessarily important to determine why she did not hear it. As noted earlier, the Examiner and I both find the Appellant a generally credible witness. Moreover, the fact that there is a plausible hypothesis for why she may not have heard the ring enhances the credibility of her testimony that she did not hear it. The majority does not directly grapple with this factual/credibility issue. Given the Appellant's general credibility, her longstanding responsible work habits, and the rational possibility that her crying and illness interfered with hearing the telephone, I am persuaded, like the Examiner, that she truthfully testified that she did not hear the office telephone.

panhandling suspect had been pepper-sprayed and subdued. Nieman stayed on the scene for

about 10 minutes, directing traffic. He noticed during this time that one of the UWM officers used her cell phone to call the dispatcher to request an ambulance and to notify Milwaukee police officials, both required protocols when pepper-spray has been employed. Shortly after Nieman heard the EMS fire alarm call (4:49), he started driving to the EMS Building to assist. However, within a few minutes he learned that the EMS situation was a false alarm and he was called back to the panhandler scene to retrieve the suspect's bicycle. By 5:20 p.m., Nieman had secured the bicycle at headquarters and signed himself out for the day, his shift having ended at 5 p.m. In the meantime, Security Officer McDonough, writing parking tickets, heard Nieman announce that he was on his way to the panhandler scene (between 4:36 and 4:41) and radioed Bowers to obtain permission to use a Department vehicle ("mule") to finish handling the lockout that Nieman had left behind. Bowers telephoned McDonough's supervisor, Sergeant Learman, who was off-duty but had left word that he could be contacted if needed. Learman approved the request, but in the meantime the motorist had received help from a road service company. Dispatcher Bowers made no effort to contact the Appellant regarding McDonough's request or the vehicle lockout incident in general. The Appellant was in the restroom during the foregoing radio traffic.[24]

20. After approximately one-half hour in the restroom, Appellant returned to her office unaware of the two incidents that had occurred while she was indisposed. She began reviewing and responding to the accrued mail and e-mail that had accumulated during her absence and also began working on the performance improvement plan as directed by Marzion. The Appellant worked in her office, with her computer and radio on, between approximately 4:50 and 5:45. During this time she does not recall hearing any radio traffic that required her involvement nor does the record reflect that there was any such traffic during that period of time or that anyone attempted to contact her for assistance.[25]

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[24] Neither the Examiner nor the majority rendered findings about the McDonough "mule" request, nor was it one of the two cited incidents underlying the Appellant's termination. As to its timing, dispatcher Bowers testified that it occurred after the fire alarm incident, but the Respondent in its brief asserts that it occurred before that incident. Either way, it is clear that Bowers made no effort to call the Appellant but instead called McDonough's supervising sergeant. The majority refers to the McDonough request/lockout incident in its Finding 14, as follows: "Additionally, another officer was occupied with attempting to assist a motorist." This is misleadingly broad, since "assisting a motorist" could imply some kind of emergency, such as a traffic accident, but no one contends that being locked out of a car created an emergency. In fact, Nieman immediately left the motorist when he heard the radio call regarding the panhandler arrest and the motorist then obtained assistance from a road service company. The sequence to which Nieman testified is important, however, to show that the radio traffic regarding both the EMS and panhandler incidents had subsided by the time the Appellant settled into her office, thus supporting her assertion that she did not hear radio traffic that required her attention.

[25] Neither the Examiner nor the majority reached findings as to the last sentence in the Finding of Fact 20, above. This is important information for determining whether or not the Appellant engaged in the alleged misconduct. The conclusion I have reached is supported by the Appellant's credible testimony and by the sequence of events depicted in Officer Nieman's testimony (see my Finding 19, above), indicating that both incidents were under control at some point between about 4:50 and 4:55.

21. At 5:45, the Appellant took her radio and left the building to make two calls on her personal cell phone. As she passed the dispatcher station in order to leave the building, she signaled dispatcher Bowers that she was going outside to make some calls and that she had her radio. If Bowers noticed the Appellant leaving, Bowers said nothing to her.[26] One of the Appellant's calls was to former Chief Hoderman, who was vacationing out of state at the time. During this call, the Appellant at first was calm, but soon became very upset, cried a great deal, and repeatedly expressed her belief that she was about to be fired. Hoderman was surprised by how upset the Appellant was, as Hoderman had worked with her for many years and had always found her to be steady, calm, and unemotional. The Appellant also telephoned another friend for advice and after about 30 minutes returned to her office.[27]

22. At about 5:45 p.m., the night duty Sergeant, Switala, arrived for the 6 p.m. start of his shift. Dispatcher Bowers informed him about the panhandler arrest and the fire alarm. Switala checked with the officers involved and was informed that both situations had been defused at that point with no ongoing need for direction or management of resources.[28] At or near 7 p.m., the Appellant went downstairs to the dispatch area to deliver some paperwork and interacted briefly with Switala, who was in the area as well. He told her things

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[26] Both the Examiner and the majority somewhat muddle the sequence of events between 4:45 and 7 p.m. The majority's Finding 19 conflates the two incidents, indicating that the Appellant left the building to make the calls at 7 p.m., which was when she saw the dispatcher. The Examiner's Findings 19 and 20 inaccurately cite the times at which Switala was starting his shift (it was 6:00 not 7:00) and at which dispatcher Bowers telephoned Marzion (it was 8:00 not 7:00). The record in fact contains potentially conflicting testimony about whether the Appellant made an appearance in the dispatch area earlier than 7 p.m. The Appellant credibly testified to passing through the dispatch area at about 5:45 when she left to make her calls, and that she briefly told or signaled to the Bowers that she was going outside and had her radio. The Appellant also testified to a second encounter at about 7 p.m., when she brought some paperwork to the dispatch desk, at which time she also encountered Switala. Earlier in the hearing, dispatcher Bowers testified that she did not see any supervisor until Switala arrived at about 5:45 and also testified that she did not see the Appellant until "roughly 7 p.m. that night when she brought me the student abroad rosters." Neither Bowers nor the Appellant were questioned about the potential conflict in their testimony as to whether the Appellant had made an appearance in the dispatch area earlier, as she exited the building to make her calls. Had they been so questioned, the conflict may have been resolved. For example, Bowers may have recalled seeing the Appellant pass through but been too busy to pay particular attention. This is made more likely by the fact that Switala arrived at about 5:45, the same time as the Appellant left the building to make her calls. The Appellant, if questioned, may also have refined her testimony to indicate that, while she signaled to Bowers, she could not be certain that Bowers noticed her. On the record as it is, without this conflict addressed or resolved, and based upon my and the Examiner's positive view of the Appellant's credibility, I conclude that she did pass through the dispatch area at approximately 5:45 or 5:50 and made some gesture intended to alert Bowers that she (the Appellant) was going outside and had her radio.

[27] In addition to somewhat editing the Examiner's Finding of Fact 18, I have deleted his statement that, "It was within Appellant's authority and discretion to take the time to make those personal calls." The Respondent has not questioned the legitimacy of the Appellant's making personal phone calls.

[28] Marzion exaggerates the situation as it existed at 5:45 p.m. in order to reinforce his termination decision. He testified that when Switala came in he "had to start managing resources," but later in his testimony acknowledged that the situations had been defused by the time Switala arrived. It appears clear from the sequencing set forth in Officer Nieman's testimony (see Finding 19, above) that matters had been defused well before Switala's arrival.

were "fine" and mentioned that some officers had dealt with "a Locust Street situation." This was the first time the Appellant was aware of that incident.[29]

23. At approximately 8 p.m., dispatcher Bowers telephoned Marzion. The record does not indicate the purpose of the call, but during the conversation she complained to him about having been asked to undertake responsibilities regarding the panhandler and the fire alarm that she felt were beyond her status. Marzion immediately e-mailed several of the pertinent officers and asked them to submit statements as to what had occurred during these incidents. At approximately the same time, Marzion e-mailed the Appellant to direct her to meet with him at 2 p.m. the next day, but did not ask her for a statement or indicate the purpose of the meeting.[30]

24. At approximately 1:09 p.m. the next day (June 15, 2010), Marzion e-mailed the Appellant that she was being placed on paid administrative leave effective immediately pending his investigation of whether her actions during the panhandler and fire alarm incidents violated certain specified work rules. He also directed her to meet with him as part of this investigation on June 22, 2010, at 8:00 a.m. The notice stated "Discipline may result from this meeting." The meeting did not take place on that date, because the Respondent was notified on that date that the Appellant was under medical treatment for work-related stress. She was cleared to return to duty on September 14, 2010.[31]

25. Upon her return to duty on September 14, 2010, the Appellant met with Marzion to discuss the allegations specified in his notice dated June 15, 2010. The Appellant explained to Marzion that she had been ill in the restroom during the two incidents and was unaware of them. By letter dated the next day, September 15, 2010, the Respondent notified the Appellant that her employment was terminated. The letter stated as follows:

> You are hereby notified that your employment at the University of Wisconsin-Milwaukee is being terminated effective Wednesday, September 15, 2010 for the following reasons. On Monday, June 14, 2010, you violated the UWM Classified Employee Work rules and the rules of this Department by failing to supervise and acting with extreme negligence in the performance of your duties as a Police Lieutenant. Your lack of involvement and lack of leadership placed an undue and dangerous burden on the Officers and Police Communications

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[29] I have corrected the Examiner's statement that the interaction between Switala and the Appellant occurred "as [Switala] was just arriving to start his … normal shift." While the Examiner is correct in his other statement that the interaction occurred at approximately 7 p.m., Switala's shift began at 6 p.m., and he arrived for duty at about 5:45. Accordingly, Switala had been on the premises for more than an hour at the time the Appellant encountered him.

[30] The foregoing Finding 23 expands upon the information in the Examiner's and Majority's Findings 20.

[31] The foregoing Finding 24 expands upon the information in the Examiner's Finding 21 and the Majority's Finding 21.

Operator (dispatcher) to manage these serious incidents. The safety of our Officers was compromised in both incidents, and the safety of the EMS building and its occupants was disregarded.

On Monday, June 14, 2010, at 4:36 pm, you were the only on-duty supervisor when Officer Buzek and Officer Trapp called for a 10-17 (Urgent-Rush) backup on the Locust Street bridge. The Officers were facing a resistive subject and deployed OC (pepper spray), then requested an ambulance. As the on duty supervisor, you did nothing to manage this incident.

In the absence of your supervision, Milwaukee Police Department responded and the UWMPD dispatcher had to send all UWM Officers to respond, running lights and siren to get there. The officers on scene had to wrestle with the suspect and pepper spray him. He was taken into custody with the help of the additional UWMPD and MPD Officers.

You didn't respond to the call, direct officers to the call, or become involved. All are duties expected of a police supervisor. You failed to notify the Chief of Police, as required by policy.

Also on Monday, June 14, 2010, at 4:49 pm, you were the only on-duty supervisor when UWMPD received an alarm indicating an active fire at the Engineering and Math Sciences (EMS) Building. Officer Delrow heard the call, got into uniform and responded before her shift was scheduled to begin. She was faced with evacuating a fourteen floor building by herself. Officer Delrow handled this entire incident by herself.

You didn't respond to the call, direct resources to the call, or become involved in the decision making; all are duties expected of a police supervisor. You failed to notify the Chief of Police of this evacuation.

These failures to perform your duties as a Police Lieutenant and a supervisor in the UWM Police Department are a violation of the following rules:

UNIVERSITY OF WISCONSIN SYSTEM CLASSIFIED EMPLOYEES WORK RULES

I. WORK PERFORMANCE

A. Insubordination, including disobedience, or failure or refusal to carry out assignments or instructions.

G. Negligence in performance of assigned duties.

IV. PERSONAL ACTIONS AND APPEARANCE

J. Failure to exercise good judgment, or being discourteous, in dealing with fellow employees, students or the general public.

UW-MILWAUKEE POLICE DEPARTMENT RULES

Section 2 Performance of Duty. Employees shall perform whatever duty is lawfully required of them. They shall comply with all directives published by the University Police Department and shall obey all directives and orders, written or oral, of their superior officers or persons in charge.

Section 3 Unbecoming conduct. Because the public trust is so essential to the operation of a police force, both on and off duty employees shall conduct themselves in such a manner so as not to reflect unfavorably upon nor bring discredit to the Department, nor bring disgrace or dishonor to themselves.

DISSENTING COMMISSIONER'S CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Sec. 230.44(1)(c), Stats.

2. Respondent University of Wisconsin has the burden to demonstrate that there was just cause for the imposition of discipline and for the degree of discipline imposed.

3. Respondent has not demonstrated that there was just cause for the imposition of discipline on Appellant.

4. Respondent was not "substantially justified" in its decision to discharge Appellant as that term is used in Sec. 227.485(3), Stats, and therefore the Appellant is entitled to fees and costs.

DISSENTING COMMISSIONER'S MEMORANDUM IN SUPPORT OF FINDINGS AND CONCLUSIONS

The issue in this case is whether the Respondent had just cause for discharging the Appellant from her employment effective September 15, 2010. See Sec. 230.44(1)(c), Stats. The Respondent bears the burden of establishing just cause "by a preponderance of credible evidence," which the courts have equated "to proof to a reasonable certainty by the greater weight or clear preponderance of the evidence." DOC (Del Frate), Dec. No. 30795 (WERC, 2/04) (citations omitted).

As the Commission summarized in Del Frate, the longstanding paradigm for deciding these cases rests upon three underlying issues, as to each of which the Respondent bears the burden of proof:

(1) Did the Appellant commit the conduct alleged by Respondent in its letter of discipline?

(2) If so, did this conduct constitute just cause for the imposition of discipline?

(3) If so, was the discipline imposed (discharge from employment) appropriate (not excessive)?

The majority opinion does not identify or address these issues in any systematic fashion, and, as a result, it is not clear precisely what misconduct they believe the Respondent has established. Also, as explained in the preceding section, the majority fails to make clear rulings on several crucial factual issues regarding the Appellant's culpability. For example, the majority seems to think that Swenson had no objective basis for becoming distraught after the meeting with Marzion, but it is not clear whether the majority believes that she in fact distraught or whether, if she were, it would mitigate her misconduct. It is also not clear whether the majority has discredited the Appellant's testimony as to whether she heard her office telephone ring and that she was did not realize she was the shift supervisor at the time of the incidents, among other credibility issues.

Because the majority has not followed the customary format, I will take the same approach to the legal analysis as I took to the findings of fact, i.e., I will simply put forth my view of the case with reference to the standard "just cause" paradigm.

1. Did the Appellant Engage in the Alleged Conduct?

According to the Respondent's letter of discipline, the Appellant was discharged for four specific reasons:

1) Failing to supervise and acting with extreme negligence in the performance of her duties as a Police Lieutenant, when, on Monday, June 14, 2010, at 4:36 pm, *as the only on-duty supervisor*, she did not manage the panhandler arrest on the Locust Street bridge, during which the officers deployed OC (pepper spray); managing the incident would have required her to "respond to the call, direct officers to the call, or become involved" (emphasis added).

2) Failing to notify Chief Marzion of the above incident.

3) Failing to perform her duties *as a police supervisor* when, on Monday, June 14, 2010, at 4:49 pm, the Department received a fire alarm at the

> Engineering and Math Sciences (EMS) Building, and the Appellant did not "respond to the call, direct resources to the call, or become involved in the decision making" (emphasis added).

4) Failing to notify Chief Marzion of the above incident.

As to the second and fourth of the foregoing allegations, the record is devoid of any evidence or argument. While clearly the Appellant did not notify Marzion of either incident, the Respondent has not substantiated that this conduct violated any rule nor offered any argument that these allegations were a significant element in determining her misconduct or the appropriate level of discipline. Rather, the Respondent has treated them as though they were simply derivative of the other two allegations, and I will follow suit.

The first and third allegations are the principal grounds for discharge and over these much disagreement exists. At the outset it is important to be precise about what the Respondent claims as its basis for discharge here, because the Respondent bears the burden of establishing what and only what it has alleged. Cf. Personnel Commission v. Brenon, 254 Wis.2d 148 (Sup. Ct. 1982). The letter of termination clearly alleges, as to grounds one and three, that the Appellant was discharged for failing to perform a specific set of duties: those of "on-duty supervisor" or "police supervisor" regarding two incidents – the panhandler arrest and the EMS building fire alarm. The Respondent has not charged the Appellant with failing to perform the duties of police Lieutenant, as such, except insofar as those duties included shift supervisor duties on the date in question. See my proposed Findings of Fact 2 and 3, above.[32]

The majority asserts, "There is no dispute that Swenson failed to perform her responsibilities" during the approximately 30 minutes after her meeting with Marzion on June 14, 2010. Contrary to the majority's assertion, there is a major dispute as to whether the Appellant culpably failed to perform the duties of shift supervisor during the approximately 30 minutes in question here.

Again, in order to decide whether the Respondent has met its burden of proof it is necessary to be precise about (1) what the shift supervisor's responsibilities were in the situation, and (2) whether the Appellant knew or reasonably should have known that she had those responsibilities at the time in question. The record is clear as to the first issue: the shift supervisor's duty is to ensure the appropriate deployment of resources regarding incidents that occur on his/her shift. The second issue, the Appellant's awareness, is much more difficult.

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[32] The majority's *ad hominem* comment in its last paragraph that "What they [the taxpayers] got from Ms. Swenson was an officer who lied to her Chief and who attempted to mislead him by instructing subordinates to leave tasks undone," is especially inappropriate, because it refers to the grounds upon which the Appellant was suspended, not the basis upon which she was terminated. As noted earlier, the parties have not litigated nor has Ms. Swenson acquiesced in the facts or merits of the suspension that preceded her termination. The majority has no record upon which to base its apparent conclusion that the Chief's allegations regarding the suspension were true.

Ultimately I conclude that the Respondent has not met its burden of establishing such awareness.

Contrary to the majority's belief that the highest ranking officer on duty would "of course" be in charge of the shift, the record is clear that the shift supervisor is normally a Sergeant, regardless of who else is on duty. Under normal circumstances, the day shift Sergeant would have been on duty on Monday, June 14, 2011 until 6 p.m. The Appellant's normal duties during her shift are administrative (scheduling, planning, etc., as set forth in my proposed Finding 2). Thus, under normal conditions (i.e., when she is not shift supervisor), a Sergeant rather than the Appellant would have been required to manage resources during the incidents in question here.

It is true, as the majority points out, that the Appellant is typically proactive even when she is not the shift supervisor and acknowledged in her testimony that she would have been proactive in these incidents if she had been aware of them. However, such exceptional "beyond the call of duty" enthusiasm on her part cannot be the measure of misconduct. Rather, the Respondent must establish that the Appellant culpably neglected her required duties. The majority's point is therefore misguided.

There is no dispute that the Appellant actually was the shift supervisor during the pertinent period of time. But was she aware of that status? Bearing in mind that the Respondent carries the burden of proof, I am not persuaded that the Appellant was consciously aware of being shift supervisor at the specific and brief time of these events (from about 4:39 p.m. to about 4:55 p.m.). Moreover, I think her lack of awareness was excusable under the circumstances.

First, the Appellant credibly and consistently testified that she was not aware that she was shift supervisor. Although Marzion testified that he told her, I have concluded that he did not effectively convey that information to her. See my proposed Finding 14 and footnote 19.

Second, the Appellant's testimony makes sense under the circumstances surrounding her arrival at work that day. Although the Appellant herself had prepared the schedule for the period including June 14, the normal schedule would have listed a Sergeant on duty for the entire day shift until 6 p.m. On June 14, the day Sergeant had taken leave for all or some portion of June 14, but the record does not reflect whether this arrangement was made at the time the Appellant prepared the schedule or sometime thereafter during her approximately 10 days off work. In addition, the Appellant had prepared the schedule several days earlier and while off duty she had had no access to any department documents, written or electronic, including the schedule. Even if she had pre-scheduled the day Sergeant to leave before 4 p.m. on June 14, the schedule is a complex document, and it would not be reasonable to expect that she would have committed one particular day's schedule to memory. Nor was the Appellant herself pre-scheduled to start work at 4 p.m., so that some awareness of being shift supervisor on that day might be attributed to her. To the contrary, she had been scheduled to begin work at 6 p.m., her normal time, as was the normal night shift Sergeant, but came to work two hours early at the Chief's request. Finally, it is true that shift schedules, including the identity

of the shift supervisor, are posted in the dispatcher area in the main entrance to the department. However, the Appellant did not enter the department that way on June 14, but rather through a

back entry, and therefore did not have an opportunity to observe the posted schedule. Nor did she have time to log into her computer first, where she might have seen the day's schedule, but rather she reported immediately to the Chief's office.

Based on this confluence of circumstances as well as her own credible testimony, I accept the Appellant's claim that she thought a Sergeant was on duty as shift supervisor, as usual, when these incidents occurred on June 14. I would conclude that the Respondent has not established that she either knew or should have known that she had the duties that she is alleged to have neglected during the pertinent period of time. It follows that the Respondent has not established that she committed the conduct of which she is accused in the first and third paragraphs of the letter of termination.

Given the foregoing conclusion, it would be unnecessary to reach the second and third elements of the just cause paradigm. Nonetheless, because they are the primary grounds for the majority's decision and because I would overturn the discharge even if the first element had been met, I will address elements two and three as well.

2. Did the Appellant's Conduct Provide Just Cause for Discipline?

For purposes of this second prong of the "just cause" analysis, I will assume that the Appellant knew or should have known that she was shift supervisor at the time the two incidents occurred and therefore that the Respondent has satisfied the first element of the just cause analysis.

The second element asks whether the Appellant's established conduct deserves the label "misconduct" warranting discipline, or whether, instead, the circumstances explain and excuse her conduct. Generally, this discussion begins with the work rules that are alleged to have been violated. In this case, the pertinent work rules are set forth in the letter of termination and quoted in my proposed Finding 25. In a nutshell, the rules forbid employees from failing or refusing to carry out assignments, from being negligent in performing assigned duties, and require employees to exercise good judgment and to comply with directives.

Assuming the Appellant was aware of her status as shift supervisor, there is no question that she failed to perform those duties as to the incidents that occurred between 4:39 and about 4:55 p.m. on June 14. On this point the majority accurately characterizes the question: has the Respondent persuasively established that this failure was culpable negligence and therefore misconduct, or instead were there mitigating factors? However, the majority on the one hand, and the Examiner and I on the other, have radically different perspectives both as to what actually occurred and whether the Appellant deserves empathy and exoneration. Under the Examiner's and my own view of the credible evidence, the majority's view of the Appellant's conduct is decidedly wrong – harsh in fact. It seems infused with unstated and unwarranted skepticism.

Although the majority acknowledges that the Appellant "was in the bathroom for up to one-half hour sobbing," that "she threw up," and that "she was emotionally upset to the point

that two hours after the incident she was crying during a telephone call to a co-worker," the majority then asserts, mystifyingly, that "there is no competent evidence" to support the Examiner's conclusion that the Appellant was "involuntarily incapacitated" while she was ill in the restroom. As discussed in my footnote 23, the majority also appears to dismiss the Appellant's testimony that, for whatever reason, she actually did not hear her office telephone ring the one time that the dispatcher called her. Even more crucial, and handled even less directly in the majority's opinion, is their view of the Appellant's behavior as a "lapse in judgment" because she "chose to be unavailable," comments that are not only inaccurate (the Appellant did not have her radio or hear her office phone, but she was available by several other means), but imply a measure of intentionality and self-control that are inconsistent with the level of distress that the majority purports to believe she experienced.

Perhaps the majority does not believe the Appellant was actually ill after the meeting with the Chief, and/or, even if she was truly ill/incapacitated, that her illness was an irrational or contemptible reaction to what occurred during the meeting, incompatible with her role as a police officer and perforce no excuse for away from her radio during this brief period of time. If so, that should be stated. The majority also buttresses its conclusion – like the Chief did in his termination letter – with exaggerated descriptions of the incidents, suggesting inaccurately that they created exigencies for which a supervisor's presence was critical.[33]

In contrast, I would take the Appellant at her word, largely as the Examiner did, that she was suddenly overwhelmed with nausea and emotion because of her genuine (though not necessarily accurate) interpretation of the Chief's comments to her during her reentry meeting with him at 4 p.m. on June 14.[34] She thought she was on the brink of discharge or layoff. The Appellant had no time to pick up her radio before becoming ill, though she had her cell phone with her and presumably could have heard a call over the public address system. She thought she would able to hear her office phone, but, perhaps because of her distress, she did not hear the one call that was made. It was not bad "judgment" but bad luck that her relatively brief period of incapacity happened to coincide with two incidents over which a shift supervisor would be expected to manage resources. The Chief, primed to distrust the Appellant because

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[33] Indeed, the majority's statement of the Appellant's misconduct is more panoramic than the actual incidents warrant: "Swenson provided no supervision during the period from 4:20 p.m. until 6 p.m." (Majority Finding of Fact 18). The Appellant is not charged with any lack of supervision except between 4:39, when the panhandler-related traffic began on the radio, and 4:50 or so, when the EMS alarm occurred and the dispatcher called her office seeking authorization for Officer Delrow's 10 minutes of overtime. Nothing in the record suggests that anything required supervisory attention after the Appellant returned to her office at about 4:50 and began to review her accumulated mail and work on the performance plan the Chief had just demanded. Delrow specifically testified that she did not use the radio to communicate about the EMS fire alarm just in case the panhandler incident required radio assistance.

[34] The Examiner concluded that the Chief had intended to create this distress in the Appellant and the majority spends much of its opinion responding to this aspect of the Examiner's decision. I agree that the record does not support the Examiner's finding about the Chief's intentions, but that finding was an unnecessary distraction. As discussed in the following footnote, it is sufficient to conclude that Marzion distrusted the Appellant's loyalty and that, swayed by his distrust, he misinterpreted and overreacted to her conduct afterwards. I agree with the Examiner, however, that the Appellant's reactions during the meeting and her brief incapacity afterwards were genuinely related to emotional distress over fear for her job and were not intentional or insubordinate.

of earlier friction, seems to have assumed, at least initially, that she was being truculent and insubordinate in ignoring her duties during these two incidents.[35] That assumption, however understandable, was not correct. An objective examination of the facts persuades me that the Appellant was neither insubordinate nor culpably neglectful of her duties, but simply and briefly too upset to handle them for a brief period of time.

The backdrop to the June 14 incident shows that Chief Marzion and the Appellant were in a situation that often leads, as it did here, to a bumpy relationship: a new boss inheriting a top manager long associated with the former boss. As of March 2009, when Marzion was appointed Chief, the Appellant had worked for the Department for some 18 years, having been promoted several times until, as Lieutenant, she was second in command of the Department. The Appellant felt loyal to former Chief Hoderman and harbored a belief that that Marzion had undermined Hoderman in order to secure the position of Chief. During her first 18 years in the Department, the Appellant had been disciplined only once, a written warning in or around 2004, routinely issued when a member of the Department is involved in a traffic accident with a squad car. According to both the Appellant's record and Hoderman's testimony, the Appellant was an excellent and reliable police officer, who was consistently calm both in her personal demeanor and in handling incidents.

Between March 2009 and June 2010, the Appellant worked directly under the new Chief, whose management style and priorities differed noticeably from former Chief Hoderman's. For one thing, it was important to Marzion that work schedules provide for superior officer coverage at all times on all shifts, rather than have "at charge" officers performing as shift supervisors. On October 23, 2009, Marzion issued a directive to that effect to the Appellant, whose duties included preparing the schedule. The Appellant almost immediately made a scheduling error for which Marzion reprimanded her on October 30.

A few months later, on March 2, 2010, Marzion gave the Appellant a positive annual performance evaluation. However, in discussing the evaluation with the Appellant, Marzion asked her where she would like to be chief – a question that the Appellant interpreted (not necessarily correctly) as an indication that Marzion wanted her to leave. About two months later, serious friction erupted between them over a set of performance deficiencies that are outlined in my proposed Finding 11, leading Marzion to suspend the Appellant for three work days (36 hours). It is clear from reading Marzion's description of these incidents that he had developed a sense of distrust about the Appellant's commitment to him and his priorities. The suspension letter itself indicates that he had considered a five-day suspension but reduced it to three in light of her stated willingness to improve and her long record of service. In fact, as he told her during the June 14 meeting, he had considered discharging her at that time.

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[35] My suggestion that Marzion may have interpreted the Appellant's failure to take charge after his meeting with her as deliberate, passive-aggressive, and insubordinate, is based upon the way he handled the situation upon learning about the incidents in the dispatcher's phone call at 8 p.m. on June 14. One might expect a manager with no animus or distrust to have called his supervisor and inquired about the events before initiating a more or less stealth investigation as recounted in my proposed Finding 23. If Marzion saw the Appellant's conduct as intentional recalcitrance, he would also be much more likely to conclude that she deserved discharge, as he did in this case.

Although the Appellant thought the suspension was unfair, she chose to move forward rather than appeal. She served the suspension on June 7, 8, and 9, 2010, and was also out on June 10, 11, 12, and 13 as previously scheduled time off. On June 9, Marzion directed the Appellant, via e-mail, to begin her shift at 4 p.m. on June 14, her first day back, rather than her usual 6 p.m., because he wanted to meet with her about "the discipline and my expectations for you as a Police Lieutenant." The Appellant came in at 4 p.m. and immediately reported to Marzion's office. After telling the Appellant that he had considered terminating rather than suspending her for the previous conduct, Marzion told her that "this wasn't necessarily the end of [your] career but the start of something good." Marzion may have intended those words to be reassuring, but he also told her that he was going to fill the Captain position to replace her as second-in-command and that she would be bumped from her office. He then began reading a prepared list of "expectations." The Appellant was dismayed by Marzion's comments and sat stonily while the information was imparted. Marzion handed her the written directives, including an order to prepare a "development plan" for herself, including a written "interpretation of the issues that caused this discipline, as you see it." The Appellant was convinced from Marzion's remarks that she was on the brink of losing her job.

When the Chief terminated the meeting, the Appellant went to her office, put her paperwork on her desk, and immediately became overcome with nausea. She repaired to the restroom where she remained, ill and unable to control her crying, for 20 to 30 minutes. She did not have time to grab her radio, but she had her cell phone on her person.

I have credited the Appellant's testimony that she did not realize she was the shift supervisor for the remainder of the day shift on June 14. Even if she knew that status, she did not have time to grab her radio. Nor, given the undisputed facts about her physical and emotional illness while in the bathroom, is it reasonable for the majority to assert that, "At some point it should have occurred to Swenson to go across the hall to her office to obtain a radio," or, "If she was so 'disabled' that she could not handle that task, she should have called the dispatcher on her cell phone." To the contrary, given the Appellant's long record of reliable and pro-active supervisory service, the much more likely conclusion to be drawn from her relatively prolonged stay in the bathroom is either that she was unaware that she was shift supervisor (my view) or that (as the majority sarcastically puts it) she was "too disabled" to do otherwise. I, like the Examiner, have also credited the Appellant's testimony that, even though her office telephone could normally be heard in the restroom, she did not hear it this time. Indeed, the fact that the Appellant herself believed that she would hear her office telephone while in the restroom could have led her to assume no problems had arisen while she was in there. This supposition would have been reinforced by the fact that she also reasonably expected, if her services were urgently needed, to have been called on her cell phone or otherwise sought or summoned. It's not as though she had disappeared from the building. Nothing about the Appellant's mode of operation, during over 20 years of police work, supports the notion that she would deliberately shirk her responsibilities if she was aware of them and was physically able to perform them.

I would conclude that the Respondent has not met its burden of establishing that the Appellant willfully used poor judgment or willfully neglected her duties.

As to the majority's implication that the Appellant should be held accountable even if she were genuinely ill, because the illness itself was an irrational reaction to the June 14 meeting with Marzion, that implication may have two prongs: first, that the Appellant's fear for her job was so irrational that her judgment can no longer be trusted as a police lieutenant; second, that it is inherently unacceptable for a police lieutenant to become distraught and cry uncontrollably for 20 to 30 minutes even if confronted with the unexpected possibility that she was on the brink of losing her job. Both implications are seriously flawed, and the second one may be tinged with a difference in gender perspective.

As to the Appellant's "overreaction" and the majority's claim that her interpretations exist only "in the dissent's mind," I have included exhaustive findings of fact precisely because the detailed context shows that the Appellant's interpretation of the situation was rational, whether or not it was correct. She herself testified as to her interpretation, and that testimony is competent "evidence," not speculation on my part. The majority is completely wrong in asserting that, "Excusing conduct based upon employees' misapprehensions about their employer's intentions is not within our province." The issue in this case inherently involves the Appellant's state of mind as a result of the meeting with the Chief, because we have to decide whether her subsequent brief period of distress was a culpable dereliction of duty or instead an excusable physical illness. We are not deciding whether or not the Chief really intended to fire her, but whether or not the Appellant genuinely thought so. After nearly 19 years of excellent service and several successive promotions, she found herself in disfavor with a new Chief, one whom she perceived as having ousted his predecessor and her close friend, former Chief Hoderman. She was aware that she had failed to meet Marzion's expectations, though she did not agree with his judgment. She was just returning from the first suspension of her career. At the time of suspending her, Marzion had told her he had considered an even more serious discipline. A typical employee, especially one who had previously been well-regarded, would naturally experience some trepidation upon returning from such a suspension. Her trepidation was heightened when, immediately upon her return, Marzion summoned her to a meeting where he essentially read to her a list of expectations and directed her to prepare a plan for addressing her prior deficiencies. In addition, he emphasized the tenuousness of her situation by telling her that he had considered discharging her instead of suspending her for the previous infractions, and that he intended to fill the essentially dormant position of Captain, replace her as second-in-command, and oust her from her office.[36] In light of what had just happened to Hoderman (replaced by Marzion as Acting Chief en route to being forced out of the department entirely), and all these other factors, I believe the Appellant's fear was rational, if overwrought. Moreover, it was genuine. Two hours later, she broke down crying again during a telephone call to Hoderman, repeatedly stating "I think I'm going to be fired." Hoderman, who had known her for many years, had never observed the Appellant so distressed.[37]

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[36] The Captain position was empty for many years until it was briefly filled by Marzion himself just before he was appointed Acting Chief and then Chief, en route to replacing Hoderman.

[37] It is inappropriate for the majority to suggest that the Appellant had committed some kind of misconduct by

The second implication in the majority's decision, that it is inherently incompatible with employment as a police officer to be briefly overcome with emotion in these circumstances, is particularly troubling. Given the Appellant's lengthy and largely excellent employment history, which lacks any prior instances of emotionality or similar incapacity, the answer simply has to be in the Appellant's favor. Having proven herself capable of handling police work at every level in this department for nearly 20 years, and having displayed a uniformly calm demeanor at all previous times, it is clear that this situation was wholly unique. It is also relevant that the incapacity did not occur during a law enforcement incident. In short, we already know that the Appellant is a calm and capable police officer.

Under the objective scrutiny required by the "just cause standard," where the burden of production and persuasion lies entirely with the employer, a single, understandable, and altogether atypical instance of temporary incapacity cannot constitute just cause for termination. This conclusion is especially warranted where the emotional reaction in question manifested itself in a stereotypically female manner: she was sick and she cried. It strikes me that my male colleagues may have a different, less empathetic, perspective on this subtly gender-related fact than I do.

Finally, the incidents that occurred during the Appellant's 20 or 30 minutes of incapacity, while serious, were not so crucially dependent upon her leadership or so fundamentally affected by her inattention as to warrant termination ipso facto. Far from it. Despite Marzion's exaggerated description of the two incidents in his letter of termination (discussed in my proposed findings and footnotes), the Appellant's absence did not generate any contemporaneous concerns among the officers involved in the incidents. Each officer testified that he/she would not have expected the shift supervisor (much less the Lieutenant) to have shown up at the scene, nor did any of them indicate any actual problems associated with the absence of a shift supervisor. As to the first (panhandler) incident, the dispatcher noted that the Appellant normally would have been especially proactive upon hearing the radio traffic, but nonetheless did not find it necessary even to try to contact the Appellant in any manner. As to the second incident, the EMS fire alarm, contrary to Marzion's hyperbole in the termination letter, Officer Delrow was already in the dispatch area fully uniformed and ready to start her shift when the alarm came in; all she needed was permission to start 10 minutes early. At this point (about 4:50 p.m.), the dispatcher made the single call to the Appellant's office to obtain permission for Delrow to start early. This is the only call or contact that anyone made during the Appellant's time in the restroom. The dispatcher had already – consistent with customary practice – ordered the building evacuated and, when the Appellant did not answer the telephone, directed Delrow to go ahead and respond. At the scene, again contrary to both the Chief's and the majority's hyperbole, Delrow quickly determined that it was construction dust rather than fire that was triggering the alarms, which were successive alarms from the same apparatus in the building (not "multiple alarms" in a multi-story building) and easily disabled. Delrow testified that she had no expectation that a supervising officer would be at the scene or actively involved – although she, like the

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making these personal telephone calls, as the Respondent itself has never made that claim, much less is there is any evidence that any work rule was violated.

dispatcher, also expressed some surprise at the Appellant's highly unusual (for her) quiescence in the situation.

It is clear that if anyone – dispatcher or officers – truly had needed the Appellant's intervention, she could easily have been reached by cell phone, by public address, or in person. The majority dismisses this point as an effort to place "blame on others," but again the majority misses the point. The dispatcher did not make such efforts because such efforts were not necessary; no one is imputing any fault to other employees. And that is the point: these two events (and the single missed call) did not present such exigencies that the Appellant's absence ipso facto warrants termination.[38]

In sum, even assuming Appellant reasonably can be charged with failing to perform supervisory duties, she was genuinely and understandably incapacitated during the 20 to 30 minutes in which the two incidents occurred, she did not culpably fail to respond to radio traffic or telephone calls because she did not hear them, and she was understandably distracted by her recent meeting with the Chief and his demand for immediate production of a performance plan once she returned to her office. Moreover, the incidents in question were not so critical that her lack of response might have impaired the department sufficiently to warrant discipline regardless of the reason for her incapacity. Thus, I agree with the Examiner that the Appellant's failure to perform the shift supervisor duties between 4:39 and 4:55 p.m. on June 14 did not constitute culpable misconduct warranting discipline.

3. If there were misconduct, was discharge the appropriate penalty?

Although both I and the Examiner would reach a different conclusion, I think a reasonable person could conclude that, had the Appellant known she was the shift supervisor, she should have been more proactive after she recovered to find out whether she had missed any important incidents while indisposed. By all accounts, that sort of hands-on assertiveness would have been typical of the Appellant's managerial style. Indeed, the Appellant's customary punctiliousness is one of the factors that convinces me she truly was not aware she was shift supervisor.

Assuming a reasonable person could conclude that the Appellant was aware of her shift supervisor status and should have been more proactive, these conclusions would trigger the third – penalty – element of the just cause paradigm. Under any view of the Appellant's conduct, even the majority's, discharge is decidedly excessive and unwarranted.

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[38] It is important to emphasize that the Appellant's termination was based on only the two incidents mentioned in the termination letter (panhandler and fire alarm) and only the single unanswered phone call, not upon "various" incidents, an "officer attempting to assist a motorist," or multiple "calls" as the majority inaccurately states. In particular, the Nieman-McDonough incident was not an element of the alleged misconduct. When McDonough asked for permission to take the "mule" vehicle to help unlock someone's car after Nieman decided to report to the panhandler scene (which had been resolved during the 5 minutes it took him to get there), the dispatcher did not even try to reach the Appellant but instead, sensibly enough, called and reached McDonough's immediate supervisor for the permission.

As explained in DOC (Gerritson), Dec. No. 31234-A (WERC 6/2005); citing Jacobs v. DOC, Case No. 94-0158-PC (Pers. Comm. 5/15/1995):

> Some of the factors that enter into the excessiveness determination are 1) the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to tend to impair the employer's operation, 2) the employee's prior record and 3) discipline imposed by the employer in other cases.

The third factor is irrelevant here, because the record contains no evidence as to discipline imposed by this employer upon other employees. Consideration of the first two factors heavily favors the Appellant.

As to the impairment factor, both Marzion and the majority have found it useful to exaggerate the extent to which the Appellant's brief illness and absence affected the department's operations in order to match her conduct here with the extreme penalty of discharge. To recap, the majority maximizes the drama by referring inaccurately to "multiple fire alarms," "several" missed "calls" to the Appellant, citizens in distress (locked out a car), and the involvement of the City of Milwaukee's police and fire personnel during the panhandler incident. In fact, there was one fire alarm that went off several times over a short period of time and was quickly identified as a false alarm, and one call to the Appellant's office – over the weighty approval of 10 minutes of overtime. There were no frantic efforts to locate the Appellant; she was present and in the immediate vicinity, had anyone thought it necessary to find her. Among many exaggerations recited in my findings and footnotes, the Chief puffed about Officer Delrow having to get into uniform and summon a vehicle in order to respond to the alarm, when, in fact, she was already in uniform, at the dispatch desk, and with her patrol car ready when the alarm came in. The City's police and fire departments are routinely called to a scene where pepper spray has been deployed, whether by their own personnel or UWM's. By the time Office Nieman arrived (within minutes), the entire event was under control.

These exaggerations aside, clearly there is potential harm to a police department's operations when the supervisor in charge is not readily available when incidents occur. Clearly also, these were serious incidents, though not quite the exigencies the Department and the majority describe. However, the very brief period of indisposition here (20 to 30 minutes) and the actual availability of the Appellant if actually needed undermine the weight of that potential impairment. Under these circumstances, I would conclude that the employer's interests suffered at most a modest impairment.

The second factor, the employee's prior record, predominates in the Respondent's and the majority's justification for discharge, but, ironically, actually favors the Appellant. It is true that she had just returned from a three-day suspension, her first suspension in more than 19 years of employment but nonetheless a serious step in progressive discipline.[39] The

[39] The Appellant accepted the three day suspension without appeal, but did not agree that she had engaged in the alleged misconduct and thought, instead, that Marzion distrusted her for invalid reasons. See my footnote 17, above.

incidents for which she had been suspended, however, carried a tinge of insubordination, of undermining Marzion's authority and his policies. It is clear from Marzion's list of expectations, handed to the Appellant during the meeting on June 14, that his concerns were primarily in that vein. Indeed, as noted earlier, I believe Marzion suspected the Appellant of having been insubordinate or passive/aggressive in this situation, rather than truly ill, and that this suspicion may have prompted the discharge. Nonetheless, both the Respondent and the majority have proceeded upon the (accurate) basis that her absence from duty was in fact due to illness. Therefore the instant misconduct was not of a similar nature to the conduct for which the Appellant had been suspended, which undermines the relevance of the previous discipline.

We are left with a single previous but unrelated disciplinary event, beyond which the Appellant had a long and excellent record. Such a single prior discipline for unrelated conduct simply cannot match the weight of such a lengthy and positive record of employment, especially when the infraction under review is of relatively minor consequence. Thus this second factor, like the first, militates against discharge as the appropriate penalty.

In sum, even if I believed the Appellant knew she was the shift supervisor and had committed misconduct by being absent from her duties for the relevant period of time, I would find discharge a completely excessive penalty under the circumstances present here.

Attorney's Fees

The Appellant requested attorney's fees pursuant to Sec. 227.485(3), Stats., which requires that the Respondent pay the "prevailing party's "costs incurred in connection with the contested case," unless "the state agency which is the losing party was substantially justified in taking its position …." "Substantially justified" means that the Respondent had a reasonable basis in fact and law for its position. See Sheely v. DHSS, 150 Wis.2d 320 (1989).

As to the first element of the just cause analysis, I have concluded that the Respondent did not meet its burden to establish that the Appellant knew or should have known she was the shift supervisor and therefore has not established that she committed the alleged conduct (neglecting or failing to perform her duties as shift supervisor). However, there is no indication in the record that, at the time the Chief imposed discipline, he was aware of this somewhat nuanced issue or that the Appellant had called it to his attention. While I have concluded that he did not clearly convey her shift supervisor status to the Appellant at the time he left on June 14, I recognize that he may have believed he had so conveyed it. As to this element, I would conclude that the Chief had a reasonable basis in fact for believing that the Appellant was so aware.

As to both the second and third elements, however, I think the Respondent's position is so unwarranted under both the facts and the law – discharge was so excessive for what happened here – that I would award the Appellant her attorney's fees. I have already

explained in detail my views as to the limited nature of the Appellant's infraction and the disparity

between the infraction and the penalty especially in light of her Appellant's record. I have also already pointed out that the Chief's overreaction was tinged with his initial misjudgment, based on his sense of distrust rather than a balanced view of the facts, that the Appellant was being truculent and insubordinate in failing to take an active role during these incidents, rather than genuinely ill and discomposed. He found it necessary to exaggerate the events in the letter of termination and at hearing in an effort to match them to the extreme penalty of discharge for a 19 year veteran employee with a largely excellent record. I think the purpose of the attorney's fee provision is to encourage more thoughtful, less reactive, conduct on the part of state officials by helping appellants of modest means hold the state accountable for actions, as here, that do not meet that standard.

Dated at Madison, Wisconsin, this 22nd day of March, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Commissioner

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