

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MELISSA WESTENDORF, Appellant,

v.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0240

Case Type: PA

DECISION NO. 37787-A

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**Appearances:**

Brian E. Pawlak, Attorney, P.O. Box 511653, Milwaukee, Wisconsin, and Sean Daley, Field Representative, AFSCME Council 32, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of Melissa Westendorf.

Cara J. Larson, Attorney, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

**DECISION AND ORDER**

On March 23, 2018, Melissa Westendorf filed an appeal with the Wisconsin Employment Relations Commission pursuant to Wis. Stat. § 230.45(1)(c), asserting that the State of Wisconsin Department of Corrections abused its discretion by the manner in which it applied the terms of a rule/policy to her.

On October 9, 2018, the State filed a motion to dismiss the appeal arguing that the content of written agency rules cannot be grieved and thus that the Commission does not have authority to rule on the merits of the appeal in its role as the final step arbiter in the State employee grievance procedure. On November 21, 2018, the Commission issued a Decision and Order denying the motion based on its view that it has jurisdiction to determine if the State abused its discretion when applying a policy.

A hearing was held on February 13, 2019 in Madison, Wisconsin before Commission Examiner Peter G. Davis. A supplemental telephone hearing was held by Examiner Davis on March 29, 2019. On September 27, 2019, Westendorf and the State filed written argument. On October 11, 2019, Westendorf filed a reply brief.

Thereafter, the appeal was held in abeyance while the parties engaged in unsuccessful attempts to reach a settlement and to allow for submission of a request for attorney fees and costs. Submission of matters related to attorney fees and costs was completed on September 28, 2020.

On November 4, 2020, Examiner Davis issued a Proposed Decision and Order. On December 4, 2020, the State filed objections and on December 7, 2020 Westendorf did the same. On December 15, 2020, Westendorf filed a response to the State's objections and on December 16, 2020 filed a request for attorney fees for the period of September 15, 2020 to December 15, 2020. The State did not file a response to that request and the matter became ripe for Commission consideration on January 11, 2021.

Having considered the matter, the Commission makes and issues the following:

### **FINDINGS OF FACT**

1. Since 2011, Melissa Westendorf, herein Westendorf, has been employed by the State of Wisconsin Department of Corrections (DOC) as a Psychologist in the Chapter 980 Forensic Evaluation Unit conducting evaluations of sex offenders completing their prison sentences to determine if they meet the criteria for civil commitment as sexually violent persons under Wisconsin law.

2. From 1995 to the present, DOC Executive Directive 26 and its 2018 successor DOC Human Resources Policy 200.30.013 have governed the circumstances under which a DOC employee can maintain outside employment. Under the terms of Executive Directive 26 and its successor, Westendorf has maintained an approved outside private practice as a psychologist since at least 2015.

3. Among other matters, DOC Human Resources Policy 200.30.013 specifies:

Employees of the DOC shall not accept employment or enter into a business relationship with . . . agent of an adult or juvenile inmate/offender . . . .

Employees shall not accept employment as a provider of direct professional human services (e.g. counseling and psychological services, job placement/development, etc.) to any juvenile or adult inmate or offender as defined above.

4. In December 2017, for the first time, DOC's approval of Westendorf's outside employment included the limitation of "May only work with Individuals not under any DOC Supervision." DOC does not place that same limitation on all its Chapter 980 Psychologists who engage in outside employment.

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

### **CONCLUSIONS OF LAW**

1. The Wisconsin Employment Relations Commission has jurisdiction under Wis. Stat. §230.45(1)(c) to determine if the State of Wisconsin Department of Corrections abused its discretion when it imposed a limitation on Melissa Westendorf's private practice.<sup>1</sup>
2. The State of Wisconsin Department of Corrections abused its discretion as to the limitation on Melissa Westendorf's private practice.
3. Melissa Westendorf is a prevailing party within the meaning of Wis. Stat. § 227.485(3).
4. The position of the State of Wisconsin Department of Corrections in this matter is not substantially justified within the meaning of Wis. Stat. § 227.485(2)(f).
5. Attorney fees and costs of \$47,975 are appropriate within the meaning of Wis. Stat. §814.245(5)(a)2.

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

### **ORDER**<sup>2</sup>

1. The State of Wisconsin Department of Corrections shall immediately rescind the December 2017 limitation on Melissa Westendorf's private practice.

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<sup>1</sup>In its December 4, 2020 objections, the State for the first time cites to a 2014 Commission decision in *Wilhorn v. DNR*, Dec. No. 35044 (WERC, 6/14) for the proposition that the Commission lacks jurisdiction. As Westendorf notes in her response, this decision contains no legal analysis. Further, current Commission Chair James Daley was not a member of the Commission at that time. Thus, while the Commission acknowledges the value of generally following its own prior precedent, it declines to do so here given the factors noted above.

<sup>2</sup>In its December 5, 2020 objections, Westendorf encourages the Commission to broaden the scope of the Order to prohibit any future application of the outside employment policy to Westendorf that is allowable under the Commission's decision unless the policy has been applied and enforced as to all DOC employees-not just DOC employed psychologists. While it seems highly unlikely that DOC could justify application of the policy to Westendorf and other DOC psychologists but not for instance to DOC employed psychiatrists, the Commission concludes the scope of the record does not allow for such an expansion. In this regard, the Commission will not be considering the affidavit filed on December 15, 2020 by a DOC psychiatrist. Said affidavit could have been but was not submitted prior to the close of the evidentiary record.

2. The State of Wisconsin Department of Corrections shall make Melissa Westendorf whole for all outside employment earnings lost since February 2, 2018 due to the December 2017 limitation.

3. The State of Wisconsin Department of Corrections shall pay Melissa Westendorf attorney fees and costs of \$47,975.

Issued at Madison, Wisconsin, this 10<sup>th</sup> day of February, 2021.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

The issue in this matter is whether Chapter 980 Psychologist Melissa Westendorf has met her burden of proof to establish that the State of Wisconsin Department of Corrections abused its discretion when it imposed a limitation on her private practice as a forensic psychologist.

An “abuse of discretion” has been defined by the Commission as an exercise of discretion “to an end or purpose not justified by and clearly against reason and evidence.” *See Moeller-Bunker v. DWD*, Dec. No. 36786 (WERC, 5/17)

Wisconsin Admin. Code § ER MRS 24.045 requires that State agencies establish guidelines regarding the outside employment of State employees. The Department of Corrections (DOC) guidelines in effect since 1995 allowed Westendorf to maintain a private practice as a Chapter 980 Psychologist at least since 2015. In December 2017, for the first time, DOC imposed a limitation on that private practice prohibiting her from providing her services to anyone under DOC supervision. The limitation was nonsensically triggered by DOC ire at the truthful and non-psychological testimony of another DOC Chapter 980 psychologist to the effect that persons between the ages of 18-20 are not minors.

The limitation on Westendorf’s private practice is not applied to all DOC Chapter 980 psychologists. The DOC has not presented any “end or purpose” as to why that is so. This disparate treatment qualifies as an “abuse of discretion.”

Even if the limitation were applied to all DOC Chapter 980 psychologists, the outside employment guidelines in question would not be applicable to portions of Westendorf’s practice as a forensic psychologist. As firmly established by the record but seemingly ignored or misunderstood by DOC, a forensic psychologist does not provide “direct professional human services” prohibited by the guidelines. There is no reasonable interpretation of that portion of the guidelines that would extend to forensic services and thus it is inapplicable to the service Westendorf wishes to provide. However, another portion of the guidelines in effect since March 2018 does prohibit providing services to the “agent of an adult or juvenile inmate/offender.”<sup>3</sup> If DOC were to apply Westendorf’s outside employment limitation to all Chapter 980 Psychologists, this portion of the guidelines would validly prohibit Westendorf from providing services to attorneys (such as Public Defenders) or others who work as an agent of an “adult or juvenile inmate/offender.” She could continue to provide forensic psychological services to prosecutors and the courts.

As to a remedy for the DOC abuse of discretion, the only limitation on remedy found in the Chapter 430 State Employee Grievance Procedure is Section 430.140, which limits retroactive relief to 14 days prior to the filing of the grievance at the first step. Westendorf filed February 16, 2018 so relief begins February 2, 2018.

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<sup>3</sup>Westendorf argues that even this restriction is invalid because the Chapter 980 psychologists employed by the State of Wisconsin Department of Human Services (DHS) do not have a similar restriction. However, at least as to the appearance of a conflict of interest, the evidence establishes a plausible basis for a distinction between the outside employment guidelines for DOC and DHS.

Westendorf is also entitled to fees and costs because she is a prevailing party under Wis. Stat. § 227.485(3) and because, given the abuse of discretion exercised by DOC in this matter, it goes without saying that the DOC litigation position in this matter is not substantially justified within the meaning of Wis. Stat. § 227.485(2)(f). Westendorf has requested attorney fees of \$86,355 based on an hourly rate of \$450 and 191.9 hours worked.<sup>4</sup> She acknowledges the \$450 rate is well above the standard roughly \$200 per hour statutory level established by Wis. Stat. §814.245(5)(a)2., but she cites the limited availability of qualified attorneys who could successfully handle the complexity of this litigation as a statutorily acknowledged basis for a higher rate. The Commission has previously found the “special factor” of limited availability to be a basis for awarding a higher hourly rate. *See Smith v. DOC*, Dec. No. 35748-B (WERC, 5/16). Here, the Commission is again persuaded that some increase in the hourly rate is appropriate under a “special factor” analysis and concludes that a \$250 hourly rate should be awarded. Use of that higher rate generates an attorney fee total of \$47,975.

Issued at Madison, Wisconsin, this 10<sup>th</sup> day of February, 2021.

## WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

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<sup>4</sup>DOC asserts that Westendorf’s attorney is not entitled to the 12 hours allocated for taking notes while listening to the hearing recordings. The Commission is persuaded that such time is readily distinguishable from the cost of having a transcript prepared (a cost disallowed by the Commission in *Walsh v. DOC*, Dec. No. 35014-C (WERC, 3/17) and thus is appropriately included in the total of 191.9 hours.

DOC also contends that attorney fees ought not be awarded for the time Westendorf allocated to responding to the DOC motion to dismiss because DOC was entitled to rely on the Commission’s decision in *Wilhorn v. DNR*, Dec. No. 35044 (WERC, 6/14) as to lack of jurisdiction. While the logic behind this contention is not clear, Westendorf correctly notes that DOC could hardly have relied on *Wilhorn* when litigating the motion to dismiss in 2018 because it did not cite same until December 2020. Thus, this contention is rejected.