Discovery and Remedies in WERC "PA" Cases

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April 6, 2006 version

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*This outline is focused almost entirely on rulings/decisions issued in "PA cases" that were filed with the WERC or predecessor agencies holding similar jurisdiction. These are actions that are filed pursuant Sec. 230.44 and .45, Stats., invoking the Commission's authority to review certain State civil service **P**ersonnel **A**ctions.*

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I. Discovery in PA cases

Note: Some of the Personnel Commission cases that are referenced in this outline arose from complaints alleging a violation of the Wisconsin Fair Employment Act (WFEA), which is not part of the WERC's jurisdiction. Even so, the WERC may reference the WFEA rulings when addressing discovery disputes in PA cases.

A. Relevant statutes and rules with limited annotations

1. Sec. 227.45, Stats.:

(7) *In any class 2 proceeding, each party shall have the right, prior to the date set for hearing, to take and preserve evidence as provided in ch. 804. Upon motion by a party or by the person from whom discovery is sought in any class 2 proceeding, and for good cause shown, the hearing examiner may make any order in accordance with s. 804.01 which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. In any class 1 or class 3 proceeding, an agency may by rule permit the taking and preservation of evidence. . . .*

2. Sec. PC 4.03, Wis. Adm. Code:

Discovery. *All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the commission or the hearing examiner may allow a shorter or longer time for discovery or for preserving testimony than is allowed by ch. 804, Stats. For good cause, the commission or the hearing examiner may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden or expense, or to compel discovery.*

Section PC 4.03 does not apply to an "expedited arbitration" proceeding (which may only be invoked to review of a classification decision) that is conducted pursuant to Sec. 230.44(4)(bm), Stats. Sec. PC 6.05(2)(b), Wis. Adm. Code.

Section PB 2.02, Wis. Adm. Code, (1979) [the predecessor rule to PC 4.03] which gives parties to appeals the same basic discovery rights as parties to judicial proceedings as set forth in chapter 804, Stats., is not invalid as in excess of statutory authority. ALFF V. DOR, CASE NOS. 78-227-PC & 78-243-PC (PERS. COMM. 6/13/79)

3. Chapter 804, Stats.

Chapter 804 may be accessed at: http://www.legis.state.wi.us/rsb/stats.html
Limited portions of ch. 804 are set forth in relevant areas of the outline, below.

The discovery methods that are described in ch. 804, Stats., are:

Written interrogatories
Depositions upon oral examination

Depositions upon written questions
Request for the production of documents and things and entry upon land for inspection and other purposes
Physical and mental examination of parties
Requests for admission

B. Authority to address discovery disputes

The Commission generally has the authority to enter orders regulating and compelling discovery. DOYLE V. DNR & DMRS, CASE NO. 86-0192-PC (PERS. COMM. 3/24/87)

Pursuant to §227.46(1), Stats., and §PC 4.03, Wis. Adm. Code, a designated hearing examiner has the authority to act on discovery disputes between the parties to cases pending before the Commission. An examiner's oral ruling is a ruling made with the authority of the Commission. HUFF V. UW (STEVENS POINT), CASE NO. 97-0092-PC-ER (PERS. COMM. 11/18/98)

Commission hearing examiners are available by telephone to rule on discovery issues that arise during the course of depositions, but to the extent possible advance arrangements should be made and the procedure should not be used for mundane issues of relevance. OWENS V. DOT, CASE NO. 91-0163-PC-ER (PERS. COMM. 9/18/92)

C. Issues relating to basic discovery procedure (including timing)

1. Timing-related topics

The 30-day period for responding to a discovery request is subject to Sec. 990.001(4), Stats., and where the 30th day would have been a Saturday, the response was due on the following Monday. LOGAN V. UW-MILWAUKEE, CASE NO. 99-0124-PC-ER (PERS. COMM. 1/19/00); RECONSIDERATION DENIED, (3/17/00).

In an appeal arising from the action of the respondent to screen out the appellants during the 1989 Fiscal Supervisor 1 examination process pursuant to a review of their resumes, the respondent was required to respond to a discovery request in 10 rather than 30 days where a hearing date had already been scheduled for a date which fell within the 30 day period and in light of the Commission's lack of authority to grant interlocutory relief to the appellants while they awaited a hearing. ALLEN ET AL. V. DMRS, CASE NO. 89-0124-PC (PERS. COMM. 11/2/89)

Respondent was not entitled to delay response to a discovery request by the appellant until the appellant responded to what amounted to an interrogatory requesting a more detailed statement of appeal. ALFF V. DOR, CASE NOS. 78-227-PC & 78-243-PC (PERS. COMM. 6/13/79)

Complainant's motion to compel was denied where the agency had declined to respond to the underlying discovery request because complainant had mailed it just one or two days before the date that had previously been established for completing discovery. However, the Commission proceeded to extend the discovery deadline. HARWELL V. DPI, CASE NOS. 98-0210-PC-ER, ETC. (PERS. COMM. 6/28/01)

Appellant's motion to compel was denied to the extent he sought discovery in a case after the parties had agreed to hold the case in abeyance pending investigation of a complaint that was to be filed by the appellant and before the complaint had been investigated. WING V. UW SYSTEM, CASE NOS. 85-0077-PC, 85-0104-PC-ER (PERS. COMM. 2/6/86)

Where appellants provided actual notice on March 3 of a deposition of a department secretary and division administrator on March 8, the notice was not unreasonable. Respondent's motion for protective order was denied. ACE ET AL. V. DHSS ET AL., CASE NO. 92-0238-PC (PERS. COMM. 3/10/93) (RULING BY EXAMINER)

A request to extend a discovery period beyond the date previously established by agreement of the parties should be analyzed in terms of a request to withdraw from a stipulation between the parties. The request was granted, but not for an unlimited period, where complainant, who appeared pro se, entered into the stipulation with a reasonable expectation that he could complete discovery within a 5 month period and there was no suggestion that an extension would operate to prejudice the opposing party. HARWELL V. DPI, CASE NOS. 98-0210-PC-ER, ETC. (PERS. COMM. 11/5/99)

Complainant's request for an extension of the discovery deadline was denied where the conference report clearly set forth the discovery schedule and complainant was aware of the deadline date, having filed his first discovery request on that designated date. Complainant's *pro se* status was insufficient in itself to justify an extension. STARK V. DILHR, CASE NO. 90-0143-PC-ER (PERS. COMM. 5/7/93) (RULING BY EXAMINER)

2. Discovery logistics

To the extent an agency had previously supplied complainant with a portion of the requested documents/information, the employer was not required to provide a second copy as long as it specified those materials it was relying on as having been previously supplied. LOGAN V. UW-MILWAUKEE, CASE NO. 99-0124-PC-ER (PERS. COMM. 1/19/00); RECONSIDERATION DENIED, (3/17/00); JAQUES V. DOC, CASE NO. 94-0124-PC-ER (PERS. COMM. 3/31/95)

A response to a discovery request for documents relating to claims of discrimination brought against a supervisor which merely stated that Personnel Commission records were open to the public was not responsive because the request related to documents found in respondent's possession and it failed to provide complainant with a method for

identifying complaints filed with the Commission which might relate to the supervisor. JAQUES V. DOC, CASE NO. 94-0124-PC-ER (PERS. COMM. 3/31/95)

Making the documents requested by the appellant available to the appellant for inspection and copying is an adequate response to certain interrogatories which asked the respondent to "identify" certain documents, in light of the fact that the burden of deriving or ascertaining the answer was substantially the same for both parties in regard to such interrogatories. SOUTHWICK V. DHSS, CASE NO. 85-0151-PC (PERS. COMM. 4/16/86)

In ruling on a motion for a protective order, appellant, whose residence was 90 miles from Madison and whose work place was 150 miles from Madison, was not limited to viewing the exam and other materials provided by respondent as the result of discovery only in Madison. Respondent was required to mail such materials to appellant whose use of such materials was limited by terms of protective order. Only the names of non-certified candidates would not be subject to disclosure. GOEHRING V. DHSS, CASE NO. 92-0735-PC (PERS. COMM. 2/8/93)

Respondent was directed to perform any photocopying of documents requested by the complainant at the cost of $0.05 per page plus any applicable sales tax, to be paid by the complainant at the time the documents were provided to him. Alternative proposals offered by complainant for photocopying the materials were denied. The cost of copying items as part of a discovery request typically rests with the party requesting production of the documents. (Due to the volume of materials sought in the discovery request, the respondent had previously been granted the option of allowing the complainant to review the requested files themselves rather than photocopying the files). ASADI V. UW-PLATTEVILLE, CASE NO. 85-0058-PC-ER (PERS. COMM. 4/7/88)

The responding party is not required to gather and create a document of the requested information at the responding party's own expense. Rather, the responding party has an obligation to produce what exists and if a requested compilation does not exist, the responding party must make available to the requesting party the documents from which the requested compilation can be derived. READY V. UW (LA CROSSE), CASE NO. 95-0123-PC-ER (PERS. COMM. 7/1/98)

Where respondent's deposition of a witness denominated by complainant as an "expert" did not occur "upon motion" and by "order" as provided in Sec. 804.01(2)(d), the respondent was not obligated to pay expert fees to the witness for the time spent in deposition. KEUL V. DHSS, CASE NO. 87-0052-PC-ER (PERS. COMM. 5/14/92)

A party obtaining a report under Sec. 804.10 is to provide the report to the adverse party. Section 804.10(3)(a) applies to non-personal injury actions. HUEMPFNER V. DOC, CASE NO. 97-0106-PC-ER (PERS. COMM. 5/6/98

D. Who is to respond to the request?

Since DHSS was the only party respondent in the appeal, completed achievement history questionnaires maintained by DMRS but not in the possession, custody, or control of DHSS were not discoverable pursuant to §804.09(1), Stats. GOEHRING V. DHSS, CASE NO. 92-0735-PC (PERS. COMM. 7/30/93)

In the absence of an allegation that DMRS carried out the examination process as part of a larger pre-selection scheme, appellant is not entitled to add DER or DMRS as party respondents simply for the purpose of being able to then obtain discovery more readily from them. GOEHRING V. DHSS, CASE NO. 92-0735-PC (PERS. COMM. 10/20/93)

E. Once discovery is obtained, what is the weight, consequence or permissible use of the discovered information?

1. Generally

Section 804.07(1)(d) relates to supplementing portions of a deposition offered by a party at hearing. The last clause in par. (d), does not give a party an absolute right to introduce any and all other parts to a deposition whenever a portion of the deposition has already been introduced by a party. It should be interpreted to mean that a party's subsequent offer of any other part of the deposition is subject to objection on grounds such as relevancy, materiality and privilege. OLMANSON V. DHFS, CASE NOS 97-0106-PC, 97-0183-PC-ER (PERS. COMM., 9/15/99) (ISSUED BY EXAMINER)

Where, in preparation for hearing on appeals arising from reallocation decisions, respondent propounded interrogatories to appellants, through their counsel, seeking to determine which of two allocations the nine individual appellants claimed to meet, five appellants identified the first allocation and four the second, and it was not until after the hearing was underway that appellants asked that they not be bound by their answers, the appellants were held to their answers to the interrogatory. The interrogatory addressed a major issue of litigation strategy and respondent had the right to rely on the answers. Appellants offered no reasons why the initial answers did not reflect their subsequent position or why they did not raise the issue until well after the commencement of the hearing. VON RUDEN ET AL. V. DER, CASE NOS. 91-0149-PC, ETC. (PERS. COMM. 8/31/95)

In a reallocation appeal, the appellant waived his right to offer evidence relating to the first of two allocation patterns identified at the higher classification level when his answer to respondent's interrogatories indicated he was only pursuing the second allocation pattern and he had reiterated this position in a telephone conference 10 days prior to hearing. The appellant was permitted to present evidence on both allocations

solely for the purpose of making a complete record for court review. WELCH V. DER, CASE NO. 92-0630-PC (PERS. COMM. 5/16/94)

Information a party provides in response to an interrogatory is not controlling as to that information. While the party propounding the interrogatory is free to rely on the information by offering the answer in evidence, or by not objecting to the answering party's offer, he also can dispute the information contained in the interrogatory answer. BALELE V. DOC ET AL., CASE NO. 97-0012-PC-ER (PERS. COMM. 10/9/98)

2. Failing to timely respond to a request for admissions

Complainant's failure to file a response to a request for admissions and production of documents in violation of the Commission's order resulted in statements in the request being deemed admitted. The cases were dismissed pursuant to the admission that complainant had agreed to settle the claims. GARNER V. SPD, CASE NOS. 88-0015-PC, 88-0183-PC-ER (PERS. COMM. 8/11/93)

Respondent was allowed to withdraw its admissions to complainant's request for admission and respondent was allowed to substitute its responses even though the 30 day period for responding to the request for admissions had run by the time respondent moved for an extension, or in the alternative, a request for leave to amend or withdraw admissions. Excusable neglect was established where counsel for respondent represented that he was forced to leave his office abruptly for treatment of an illness and this lead to confusion in his office which resulted in the failure to timely respond to the request for admissions. There was no suggestion of bad faith on the part of respondent and there was no prejudice to complainant, save being required to prove what otherwise would be deemed admitted. In addition, the two requests for admission that were in question ran to the merits of the cases and the presentation of the merits would have been subserved if the admissions were not allowed to be withdrawn. HARRIS V. DHSS, CASE NOS. 84-0109-PC-ER, 85-0115-PC-ER (PERS. COMM. 4/22/87)

Complainant mailed her response to a request for admissions 35 days after they had been mailed to her, so they were deemed admitted by operation of 804.11(2), Stats. However, she was allowed to withdraw the admissions because to do otherwise would block any consideration of the merits of the appeal and the respondent made no showing of prejudice (other than simply requiring respondent to mount a defense to the claim). HANSON V. DOT, CASE NOS. 00-0027, 0103-PC-ER (PERS. COMM. 5/30/01)

An example of the application of the statutory criteria in Sec. 804.11(2), Stats., for determining whether to allow for the withdrawal of an admission as well as consideration of the appellant’s pro se status. NELSON V. DOT & DER, CASE NO. 98-0176-PC (PERS. COMM. 8/27/99)

The complainant, who appeared pro se, was not justified in failing to respond to a request for admissions and withdrawal of the admissions was inappropriate. While a

pro se litigant can be confused by the technical requirements of the statutory discovery process, complainant's failure to respond did not result from such a circumstance. The matters stated in the request for admissions were deemed admitted and summary judgment issued. HOLLIS V. DOT, CASE NO. 97-0153-PC-ER (PERS. COMM. 6/23/99)

3. Establishing limits on the use of the information once discovery is provided

Sample language used in an order limiting the use of discovered information:

> Upon the mutual agreement of the parties, the Commission imposes the following order:
>
> Conditions are placed upon access and use of materials supplied to Appellant by the Respondent, the release of which is limited under Secs. 19.85(1)(c), 103.13, 230.13 and 230.16, Stats., and Sec. ER-MRS 6.08(2), Wis. Admin. Code. Those materials include employment application forms and resumes, notes by employment interview panel members, reference check records and notes, benchmarks and other standards or criteria, and other evaluation or employment examination records regarding applicants for employment.
>
> Appellant and any person(s) retained by Appellant for assistance in this action may use these materials only for the purpose of litigating this case or related cases involving identical or similar issues in other forums, will not disclose any of these materials to any other persons, and will, upon request and upon the final resolution of this action or any related actions involving identical or similar issues in other forums, return to Respondent all of those materials and any copies thereof.

A protective order limiting the complainant's use of certain information does not prevent him from making the information available to an attorney who is reviewing the file for the purpose of evaluating whether or not to represent complainant. BEDYNEK-STUMM V. DPI, CASE NO. 99-0186-PC-ER (PERS. COMM. 4/7/00) (DICTA)

Where the state agencies had a strong interest in limiting the dissemination of certain materials relating to selection processes, including candidate applications, interview notes and benchmark responses, their request for a protective order requiring the complainant to return the materials to the agencies, if requested, upon final resolution of the appeal, was granted. BALELE V. DOA ET AL., CASE NO. 01-0067-PC-ER (PERS. COMM. 7/16/01) (RULING OF THE EXAMINER)

The policies underlying the open records law may be relevant to determining whether a protective order should be issued to limit the use of discoverable materials. SHIMKUS V. DOC, CASE NO. 99-0166-PC-ER (PERS. COMM.. 2/11/00)

In an appeal and complaint arising from a hiring decision, the Commission granted the appellant's motion to compel discovery of performance evaluations of the successful applicant but directed the appellant and his attorney to handle the material confidentially and not to disclose the material or any information regarding it to the public, as provided in Sec. 230.13(l), Stats. PAUL V. DHSS, CASE NOS. 82-PC-ER-69, 82-156-PC (PERS. COMM. 10/14/83)

Where the appellant's ability to prepare for hearing was directly related to the availability of information controlled exclusively by respondent, and respondent had a valid interest in the confidentiality of certain information, both interests are served by providing that the requested discovery be made available to the appellant under seal. ROWE V. DER, CASE NO. 79-202-PC (PERS. COMM. 6/3/80)

In an appeal arising from an examination, the appellant was directed, if he determined he needed to make notes or photocopies of the exam materials (provided to him pursuant to a discovery request) to prepare for hearing or to consult with attorneys or exam experts, to advise the Commission of the names of such attorneys or experts so a copy of the Commission's Order, restricting the dispersal of the materials, could be provided them. DOYLE V. DNR & DMRS, CASE NO. 86-0192-PC (PERS. COMM. 3/24/87)

The Commission upheld the request of the respondent that an exam plan sought by the appellant be kept under seal by the Commission and, when made available to the appellant, the appellant not be permitted to copy it, as the information could give the appellant an unfair advantage in future exams. HOLMBLAD V. DP, CASE NO. 78-169-PC (PERS. COMM. 1/30/79)

In an appeal of an examination, the Commission required respondent DMRS to respond to appellant's discovery request despite Sec. 230.13, 230.16(10) and (11), Stats., and ER-Pers 6.08, Wis. Adm. Code, by providing him information including: names, scores and ranks of other applicants, applications, examination questions and responses, tapes of oral interviews and benchmark answers. The Commission was to maintain the material on a sealed basis, providing access to the appellant who was directed not to divulge the material beyond the extent necessary for the processing of his appeal. DOYLE V. DNR & DMRS, CASE NO. 86-0192-PC (PERS. COMM. 3/24/87)

Consistent with the precautions described in §230.16(10), Stats., DMRS's request for a protective order was granted where the request required appellant to return to DMRS exam-related materials provided by DMRS pursuant to a discovery request which appellant did not intend to use at hearing, and to return the remaining materials at the date of the closure of proceeding, with such closure date to reflect any period for pursuing an appeal of the underlying decision. GOEHRING V. DHSS & DMRS, CASE NO. 92-0735-PC (PERS. COMM. 2/3/94)

F. What can and what cannot be discovered

1. Generally

Complainant's interrogatories directing respondent to ask a particular employee certain questions were improper. HARWELL V. DPI, CASE NOS. 98-0210-PC-ER, ETC. (PERS. COMM. 11/5/99)

Motion to compel granted where the request (to provide a list of attendees at a meeting) required an act of informal fact-gathering that did not rise to the level of record creation. HAWK V. DOCOM, CASE NO. 99-0047-PC-ER (PERS. COMM. 1/19/00)

While a discovery request is not objectionable because the information sought would not be admissible at trial, the information must, in a broad sense, be relevant to the subject matter of the pending action. In the absence of any articulation by the appellant as to how the requested information was relevant to the proceeding, the Commission denied appellant's motion to compel discovery. PAUL V. DHSS, CASE NOS. 82-PC-ER-69, 82-156-PC (PERS. COMM. 10/14/83)

On a motion to compel discovery, the Commission noted that the test for relevancy was very broad, relating to the subject matter of the appeal as opposed to the precise issue for hearing, and certain interrogatories were analyzed pursuant to this test. The Commission determined that certain interrogatories directing the respondent to "identify all documents and give the details of all communications, written and oral, relative to the reassignment…," were too broad but could be amended to be more specific. The Commission also determined that where the information sought had never been compiled but could readily be determined from documents found in specific locations, it was an appropriate response for the respondent to have provided the appellant with the specific location of the documents containing the information being sought. BIDDICK V. DHSS, CASE NO. 82-127-PC (PERS. COMM. 10/14/82)

Interrogatories which seek information that could be relevant to the issue in the instant case, i.e. whether respondent's reassignment of the appellant was an unreasonable and improper exercise of discretion, are appropriate. SOUTHWICK V. DHSS, CASE NO. 85-0151-PC (PERS. COMM. 4/16/86)

Where respondent asserted that it did not possess the documents being requested, the appellants' motion to compel was denied. MINCY ET AL. V. DER, CASE NOS. 90-0229, 0257-PC (PERS. COMM. 2/21/91); REHEARING DENIED, 3/12/91

It is not possible, within the context of discovery, to order the production of something that does not exist. Complainant's motion for discovery sanctions was denied. NELSON V. UW-MADISON, CASE NO. 97-0020-PC-ER, 5/20/98

The responding party is not required to gather and create a document of the requested information at the responding party's own expense. However, the responding party has an obligation to produce what exists and if a requested compilation does not exist, the responding party must make available to the requesting party the documents from which the requested compilation could be derived. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

Respondent's answer that "no statistics are available" was an inadequate response to a request for the number of times the agency had used a two-page executive summary for screening candidates for positions in 1997. The fact that the information is not available already in summary form does not meet the duty to respond. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

The nature of the defense offered by respondent does not define the permissible scope of complainant's discovery inquiry. KALASHIAN V. OFFICE OF THE JEFFERSON COUNTY DISTRICT ATTORNEY, CASE NO. 97-0157-PC-ER (PERS. COMM. 2/25/98)

The policies underlying the open records law may be relevant to determining whether a protective order should be issued to limit the use of discoverable materials. SHIMKUS V. DOC, CASE NO. 99-0166-PC-ER (PERS. COMM.. 2/11/00)

2. Reasonable time period (the temporal expanse of the request)

In an appeal in which the appellant sought reinstatement and back pay and her claim was based on her allegation that her medical condition prevented her from performing the duties and responsibilities of the position that she held at that time but not the duties and responsibilities of other positions within respondent agency that were available at that time and thereafter, the respondent was entitled to obtain discovery of information relating to appellant's medical condition at the time of, and subsequent to, her termination. SMITH V. DHSS, CASE NO. 88-0063-PC (PERS. COMM. 5/1/91)

In a complaint arising from a decision not to select the complainant for a vacant position, a request for all correspondence between two offices, with no limits as to either subject matter or time, was too broad. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

Discovery inquiries relating to the names of persons hired or promoted by respondent must be of a reasonable period of time but are not limited solely to the time complainant was not hired. Rather, the period of time may precede and/or follow the date when complainant was not hired. Complainant's motion to compel discovery of the names of persons hired or promoted in the College of Business for a ten year period was granted. READY V. UW (LA CROSSE), CASE NO. 95-0123-PC-ER (PERS. COMM. 7/1/98)

3. ***In appeals of examinations – Sec. 230.44(1)(a), Stats.***

In an appeal of an examination, the Commission required respondent DMRS to respond to appellant's discovery request despite Sec. 230.13, 230.16(10) and (11), Stats., and ER-Pers 6.08, Wis. Adm. Code, by providing him information including: names, scores and ranks of other applicants, applications, examination questions and responses, tapes of oral interviews and benchmark answers. The Commission was to maintain the material on a sealed basis, providing access to the appellant who was directed not to divulge the material beyond the extent necessary for the processing of his appeal. DOYLE V. DNR & DMRS, CASE NO. 86-0192-PC (PERS. COMM. 3/24/87)

In an appeal arising from the action of the respondent to screen out the appellants during the 1989 Fiscal Supervisor 1 examination process pursuant to a review of their resumes, the appellants were entitled to discovery of the ranking from the previous Fiscal Supervisor 1 examination. ALLEN ET AL. V. DMRS, CASE NO. 89-0124-PC (PERS. COMM. 11/2/89)

4. In appeals of classification decisions – Sec. 230.44(1)(b), Stats.

Production and inspection of the notes of the personnel specialist involved in a reclassification decision was ordered, as against the agency's arguments that the notes were not "public records" or, alternatively, that they were exempt from disclosure under the public records law. SIEGLER V. DNR & DER, CASE NO. 82-206-PC (PERS. COMM. 3/4/83)

Appellant's motion to compel discovery of an employee evaluation report for another position was granted in an appeal of a classification decision where the position was at the classification level sought by the appellant and the appellant specifically excluded those portions of the evaluation which related to the quality of performance of the incumbent. The evaluation report was not confidential and was subject to the open records law. The decision includes a weighing of the relevant interests under the open records law. BEHLING V. DOR & DER, CASE NO. 88-0060-PC (PERS. COMM. 12/14/88)

Where, in an appeal of a reallocation decision, the work of the rating panel resulted both directly in the decision to reallocate appellants' positions and in the establishment of class specifications and where the specifications were established at the end of the reallocation process and amounted to simply labeling the assessment of positions which already had occurred, the appellants were entitled to discovery which ran to their attempt to show that the rating panel's evaluation was erroneous and resulted in their positions being placed in the wrong cluster and hence at a lower class level than should have been the case. MINCY ET AL. V. DER, CASE NOS. 90-0229, 0257-PC (PERS. COMM. 2/21/91); REHEARING DENIED, 3/12/91

In an appeal of a reallocation decision, the appellant was entitled to discover the rating sheets prepared by the individual members of the rating panel, citing the decision in MINCY ET AL. V. DER, CASE NOS. 90-0229, 0257-PC (PERS. COMM. 2/21/91); REHEARING DENIED, 3/12/91; HUBBARD V. DER, 91-0082-PC, 11/6/91

In a reallocation appeal, appellant was required to answer interrogatories which directed her to compare her position to representative positions as described in the classification specification, to identify the reasons she was contending her position was wrongly reallocated, and to compare her position to the position descriptions of two other positions classified at the same level as her position. CARROLL V. DER, CASE NO. 94-0434-PC (PERS. COMM. 3/20/96) (RULING BY EXAMINER)

5. In appeals from the imposition of discipline – Sec. 230.44(1)(c), Stats.

Complainant was entitled to know the specifics of the poor performance allegedly relied upon by respondent when it took the personnel actions that are the subject of the complaint. LOGAN V. UW-MILWAUKEE, CASE NO. 99-0124-PC-ER (PERS. COMM. 1/19/00); RECONSIDERATION DENIED, (3/17/00)

In a complaint arising from the termination of complainant's probationary faculty appointment, the complainant was entitled to review the entire files maintained by various committees which must act on probationary faculty appointments. ASADI V. UW, CASE NO. 85-0058-PC-ER (PERS. COMM. 4/10/92)

In a complaint arising from the termination of complainant's probationary faculty appointment, the complainant was entitled to review the academic transcripts of those faculty and academic staff at the campus whose contracts were considered for renewal during the relevant time period. ASADI V. UW, CASE NO. 85-0058-PC-ER (PERS. COMM. 4/10/92)

In a complaint arising from the termination of complainant's probationary faculty appointment, the complainant's request to look through entire personnel files of faculty and academic staff was too broad in light of the fact the files contained materials relating to sensitive and personal matters unrelated to the complaint. ASADI V. UW, CASE NO. 85-0058-PC-ER (PERS. COMM. 4/10/92)

In a complaint arising from the termination of complainant's probationary faculty appointment, the complainant was not entitled to review the files of students he taught during the course of his employment, in light of the status accorded student records under the family Educational Rights and Privacy Act, commonly known as the Buckley Amendment. ASADI V. UW, CASE NO. 85-0058-PC-ER (PERS. COMM. 4/10/92)

In a race discrimination case involving complainant's termination from the State Patrol Academy, deposition questions about his earlier termination from the Milwaukee Police

Department were within the boundaries of relevance for discovery purposes. OWENS V. DOT, CASE NO. 91-0163-PC-ER (PERS. COMM. 9/18/92)

In an appeal involving termination for an alleged conflict of interest resulting from a personal relationship with a representative of a regulated industry, discovery relating to this relationship would be permitted since it was clearly relevant to the question of just cause and there was no showing the information was to be provided to any of respondent's employees other than those directly involved in the appeal and there was no showing of a privacy interest which would outweigh governmental interest in obtaining such information. GIEBEL V. WGC, CASE NO. 93-0041-PC (PERS. COMM. 3/15/94) (RULING BY EXAMINER)

In an appeal of the decision to discharge the appellant in 1997, due to her alleged denial on several employment applications that she had been convicted of any offense, respondent was entitled to obtain information regarding appellant's indictment for homicide in 1980. In the letter of termination, respondent alleged that appellant had been convicted of prostitution, criminal trespass and two city ordinance violations for retail theft. Appellant contended she had understood that the prostitution charge against her had been withdrawn at the same time the prosecutor chose to dismiss the homicide charge. Information about the events which served as the basis for the prostitution and homicide charges could tend to show that it would have been less or more likely for someone in appellant's position to have believed that the prostitution charges had been withdrawn. ZEICU V. DOC, CASE NO. 97-0013-PC (PERS. COMM. 9/10/97)

6. In appeals from the failure to select for a vacancy – Sec. 230.44(1)(d), Stats.

Appellant was entitled to obtain interview notes arising from his prior attempt for employment with the agency as long as the previous interviews had been conducted by any of the interviewers comprising the subject panel. CARRATT V. DOC, CASE NOS. 98-0063-PC, 98-0143-PC-ER (PERS. COMM. 4/7/00)

In a complaint arising from a decision not to select the complainant for a vacant position, a request for all correspondence between two offices, with no limits as to either subject matter or time, was too broad. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

The respondent agency was entitled to obtain materials in the complainant's personnel file that post-dated the hiring decision in question. KOVACIK V. DHFS, CASE NO. 97-0076-PC-ER (PERS. COMM. 9/7/00); MOTION TO RECONSIDER DENIED, 11/13/01

Discovery inquiries relating to the names of persons hired or promoted by respondent must be of a reasonable period of time but are not limited solely to the time complainant was not hired. Rather, the period of time may precede and/or follow the non-selection date. Complainant's motion to compel discovery of the names of persons

hired or promoted for a ten-year period was granted. READY V. UW (LA CROSSE), CASE NO. 95-0123-PC-ER (PERS. COMM. 7/1/98)

Where it appeared reasonable to presume that respondent's personnel office would have access to hiring and promotion information without much difficulty and where respondent presented insufficient information about its record-keeping system to conclude that answering complainant's interrogatory would create an undue burden, complainant's motion to compel discovery of the names of persons hired or promoted in a ten-year period was granted. READY V. UW (LA CROSSE), CASE NO. 95-0123-PC-ER (PERS. COMM. 7/1/98)

Complainant was not entitled to discover the salary paid to one of the persons involved in the subject hiring decision, either by his current or previous employer, because the inquiry was not reasonably calculated to the discovery of admissible evidence. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

In a complaint arising from a decision not to select the complainant for a vacant position, information as to how the successful candidate came to apply for the job is a topic that could lead to the discovery of admissible evidence. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

In a complaint arising from a decision not to select the complainant for a vacant position, information about connections between the successful candidate and someone who played a part in the hiring decision could lead to the discovery of admissible evidence. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

In a complaint arising from the decision not to select the complainant for a vacant Administrative Officer 3 position, where complainant had not asked a preliminary question relating to whether the materials he submitted for the job were received by the employing agency and reviewed by the rating panel, and, therefore, had not established that the raters did not see all of his materials, he was not entitled to discover information about the clerical handling of the application materials. To rule otherwise would create an undue burden for the employing agency. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

Where the agency claimed it had not reinstated complainant because of various conduct, some of which necessitated his supervisor’s intervention, complainant was entitled to obtain information relating to the supervisor’s performance vis-à-vis another supervisor in the program. CHOU V. DNR, CASE NO. 00-0019-PC-ER (PERS. COMM. 8/28/00)

Respondent was required to provide complainant with a non-redacted version of notes taken by the appointing authority when conducting reference checks regarding complainant. Respondent had redacted the names of the individuals who provided the information to the appointing authority. According to respondent, the appointing authority had informed the references he was speaking with them confidentially.

Complainant indicated she intended to depose the individuals providing the references to discover what information they provided that was not reflected in the appointing authority's notes. Complainant's motion to compel was granted. KALASHIAN V. OFFICE OF THE JEFFERSON COUNTY DISTRICT ATTORNEY, CASE NO. 97-0157-PC-ER (PERS. COMM. 2/25/98)

Appellant's access to the underlying examination materials did not extend to the names of non-certified candidates. GOEHRING V. DHSS, CASE NO. 92-0735-PC (PERS. COMM. 2/8/93)

G. Specific defenses to discovery (both valid and rejected)

1. The information sought is exempt from Open Records law production

The question of whether the same material would not be released if subject to an open records request is separate from the question of whether the materials are discoverable. Specific requests are analyzed. LOGAN V. UW-MILWAUKEE, CASE NO. 99-0124-PC-ER (PERS. COMM. 1/19/00); RECONSIDERATION DENIED, (3/17/00).

The closed record protections of §230.13, Stats., pertain to keeping personnel matters closed to the public, not to a complainant in the context of litigation where the information is relevant to the complainant's claims. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

Section ER-Pers 6.08(l), Wis. Adm. Code, governing the release of information to an examinee, which constitutes an exception to the open records law, is not inconsistent with an order of the Commission extending discovery of certain exam materials to a party to an appeal. DOYLE V. DNR & DMRS, CASE NO. 86-0192-PC (PERS. COMM. 3/24/87)

Production and inspection of the notes of the personnel specialist involved in a reclassification decision was ordered, as against the agency's arguments that the notes were not "public records" or, alternatively, that they were exempt from disclosure under the public records law. SIEGLER V. DNR & DER, CASE NO. 82-206-PC (PERS. COMM. 3/4/83)

2. Assertion of a privilege

In responding to a discovery request, the party may assert the attorney-client privilege or any other privilege that may apply to the particular document/information being sought. JAQUES V. DOC, CASE NO. 94-0124-PC-ER (PERS. COMM. 3/31/95)

Respondent was compelled to respond to certain requests for production where the requests were for notes made by respondent's agents with regard to the Commission's initial determination of probable cause. While the documents were otherwise protected by the attorney-client privilege, the privilege was waived when the supervisor had testified that she had referred to the documents to refresh her recollection prior to the deposition. HARRIS V. DHSS, CASE NOS. 84-0109-PC-ER, 85-0115-PC-ER (PERS. COMM. 4/22/87)

The attorney-client privilege as applied to a memo, stamped "Confidential," from a personnel assistant (who was both a witness to the underlying personnel action and the liaison between the facility and agency's legal counsel) to legal counsel is analyzed, including the contention that the privilege had been unintentionally abandoned/waived. Motion to compel denied. KOVACIK V. DHFS, CASE NO. 97-0076-PC-ER (PERS. COMM. 9/7/00); MOTION TO RECONSIDER DENIED (11/13/01)

The attorney-client privilege could not rightfully be claimed for all communications that occurred at meetings where a personnel problem was discussed and advice was sought from a number of persons, one of whom was a lawyer, and where it could not be said that the primary purpose of the communications made by those present at the meeting besides counsel was to facilitate the obtaining of legal advice. Respondent was ordered to provide information on the meetings pursuant to discovery requests except that the respondent was not required to provide information regarding the content of any legal advice rendered by counsel at the meetings. IWANSKI V. DHSS, CASE NOS. 89-0074-PC-ER, ETC. (PERS. COMM. 8/21/91)

Because petitioner alleged handicap discrimination, there was no privilege attached to her relevant medical records, and they were subject to discovery by the employer. MOSLEY V. DILHR, CASE NO. 93-0035-PC, ETC. (PERS. COMM. 1/25/94)

3. Student records

In a complaint arising from the termination of complainant's probationary faculty appointment, the complainant was not entitled to review the files of students he taught during the course of his employment, in light of the status accorded student records under the family Educational Rights and Privacy Act, commonly known as the Buckley Amendment. ASADI V. UW, CASE NO. 85-0058-PC-ER (PERS. COMM. 4/10/92)

Where a discovery request required the employing agency to identify students, a balance was struck between the requester's need to know and the time and expense associated with the employer's responsibility to notify affected students pursuant to the Family Educational Rights and Privacy Act of 1974. LOGAN V. UW-MILWAUKEE, CASE NO. 99-0124-PC-ER (PERS. COMM. 1/19/00); RECONSIDERATION DENIED, (3/17/00).

4. Attorney work product

Investigative materials prepared by a personnel manager for respondent, acting as a representative of the respondent's attorney, are subject to protection from discovery under the attorney work product doctrine. The protection extended to statements the personnel manager took from party witnesses as well as the portions of her report that discussed or summarized information obtained from party witnesses. However, the protection did not extend to copies of statements obtained from non-party witnesses or to other portions of her report. WINTER V. DOC, CASE NO. 97-0149-PC-ER (PERS. COMM. 3/11/98)

5. Undue burden of production

When raising an "undue burden" defense, the party must do more than merely state the conclusion that it would be subjected to an undue burden. The Commission must have a basis for making its own conclusion as to whether there would be an undue burden. LOGAN V. UW-MILWAUKEE, CASE NO. 99-0124-PC-ER (PERS. COMM. 1/19/00); RECONSIDERATION DENIED, (3/17/00).

In a complaint arising from the decision not to select the complainant for a vacant Administrative Officer 3 position, where complainant had not asked a preliminary question relating to whether the materials he submitted for the job were received by the employing agency and reviewed by the rating panel, and, therefore, had not established that the raters did not see all of his materials, he was not entitled to discover information about the clerical handling of the application materials. To rule otherwise would create an undue burden for the employing agency. BALELE V. DOR ET AL., CASE NO. 98-0002-PC-ER (PERS. COMM. 7/7/98)

Where it appeared reasonable to presume that respondent's personnel office would have access to hiring and promotion information without much difficulty and where respondent presented insufficient information about its record-keeping system to conclude that answering complainant's interrogatory would create an undue burden, complainant's motion to compel discovery of the names of persons hired or promoted in a ten-year period was granted. READY V. UW (LA CROSSE), CASE NO. 95-0123-PC-ER (PERS. COMM. 7/1/98)

6. Deposition of an agency head

A "highly placed public official" will not be compelled to appear for a deposition unless there is a clear showing that the deposition is necessary to prevent prejudice or injustice. While usually the burden of persuasion is on the party seeking a protective order from the forum, the burden is on the party noticing the deposition of the highly placed public official to clearly show that "the deposition is necessary to prevent

prejudice or injustice." STATE V. BELOIT CONCRETE STONE, 103 WIS. 2D 506, 309 N.W.2D 28 (CT. APP., 1981)

In order to depose a cabinet secretary, the party seeking the deposition must satisfy the standards set forth in STATE V. BELOIT CONCRETE rather than simply with those in 804.05(2)(e), Stats. A protective order was granted as to the secretary but the agency was ordered to designate an individual who could provide testimony in lieu of the secretary on certain topics. HAWK V. DOCOM, CASE NO. 99-0047-PC-ER (PERS. COMM. 4/7/00)

7. Effect of the existence of a proceeding in another forum

Respondent's general objection to *any* discovery by the petitioner was denied where the objection was based solely on the existence of a corresponding claim before the EEOC. CARR V. DOC, CASE NOS. 01-0174-PC-ER, 02-0022-PC (PERS. COMM. 10/31/02)

8. Multiple forms of discovery

A party may utilize both depositions and interrogatories and is not prohibited from seeking to elicit the same type of information through both discovery devices subject to certain limits imposed to prevent unreasonable duplication. SOUTHWICK V. DHSS, CASE NO. 85-0151-PC (PERS. COMM. 4/16/86)

9. Redaction

Respondent was permitted to substitute some form of coding in lieu of the actual names of the examinees listed on materials to be provided to the appellant pursuant to the Commission's order. DOYLE V. DNR & DMRS, CASE NO. 86-0192-PC (PERS. COMM. 3/24/87)

H. Once a party believes discovery rules have not been followed

1. Initial informal effort to resolve any dispute

A party to a discovery dispute was ordered to make a good faith effort to resolve, informally, all aspects of their discovery dispute before filing written arguments with the Commission on the merits of the dispute. ORIEDO V. DOC, CASE NO. 98-0124-PC-ER (PERS. COMM. 4/21/99)

Counsel is not required to explain the relevance of information sought through deposition at the time the issue arises at the deposition, but attorneys are encouraged to attempt to resolve discovery disputes by informal means to the extent possible. OWENS V. DOT, CASE NO. 91-0163-PC-ER (PERS. COMM. 9/18/92)

2. Motion for a protective order limiting discovery – Sec. 804.01(3), Stats.:

(3) Protective orders.
(a) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:
1. That the discovery not be had;
2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
5. That discovery be conducted with no one present except persons designated by the court;
6. That a deposition after being sealed be opened only by order of the court;
7. That a trade secret, as defined in s. 134.90(1)(c), or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
8. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
(b) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Section 804.12(1)(c) applies to the award of expenses incurred in relation to the motion.

3. Where there has been a total failure to provide discovery – Sec. 804.12(4), Stats.:

(4) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection or supplement responses.
If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05(2)(e) or 804.06(1) to testify on behalf of a party fails (a) to appear before the officer who is to take the party's deposition, after being served with a proper notice, or (b) to serve answers or objections to interrogatories submitted under s. 804.08, after proper service of the interrogatories, or (c) to serve a written response to a request for inspection submitted under s. 804.09, after proper service of the request, or (d) seasonably to supplement or amend a response when obligated to do so under s. 804.01(5), the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2)(a)1., 2., and 3. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney

fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by s. 804.01(3).

Procedure (Sec. 804.12(4) motion)

If there has been a total failure to respond to the discovery request or to appear at the deposition of a party, the issue of awarding expenses of the motion to compel may be considered immediately without the opportunity for hearing. ALLISON V. DOR, CASE NO. 98-0190-PC-ER (PERS. COMM. 7/20/99)

Standards (Sec. 804.12(4) motion)

Section 804.12(4), Stats., requires payment of reasonable expenses when the deposition has been properly noticed, the failure to appear was not substantially justified and other circumstances do not make an award of expenses unjust. While a party's pro se status may be a factor in determining that expenses would be unjust, mere status as a pro se litigant is not an automatic bar to awarding reasonable expense. Even though the Commission lacks the authority to order a state agency to pay costs and attorneys' fees related to a discovery motion, the limitation does not apply to a party other than the state. ALLISON V. DOR, CASE NO. 98-0190-PC-ER (PERS. COMM. 7/20/99)

Sanctions (Sec. 804.12(4) motion)

A single unjustified failure by complainant to appear for a properly noticed deposition did not justify the sanction of dismissal but did justify the award of reasonable expenses to respondent. DORF V. DOC, CASE NO. 93-0121-PC-ER (PERS. COMM. 5/27/94)

Where complainant did not advise respondent or the Commission of her change of address, her representative gave inconsistent statements about complainant's whereabouts at the time the notice of deposition was received, and it was represented that complainant would be unavailable for deposition prior to hearing, the Commission granted respondent's motion to dismiss, citing §804.12(2) and (4), Stats. as authority. FARR V. DOC, CASE NOS. 93-0065, 0111-PC-ER (PERS. COMM. 8/23/94)

Dismissal, though an extreme sanction, was appropriate where complainant failed to attend his scheduled deposition and the failure was intentional and in bad faith. Complainant refused to attend the deposition that had been scheduled with relatively short notice although it had been scheduled to take advantage of complainant's presence in Wisconsin to attend another Personnel Commission proceeding. The deposition had been discussed during two separate telephone conferences with the designated hearing

examiner and the parties. Complainant also refused to respond to specific questions posed by the designated hearing examiner in a letter to the parties establishing a briefing schedule on respondent's motion to dismiss. HUFF V. UW (STEVENS POINT), CASE NO. 97-0092-PC-ER (PERS. COMM. 11/18/98)

Where complainant did not receive the notice of deposition (it was served on his mother) and where there was a relatively short time period between the service of the notice and the date of the deposition, the complainant's failure to appear at the deposition was "substantially justified." Respondent's motion for expenses caused by the failure to attend the deposition was denied. PUGH V. DNR, CASE NO. 86-0059-PC-ER (PERS. COMM. 4/28/88)

Respondent was awarded reimbursement of deposition expenses when complainant, who appeared pro se at the time, failed to attend. While a party's pro se status may be a factor in determining that expenses would be unjust, mere status as a pro se litigant is not an automatic bar to awarding reasonable expense. ALLISON V. DOR, CASE NO. 98-0190-PC-ER (PERS. COMM. 7/20/99)

A sanction hearing would be held relative to appellant's representative who had promised to produce appellant at a scheduled deposition if his motions opposing the deposition were denied. Both motions were denied yet appellant's representative said the client was no longer available for deposition scheduled the following day. The examiner rejected the option of imposing sanctions on the appellant because it was not shown that appellant shared in, or was even aware, of her representative's conduct. The potential sanction at issue would be the costs incurred by respondent for the deposition which appellant failed to attend, and the rescheduled deposition, including the cost of obtaining an expedited transcript to ensure the transcript would be available for hearing. LYONS V. WGC, CASE NO. 93-0206-PC (PERS. COMM. 3/11/94)

Respondent's claim for nearly 20 hours spent by a law clerk and two lawyers to prepare a 10 page reply brief was not a "reasonable expense" under Sec. 804.12(4), Stats. Five hours were found to be reasonable. Other attorneys' fees, court report costs and copying costs were granted. ALLISON V. DOR, CASE NO. 98-0190-PC-ER (PERS. COMM. 9/8/99)

4. Motion to compel – Sec. 804.12(1), Stats.:

(1) Motion for order compelling discovery. *A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:*
(a) Motion. If a deponent fails to answer a question propounded or submitted under s. 804.05 or 804.06, or a corporation or other entity fails to make a designation under s. 804.05(2)(e) or 804.06(1), or a party fails to answer an interrogatory submitted under s. 804.08, or if a party, in response to a request for inspection submitted under s. 804.09, fails to respond that inspection will be

permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he or she applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to s. 804.01(3).
(b) Evasive or incomplete answer. For purposes of this subsection an evasive or incomplete answer is to be treated as a failure to answer.
(c) Award of expenses of motion.
1. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.
2. If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.
3. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Procedure (motion to compel)

A failure to answer or an evasive or incomplete answer to a discovery request is not a basis for a motion for sanctions, but is a basis for an order compelling discovery. PAUL V. DHSS, CASE NO. 82-PC-ER-69, 82-156-PC (PERS. COMM. 10/14/83)

A hearing was ordered scheduled on complainant's request for fees and expenses incurred in connection with his motion to compel discovery where, after the motion was filed, respondent filed answers to the underlying interrogatories. HEBERT V. DILHR, CASE NOS. 84-0206-PC-ER, 84-0242-PC (PERS. COMM. 9/13/85)

Standards (motion to compel)

The party making the motion to compel must, in a broad sense, articulate how the requested information is potentially relevant to the proceeding, even though the requesting party does not have to show that the information sought would be admissible. PAUL V. DHSS, CASE NOS. 82-PC-ER-69, 820156-PC (PERS. COMM. 10/14/83)

When addressing a motion from a pro se party that was vague and in an effort to eliminate unnecessary delays in the proceeding, the Commission assumed that the request had been redrafted with greater specificity and then proceeded to rule on the motion. ASADI V. UW-PLATTEVILLE, CASE NO. 85-0058-PC-ER (PERS. COMM. 11/13/87)

Costs of a motion to compel

Where there has been a partial failure (e.g. the refusal to answer one question in a series of interrogatories), expenses may only be awarded after a motion to compel has been granted and there has been an opportunity for a hearing on the appropriateness of awarding the expenses of the motion, as provided in Sec. 804.12(1), Stats.

Respondent's request for the imposition of sanctions under 804.12, Stats., was premature where no previous discovery order had been issued by the Commission. LANG V. SPD, CASE NO. 98-0197-PC-ER (PERS. COMM. 8/23/00)

The parties must have an opportunity for hearing before costs are granted arising from a motion to compel discovery. LANG V. SPD, CASE NO. 98-0197-PC-ER(8/23/00)

Apportionment of the moving party's expenses associated with a motion to compel is appropriate where the motion was only partially successful. Sec. 804.12(1)(c)3., Stats. Factors considered when deciding whether to award any costs were that the moving party had made a timely effort to resolve the discovery dispute informally and that there was no showing of any special circumstances that would make an award unjust. BALELE V. DER & DMRS, CASE NO. 98-0145-PC-ER (PERS. COMM. 2/28/00)

While the Commission lacks the authority to order a state agency to pay costs and attorneys' fees related to a discovery motion, the limitation does not apply to a party other than the state. ALLISON V. DOR, CASE NO. 98-0190-PC-ER (PERS. COMM. 7/20/99

The appellant was not entitled to an order of immediate reinstatement or order quashing testimony of a witness where the respondent refused to produce the witness for deposition on the theories that the discovery rule (Sec. PC 2.02, Wis. Adm. Code) was invalid as in excess of statutory authority and that respondent was entitled to more detailed statement of appeal before submitting to discovery. The Commission noted that such sanctions might be available in the future, depending on the circumstances. ALFF V. DOR, CASE NO. 78-227-PC & 78-243-PC (PERS. COMM. 6/13/79)

Sanctions under §804.12(2), Stats., were premature where the Commission granted, in part, complainant's motion to compel, and there had been no opportunity to fail to comply with that ruling. In addition, the Commission lacks authority to order a state agency to pay costs and attorney fees for discovery motions filed by a complainant in a proceeding under the Wisconsin Fair Employment Act, citing DEPT. OF TRANSPORTATION V. WIS. PERS. COMM., 176 WIS. 2D 731, 500 N.W.2D 545 (1993). READY V. UW (LA CROSSE), CASE NO. 95-0123-PC-ER (PERS. COMM. 7/1/98)

No motion expenses were awarded where the motion to compel discovery was resolved informally, no order was necessary and none was issued. ACE ET AL. V. DHSS ET AL., CASE NO. 92-0238-PC (PERS. COMM. 10/24/94)

5. Motion alleging failure to comply with order – Sec. 804.12(2), Stats.

(2) Failure to comply with order.
(a) If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05(2)(e) or 804.06(1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;
3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical, mental or vocational examination.
(b) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Standards (relating to a failure to comply with a discovery order)

The burden of proof rests on the party subject to the order to show they could not comply with the order. MIDWEST DEVELOPERS V. GOMA CORP., 121 WIS. 2D 632, 360 N.W.2D 554 (CT. APP., 1984)

Sanctions (upon a failure to comply with a discovery order)

Possible forms of sanctions: 804.12(2)

Matters subject to the request are deemed admitted
Preclusion of the evidence at hearing
Dismissal of the appeal
Costs
Sanctions against the party's representative

The standard for determining bad faith in terms of whether a complaint should be dismissed as a sanction under 804.12(2), Stats., for failing to comply with an order to compel discovery is whether the discovery responses constitute "bad faith" as either intentional conduct without a clear and justifiable excuse or as unintentional conduct which is so extreme, substantial and persistent that it properly can be characterized as egregious. Dismissal ordered. BALELE V. DER & DMRS, CASE NO. 98-0145-PC-ER (PERS. COMM. 12/3/99)

Where respondent agency contended that an employee was a Native American but failed to supply complainant with the employee's tribal enrollment identification number after the Commission had ordered the agency to provide the information, the sanction imposed was to establish, for all purposes related to the complaint, that the employee did not have a federally recognized tribal affiliation or a tribal enrollment identification number. HAWK V. DOCOM, CASE NO. 99-0047-PC-ER (PERS. COMM. 4/7/00)

The Commission has the authority to dismiss a case for failure to pay costs awarded under Sec. 804.12(4), Stats. While the standard in HUDSON DIESEL, INC. V. KENALL, 194 WIS.2D 531, 535 N.W.2D 65 (CT. APP. 1995), for determining whether dismissal is an appropriate sanction for failing to comply with a court order is not *per se* applicable to an administrative proceeding, the Commission will look to the standard for guidance and will not use a stricter standard than the one used by courts. Complainant's failure to comply with an order to pay costs associated with respondent's successful motion to compel discovery constituted bad faith and the matter was dismissed. Complainant provided no explanation for not contacting the other party before the payment was due so that payment arrangements could be made. ALLISON V. DOR, CASE NO. 98-0190-PC-ER (PERS. COMM. 3/21/00)

While the Commission has the authority to award costs for a failure to comply with a discovery order, it lacks the authority to award costs for a party's failure to comply with an order to pay costs. ALLISON V. DOR, CASE NO. 98-0190-PC-ER (PERS. COMM. 3/21/00)

Complainant, who appeared pro se, was barred from engaging in any further discovery where respondent had prevailed as to all but one of its 90 objections to complainant's first set of discovery requests, and in his second set of discovery requests, complainant repeated 97 requests from the first set, including 30 where respondent's objections had been sustained. HARWELL V. DPI, CASE NOS. 98-0210-PC-ER, ETC. (PERS. COMM. 12/3/01)

While the Commission lacks the authority to order a state agency to pay costs and attorneys' fees related to a discovery, the limitation does not apply to a party other than the state. ALLISON V. DOR, CASE NO. 98-0190-PC-ER (PERS. COMM. 7/20/99

Appellant, who was proceeding *pro se*, unjustifiably refused to comply with an order compelling discovery. The Commission concluded that "other circumstances" within the meaning of §804.12(2)(b), Stats., made an award of attorney's fees to respondent unjust, since the Commission already had dismissed her handicap claims and barred her from supporting two disciplinary appeals with evidence relating to her medical condition. MOSLEY V. DILHR, CASE NO. 93-0035-PC, ETC. (PERS. COMM. 6/21/94)

Petitioner's refusal to comply with an order compelling discovery did not result in dismissal of all her cases, inasmuch as she is proceeding *pro se* and her refusal to permit discovery of her medical records did not relate to all her claims. However, her claims of handicap discrimination were dismissed, and she was prohibited from using any evidence concerning her medical condition in connection with her disciplinary action appeals. MOSLEY V. DILHR, CASE NO. 93-0035-PC, ETC. (PERS. COMM. 6/21/94)

The appeal of a non-selection decision was dismissed where appellant refused to comply with the Commission's order to disclose the name of a potential witness, citing fears of retaliation, where the Commission had entered an order forbidding retaliation against such witness and appellant's allegations were conclusory in nature. ROWE V. DP, 79-202-PC (PERS. COMM. 7/22/81); AFFIRMED BY DANE COUNTY CIRCUIT COURT, ROWE V. WIS. PERS. COMM., CASE NO. 81-CV-4288, 4/13/83

To enforce its order compelling discovery of exam materials, the Commission could petition circuit court for remedial or punitive sanction under Sec. 785.06, Stats., in addition to invoking those sanctions specified in Sec. 227.44(5) and 804.12(2)(a) 3, Stats. DOYLE V. DNR & DMRS, CASE NO. 86-0192-PC (PERS. COMM. 3/24/87)

As a sanction for failure to comply with the Commission's order for respondent to answer certain interrogatories, the Commission barred the respondent from offering any evidence related to the subject matter inquired into by the unanswered interrogatories. SOUTHWICK V. DHSS, CASE NO. 85-0151-PC (PERS. COMM. 2/13/87)

Discovery sanctions were imposed where complainant's answers to respondent's interrogatories were tardy, incomplete and evasive and the continued tardiness had the effect of avoiding a Commission order to reply. SOLIMAN V. DATCP, CASE NO. 93-0049-PC-ER, 94-0018-PC-ER (PERS. COMM. 3/2/94) (RULING BY EXAMINER)

No sanctions were appropriate where respondent DMRS had failed to comply with an order to provide certain examination materials, because appellant had not appeared by counsel, the appellant rather than respondent would presumably be seeking to offer the subject materials into the record, and a default judgment would deprive the appellant of a chance to have his claims adjudicated and would be of limited practical effect given restrictions on the Commission's ultimate remedial authority in the case. In addition, seeking judicial sanctions would generate costs and delays. DOYLE V. DNR & DMRS, CASE NO. 86-0192-PC (PERS. COMM. 3/24/87)

Expenses were granted where there was bad faith by complainant and dismissal (which had already been ordered) without an award of expenses would not tend to discourage repetition of the misconduct. BALELE V. DER & DMRS, CASE NO. 98-0145-PC-ER (PERS. COMM. 2/28/00)

The agency's motion to dismiss was granted where complainant's egregious violation of discovery procedures included the failure to answer interrogatories and produce documents on two separate occasions and the failure to appear at an oral deposition and had written he would ignore future discovery requests. HUFF V. UW (LA CROSSE), CASE NO. 95-0113-PC-ER (PERS. COMM. 7/27/00)

In addition to already having found that the case should be dismissed as one sanction, the Commission awarded the costs associated with filing the 804.12(2) motion. Complainant, who appeared pro se, engaged in multiple instances of bad faith. Mere dismissal without an award of expenses would not have tended to discourage complainant from engaging in substantially similar discovery tactics with respect to other pending and future cases. BALELE V. DER & DMRS, CASE NO. 98-0145-PC-ER (PERS. COMM. 2/28/00)

6. Expenses on a failure to admit – Sec. 804.12(3), Stats.

(3) Expenses on failure to admit. *If a party fails to admit the genuineness of any document or the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.*

7. Sanction requests at hearing

Complainant's motion, made during the hearing, to strike certain evidence because respondent allegedly failed to include the information in its responses to complainant's discovery requests, was denied where, despite instructions from the hearing examiner, the complainant failed to provide sufficient specificity to decide the motion. RUFENER V. DNR, CASE NO. 93-0074-PC-ER, ETC. (PERS. COMM. 8/4/95)

II. Remedies (other than costs under Wisconsin's Equal Access to Justice Act) in PA cases

A. Relevant statutes and rules with limited annotations

1. Sec. 230.44(4), Stats.:

(c) After conducting a hearing or arbitration on an appeal under this section, the commission or the arbitrator shall either affirm, modify or reject the action which is the subject of the appeal. If the commission or the arbitrator rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service of the decision of the commission or the arbitrator.
(d) The commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in s. 230.43(1).

The provisions of Sec. 230.44(4)(c), Stats., do not apply where the appeal was not brought pursuant to Sec. 230.44. STASNY V. DOT, 78-158-PC, 10/12/79 (NOTE: THIS CASE WAS AFFIRMED BY THE DANE COUNTY CIRCUIT COURT IN ALL RESPECTS EXCEPT FOR RESTORATION OF SICK LEAVE. DOT V. PERS. COMM. (STASNY), DANE COUNTY CIRCUIT COURT, 79-CV-6102, 6130, 3/27/81

2. Sec. 230.43, Stats.:

(1) Obstruction or falsifications of examinations.
(a) Any person who willfully, alone or in cooperation with one or more persons, defeats, deceives or obstructs any person in respect of the rights of examination or registration under this subchapter or any rules prescribed pursuant thereto, or
(b) Who willfully, or corruptly, falsely marks, grades, estimates or reports upon the examination or proper standing of any person examined, registered or certified, pursuant to this subchapter, or aids in so doing, or
(c) Who willfully or corruptly makes any false representations concerning the same, or concerning the person examined, or
(d) Who willfully or corruptly furnishes any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any persons so examined, registered or certified, being appointed, employed or promoted, or
(e) Who personates any other person, or permits or aids in any manner any other person to personate him or her in connection with any examination, registration, application or request to be examined or registered, shall for each offense be guilty of a misdemeanor.

> ***(2) Prohibited appointments.*** *Whoever, after a rule has been duly established and published, makes an appointment to office or selects a person for employment, contrary to such rule, or willfully refuses or neglects otherwise to comply with, or to conform to, this subchapter, or violates any of such provisions, shall be guilty of a misdemeanor. If any person is convicted under this subsection, any public office which such person may hold shall by force of such conviction be rendered vacant, and such person shall be incapable of holding public office for a period of 5 years from the date of such conviction.*
> ***(3) Penalty.*** *Misdemeanors under this section are punishable by a fine of not less than $50 nor more than $1,000, or by imprisonment for not more than one year in the county jail or both.*
> ***(4) Rights of employee.*** *If an employee has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission or any court upon review, the employee shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification. Interim earnings or amounts earnable with reasonable diligence by the employee shall operate to reduce back pay otherwise allowable. Amounts received by the employee as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the employee and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making such payment. The employee shall be entitled to an order of mandamus to enforce the payment or other provisions of such order.*

The plain language of Sec. 230.43(1)(a), Stats., indicates it is meant to cover intentional action against a particular individual or individuals, rather than a violation of the civil service code that has the effect of inuring to the detriment of some of the examinees. The statute is intended to deal with an active, purposeful intent to interfere unlawfully with individual rights under the civil service code, either by helping or hindering particular persons. It is not intended to criminalize any violation of the civil service code that results in adverse effects on a group of examinee's chances for success in a competitive selection process. SMITH V. DMRS, 90-0032-PC, 8/3/95; EXPLAINED FURTHER IN RULING ON REQUEST FOR RECONSIDERATION, 1/5/96; AFFIRMED BY DANE COUNTY CIRCUIT COURT; SMITH V. SHAW ET AL., 90 CV 5059, 96 CV 283, 12/10/96

There was no violation of Sec. 230.43(1)(a), Stats., when respondent improperly permitted someone to participate in the selection process which lowered the rank of appellant, as well as all others, on the exam register. Even if respondent had properly disqualified the candidate who was ultimately hired, the appellant's rank would have improved from tenth to ninth, but appellant still would not have been certified. It would be speculative to rely on the mere possibility that the three other candidates ranked ahead of the appellant would have dropped out of consideration for one reason or another and that appellant ultimately might have been certified and selected. Appellants'

request that he be appointed to the position in question and that the incumbent be removed as a remedy to respondent's illegal action of certifying an out-of-state candidate for a vacancy, was rejected. SMITH V. DMRS, 90-0032-PC, 8/3/95; EXPLAINED FURTHER IN RULING ON REQUEST FOR RECONSIDERATION, 1/5/96; AFFIRMED BY DANE COUNTY CIRCUIT COURT; SMITH V. SHAW ET AL., 90 CV 5059, 96 CV 283, 12/10/96

Although there were violations of Sec. 230.16, Stats., in an exam process with respect to its timing and nonverbal feedback from one of the oral exam panel members, there was no showing of obstruction or falsification as set forth in Sec. 230.43(l), Stats., and therefore the Commission could not require the removal of the incumbent. The remedy was to require the respondents to cease and desist from further violations of the kind found in this case. ZANCK & SCHULER V. DP, 80-380-PC, 81-12-PC, 12/3/81

3. Sec. PC 5.07, Wis. Adm. Code:

Computation of interest. *Any interest that may be awarded on a back pay award made by the commission shall be added to the award and computed at the annual rate specified in s. 814.04(4), Stats., simple interest. Interest shall be computed by calendar quarter. Interest shall begin to accrue on the last day of each calendar quarter, or portion thereof, in the back pay period on the net amount of back pay attributable to that calendar quarter, or portion thereof, after any set-offs, and shall continue to accrue until the date of compliance with the back pay order.*

B. Remedies according to the jurisdictional basis for the PA appeal

1. Remedies for all PA cases before the WERC

The Commission lacks the authority to issue a preliminary injunction with respect to a civil service appeal. VAN ROOY V. DILHR & DER, 87-0117-PC, 87-0134-PC-ER, 10/1/87; LYONS V. DHSS, 79-81-PC, 4/26/79, AFFIRMED BY DANE COUNTY CIRCUIT COURT, DHSS V. WIS. PERS. COMM. (LYONS), 80-CV-4948, 7/14/81

2. Remedies for appeals filed pursuant to 230.44(1)(a): exam cases

("Appeal of a personnel decision under [subch. II, ch. 230] made by the administrator [of DMRS] or by an appointing authority under authority delegated by the administrator under 230.05(2).")

In an appeal of the refusal to admit the appellant to an examination, if the appellant was successful with her appeal but someone else already had been appointed to the position in question, she would not be entitled to a salary award as a remedy.. NOLTEMEYER V. DILHR & DP, 78-14-PC, 78-28-1, 12/20/78

While the timing of the exam process and some nonverbal feedback from one of the oral exam panel members violated Sec. 230.16, Stats., there was no showing of obstruction or falsification as set forth in §230.43(l), Stats., and therefore the Commission could not require the removal of the incumbent. The remedy was to require the respondents to cease and desist from further violations of the kind found in this case. ZANCK & SCHULER V. DP, 80-380-PC, 81-12-PC, 12/3/81

Where the respondent, in deciding that the appellant did not qualify for Handicapped Expanded Certification, relied improperly on criteria that were required to have been, but were not, promulgated as administrative rules, and where the Commission could not conclude that a correct result under the statute would have been to have certified the appellant as HEC eligible, the only appropriate remedy was to remand the matter to the respondent to exercise its statutory discretion without reliance on the invalid criteria. SCHAUB V. DMRS, 90-0095-PC, 10/17/91

Where a non-resident was illegally permitted to compete for a vacant position and was ultimately hired to fill the vacancy, the respondent was required to cease and desist from similar violations of the civil service code with respect to any future examinations and certifications in which the appellant participated. The appellant had ranked tenth on the examination and his name was not among the top five candidates whose names were certified and interviewed for the vacancy. SMITH V. DMRS, 90-0032-PC, 8/3/95; EXPLAINED FURTHER IN RULING ON REQUEST FOR RECONSIDERATION, 1/5/96; AFFIRMED BY DANE COUNTY CIRCUIT COURT; SMITH V. SHAW ET AL., 90 CV 5059, 96 CV 283, 12/10/96

A conclusion that an appointment was made outside the 60 day period referenced in Sec. 230.25(2)(b), Stats., would not result in an order voiding the certification or the appointment. SEITTER V. DOT & DMRS, 94-0021-PC, 3/9/95

Where the Commission rejected the respondent's requirement of certain training and experience criteria for the Civil Engineer 1 - Transportation exam, the Commission declined appellant's request to void the current register. The record did not establish that the persons on the register were unqualified and the only purpose of voiding the register would be to delay any possible appointments until appellant would have a chance to compete under revised training and experience standards, a purpose which did not meet the standards necessary for invalidating a register established in §230.44(4)(d), Stats. HEIKKINEN V. DOT, 90-0006-PC, 4/16/90

The only appropriate remedy in an appeal arising from an invalid exam is to order respondent to cease and desist from utilizing the subject exam or an employment register created using the results of the exam. It would be inappropriate to put the appellant on the certification list or to appoint the appellant to the position. It would also be inappropriate for the order to encompass any other exam, register, certification, or position. DOYLE V. DNR & DMRS, 86-0192-PC, 87-0007-PC-ER, 11/3/88

Where the failure to certify the appellant for the position in question was the result of an unintentional administrative oversight and there was no showing of willfulness, the Commission ordered the respondents to cease and desist from engaging in the activities which resulted in the subject error. ROSE V. DHSS & DMRS, 89-0035-PC, 10/25/89

The Commission declined to award the appellant any relief where she had been illegally certified for a vacant position, hired and then fired by the appointing authority less than two weeks into her probationary period, where the appellant had declined an opportunity to return to her former position and where she had been paid for her work in the position to which she had been illegally certified. The appellant was not entitled to back pay until the date of the Commission's hearing because to do so would place her in a far better position than she would have been in absent the error by DMRS. CAREY V. DMRS & DOR, 85-0179-PC, 3/13/86

Where the Commission found the certification of the successful candidate was illegal (although the selection decision was not an abuse of discretion) and found that, had the successful candidate not been eligible, the appellant would have been appointed, the Commission ordered the respondent to appoint the appellant, if still qualified, to the disputed position or a comparable promotional position upon the next vacancy. PAUL V. DHSS & DMRS, 82-156-PC & 82-PC-ER-69, 6/19/86

3. Remedies for appeals filed pursuant to 230.44(1)(b): classification cases

("Appeal of a personnel decision under 230.09(2)(a) or (d) or 230.13(1) made by the director [of OSER] or by an appointing authority under authority delegated by the director under s. 230.04(1m).")

In an appeal arising from the decision not to reclassify appellant based on an evaluation of her performance when classification levels were differentiated on the basis of performance, and where appellant showed that the failure to consider one file as part of the review was contrary to the civil service code, the proper remedy was to review an additional ten files to determine whether appellant obtained an overall passing score, in accord with the respondent's normal procedure for analyzing performance. MCNOWN [WILLIAMS] V. DILHR & DER, 94-0828-PC, 11/14/95

Where the respondents' overturned decision to deny reclassification was based on an analysis of the classification level of appellant's duties and responsibilities but did not address the question of whether the changes in the position had been logical and gradual, the Commission remanded the matter "for action in accordance" with the Commission's decision which would presumably result in a determination as to whether there had been a logical and gradual change. BEAUMIER V. DNR & DER, 90-0203-PC, 1/24/91

Given the limitation in Sec. 230.43(4), Stats., to employees who have been unlawfully "removed, demoted or reclassified," the Commission lacks the authority to award back pay in an successful appeal to a reclassification denial, citing SEEP V. PERSONNEL COMMISSION, 140 WIS 2D 32, 41-42 (CT. APP, 1987) MANTHEI ET AL. V. DER, 86-0116, ETC.-PC, 1/13/88; DHSS V. WIS. PERS. COMM. (ESCHENFELDT), DANE COUNTY CIRCUIT COURT, 81-CV-5126, 4/27/81; DER V. WIS. PERS. COMM. (CADY), DANE COUNTY CIRCUIT COURT, 79-CV-5099, 7/24/81; GHILARDI & LUDWIG V. DER, 87-0026, 0027-PC 4/14/88

Where the appellant left the position in question subsequent to having filed an appeal of a reclassification denial, the respondent's motion to dismiss on the ground that the Commission lacked the authority to require that back pay be paid was denied, because regardless of whether such authority were present, the Commission must assume that if it were to determine that the position should have been reclassified, the agency would comply with the Wisconsin Personnel Manual promulgated by the Division of Personnel and effectuate the transaction retroactively. MCGREW V. UW & DP, 81-443-PC, 1/10/83; TIFFANY ET AL. V. DHSS & DER, 83-0225-PC, 7/6/84

The Commission lacks the authority to award retroactive compensation to persons who have been denied reclassification. DER & DP V. PC (DOLL), DANE COUNTY CIRCUIT COURT, 79-CV-3860, 9/2/80; APPEAL SETTLED BY COURT OF APPEALS, 80-1689, 2/9/81 (In the settlement agreement, the Division of Personnel agreed not to construe the circuit court decision as contrary to the proposition that compensation is appropriately paid from the effective date of the reclassification, regardless of whether reclassification is by DP action on its own motion or as required by lawful order.)

If the positions in question would be reclassified retroactively from Area Services Specialist 5 to Administrative Assistant 5 for the period from January 17, 1988 through October 8, 1989, the reclassification would have no effect on the actions of the appellants to demote into the positions effective January 15, 1988, i.e. prior to the effective date of the reclassification. In addition, the degree of hardship that would be suffered by the appellants who were not eligible to have demoted in lieu of layoff into an Administrative Assistant 5 classification would also preclude the reclassification having a retroactive effect on the demotions. GARDIPEE, ET AL. V. DER, 88-0004-PC, 1/24/92

Where the appellants were successful in a reclassification appeal, the Commission could not effectuate a remedy requiring the extension of the appellants' reinstatement rights at the higher classification level because the sole respondent, DER, had no authority with respect to reinstatement. GHILARDI & LUDWIG V. DER, 87-0026, 0027-PC 4/14/88

The Commission lacked the authority to award back pay for the period of time the appellant was assigned duties consistent with the higher classification level in a case where appellant had met his burden of showing the position he filled was entitled to reallocation to the higher level and that it should be filled via competition. The

Commission declined to grant appellant's request to order respondent to complete the recruitment and selection process by a date certain. SHOREY V. DILHR & DER, 87-0070-PC, 2/L/88

4. Remedies for appeals filed pursuant to Sec. 230.44(1)(c), Stats.: discipline cases

("If an employee has permanent status in class, or an employee has served with the state as an assistant district attorney for a continuous period of 12 months or more, the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.")

Demotion: The statutory remedy for an improperly demoted employee is restoration to her former position except that absent a showing of obstruction or falsification, restoration shall not result in the removal of the position incumbent. In the absence of obstruction or falsification, the fact that the incumbent would have rights to other positions in state service does not satisfy the requirement that the incumbent shall not be removed. An appropriate remedy was to offer appellant appointment to a position in the same classification as the position from which she was demoted and in which the nature of the assigned duties were equivalent. WARREN V. DHSS, 92-0750-PC, 92-0234-PC-ER, 5/14/96

Constructive demotion: Where appellant alleged she had been constructively demoted from her career executive position when her duties were changed and the Commission concluded that the new duties were better described at a lower classification level that was outside the career executive program, there was no remedy available to the appellant because while the case was pending, respondents had already reallocated the position to a newly created classification that was also in the career executive program and the appellant had suffered no loss of pay in the interim. Summary judgment was granted except that appellant was given the opportunity to pursue a claim for costs under Sec. 227.485. OSER & DATCP (KOHL), DECISION NO. 30996-A (WERC, 1/06)

Suspension: Where respondent's action of suspending the appellant was rejected and the matter remanded to respondent for action in accordance with the decision and appellant's request to clarify the order to require the payment of lost pay plus interest was unopposed, the respondent was required to pay appellant the lost pay plus interest. RENTMEESTER V. WIS. LOTTERY, 91-0243-PC, 7/8/94

Demotion and suspension while on probation: Where respondent had terminated appellant's employment as a MIS 4-Supervisor while the appellant was serving a promotional probationary period, suspended him for 30 days without pay, reduced his rate of pay and demoted him to a position in a classification with a lower pay range, and where the Commission found the predisciplinary process to have been inadequate,

the Commission rejected the respondent's contention that the appellant was not entitled to be restored to his MIS 4-Sup position. While the respondent could have simply terminated the appellant's probationary employment as a MIS 4-Sup and restored him to a position in his previous MIS 3 classification without a right to an appeal under Sec. 230.44(1)(c), once the respondent went further, there was no basis for respondent to argue that appellant was not entitled to restoration to his previous position as a remedy to successful appeal, citing Sec. ER-Pers 14.03. ARNESON V. UW, 90-0184-PC, 2/6/92

Job abandonment: Where the respondent's action of treating the appellant as having abandoned her position was rejected, the appellant was not entitled to back pay where the appellant was unable to work and also failed to diligently seek employment during the relevant period. The appellant also was not entitled to be reinstated because she would only have continued on an unpaid medical leave until she reached the end of the maximum period of such leave, and her medical condition had not, in fact, changed during that entire period. SMITH V. DHSS, 88-0063-PC, 3/19/92

Layoff: Where the respondent provided only 14 days notice of the layoff, as opposed to the 15 days mandated by Sec. Pers 22.07, Wis. Adm. Code, it failed to establish just cause for the layoff. With respect to a remedy, complete rejection of the action and full reinstatement of the appellant was considered more extensive than necessary to remedy the relatively minor procedural error which had not been shown to have prejudiced the appellant, and therefore the action would be modified by changing its effective date by one day. THOMAS V. UW, 81-332-PC, 3/25/82

Back pay, limitation of back pay, and mitigation of back pay: One of the purposes of back pay is to make the individual victim of an unlawful employment action whole by putting the victim in nearly the same financial position had the unlawful employment action not occurred. BRENON V. UW, CASE NO. 96-0016-PC (PERS. COMM. 9/1/99); AFFIRMED, BOARD OF REGENTS V. STATE PERSONNEL COMM., 2002 WI 79, 254 WIS.2D 148, 646 N.W.2D 759.

Back pay liability is reduced by an unconditional offer of reinstatement. An unconditional offer of reinstatement terminates the accrual of the appellant's back pay. In order to be considered valid, the offer must satisfy the elements identified in ANDERSON V. LIRC, 111 WIS. 2D 245, 33 N.W.2D 594 (1983), i.e. reinstatement to the same or substantially equivalent position, an unconditional offer made by an individual who had the authority to offer the position and with a reasonable opportunity to respond. The offer did not have to be in writing. KLEINSTEIBER V. DOC, CASE NO. 97-0060-PC (PERS. COMM. 8/25/99)

Respondent has the burden to show that appellant failed to exercise reasonable diligence to mitigate his damages and that there was a reasonable likelihood that appellant might have found comparable work by exercising reasonable diligence. BRENON V. UW, CASE NO. 96-0016-PC (PERS. COMM. 9/1/99); AFFIRMED, BOARD OF REGENTS V. STATE PERSONNEL COMM., 2002 WI 79, 254 WIS.2D 148, 646 N.W.2D 759

When deciding whether the appellant failed to exercise reasonable diligence to see other comparable employment, and where appellant's discharge from a Nursing Supervisor position had been modified to a demotion to a non-supervisory position, the proper comparison would be to a Nurse Clinician or comparable position, i.e. to the position to which the appellant was to be demoted. KLEINSTEIBER V. DOC, CASE NO. 97-0060-PC (PERS. COMM. 8/25/99)

After acquired evidence: Before it can introduce "after-acquired evidence" of additional misconduct in a remedy proceeding, the employer is required to provide notice and follow due process and civil service statutory requirements for the imposition of discipline. BOARD OF REGENTS V. STATE PERSONNEL COMM., 2002 WI 79, 254 WIS.2D 148, 646 N.W.2D 759

5. Remedies for appeals filed pursuant to 230.44(1)(d): hiring decisions

(an appeal of a "personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion")

Generally: Retroactive pay is limited to those transactions enumerated in Sec. 230.43(4), Stats.. STASNY V. DOT, 78-158-PC, 10/12/79 (NOTE: THIS CASE WAS AFFIRMED BY THE DANE COUNTY CIRCUIT COURT IN ALL RESPECTS EXCEPT FOR RESTORATION OF SICK LEAVE. DOT V. PERS. COMM. (STASNY) DANE COUNTY CIRCUIT COURT, 79-CV-6102, 6130, 3/27/81

Failure to consider reinstatement request: Where respondent's action violated Sec. 230.31(l)(a), Stats. (1985), the respondent was directed to consider appellant's request. Respondent was not ordered to reinstate the appellant. FRANK V. PERS. COMM., COURT OF APPEALS, 141 WIS. 2D 431 (1987); AFFIRMING DECISION OF DANE COUNTY CIRCUIT COURT, 85-CV-5490, 3/11/86

Failure to reinstate: The Commission did not exceed its authority where it rejected the decision of the respondent denying appellant's reinstatement and remanded the case for action in accordance with its decision. While the effect of the order may be appellant's reinstatement, the Commission's actions were clearly within the confines of its authority to "affirm, modify or reject the action which is the subject of the appeal." SEEP V. PERS. COMM., COURT OF APPEALS DISTRICT 11, 140 WIS 2D 32, 5/6/87; AFFIRMING IN ALL RESPECTS SEEP V. DHSS, 83-0032-PC, 83-0017-PC-ER, 10/10/84

Failure to interview: As the remedy to a finding that respondent abused its discretion in failing to interview appellant for a vacant position, the Commission ordered respondent to interview him for the next vacancy, the duties of which the appellant would be qualified to perform after the customary probationary period, at the same class level in

the same geographic region as the vacancy which generated the appeal. JOHNSON V. DHSS, 94-0009-PC, 3/3/95

Failure to select: Where the respondent manipulated the hiring process to avoid hiring the appellant and, absent this manipulation, appellant would have been the successful candidate, the Commission ordered the respondent to appoint the appellant, if still qualified, to the disputed position or a comparable promotional position upon its next vacancy but rejected appellant's request that a reprimand be issued to the interviewers. ZEBELL V. DILHR, 90-0017-PC, 10/4/90

Where appellant established that respondent abused its discretion by not giving all certified candidates the same opportunity to augment their resumes with details of their training and experience, but did not establish that she would have been hired if this had not occurred, the appropriate remedy is limited to a cease and desist order. ROSENBAUER V. UW-MILWAUKEE, 91-0086-PC, 91-0071-PC-ER, 9/24/93

Where there was insufficient evidence on which to conclude that the appellant would have been selected for a vacancy had the respondent not abused its discretion, the only appropriate remedy was to order the respondent to cease and desist from continuing those practices in the selection process which were found to constitute an abuse of discretion. THORNTON V.DNR, 88-0089-PC, 11/15/89

Where the Commission found that the respondent had violated the civil service law in improperly awarding veterans points and improperly using a trainee designation, the Commission was prevented from ordering the appellant reclassified because the issue of reclassification had not been addressed at the hearing. The only remaining remedy was to order respondent to cease and desist from similar violations. MARTIN V. DILHR, CASE NO. 74-132, 12/16/81

As a remedy in a successful appeal of a non-selection decision, the Commission ordered the respondent to appoint the appellant, if still qualified, to the disputed position (or comparable one) upon its next vacancy. PEARSON V. UW-MADISON, 84-0219-PC, 9/16/85; AFFIRMED BY DANE COUNTY CIRCUIT COURT, PEARSON V. UW & WIS. PERS. COMM., 85-CV-5312, 6/25/86; AFFIRMED BY COURT OF APPEALS DISTRICT IV, 86-1449, 3/5/87

Where, in a decision issued 10 years prior to the parties' petitions for declaratory ruling, the Commission concluded that respondent's decision not to have promoted appellant constituted an abuse of discretion, and that appellant was entitled as a remedy to appointment to the position in question when it next became vacant, appellant was entitled to an immediate promotion upon the retirement of the incumbent. Respondent had taken no action with respect to the position prior to the retirement of the incumbent. Respondent's assertion that there was no vacancy until it decided to fill the position after the incumbent had retired, was rejected. PEARSON V. UW, 84-0219-PC, 8/5/96; EXPLAINED FURTHER, 2/12/97 A

The remedy of back pay is not available in failure to hire cases. SEEP V. STATE PERS. COMM., 140 WIS. 2D 32, 409 N.W.2D 142 (CT. APP. 1987); AFFIRMING IN ALL RESPECTS SEEP V. DHSS, 83-0032-PC, 83-0017-PC-ER, 10/10/84

The Commission lacks the authority to award back pay or front pay as a remedy in a successful appeal of a decision not to select the appellant. PEARSON V. UW & WIS. PERS. COMM., DANE COUNTY CIRCUIT COURT, 85-CV-5312, 6/25/86; AFF'D BY COURT OF APPEALS DISTRICT IV, 86-1449, 3/5/87

Refusal to reinstate or restore following probationary termination: Where respondent acted unlawfully in denying restoration to appellant, appellant was entitled to restoration upon remand as well as back pay pursuant to Sec. 230.43(4), Stats. DUPUIS V. DHSS, 90-0219-PC, 9/3/92

Where respondent offered to reinstate appellant, after having terminated her permissive probation following her transfer, into a position at the same class level, pay range and pay rate at her former place of employment, respondent's action complied with Sec. ER-Pers 15.055, Wis. Adm. Code. However, until the respondent provided notice of the starting salary and of appellant's assigned shift, respondent had not complied with Sec. ER-Pers 12.08, which requires the letter of appointment to "include conditions of employment such as starting date, rate of pay and probationary period." DUPUIS V. DHSS, 90-0219-PC, 10/4/94

6. Remedies for non-contractual grievances filed pursuant to 230.45(1)(c)

(The WERC shall "serve as final step arbiter in the state employee grievance procedure established under s. 230.04(14)")

Restoration of sick leave is beyond the remedial powers of the Commission in an appeal of a noncontractual grievance which determined that the appellant had been improperly transferred and that this exacerbated his medical condition to the point where he had to take medical leave. DOT V. WIS. PERS. COMM. (STASNY), DANE COUNTY CIRCUIT COURT, 79-CV-6102, 6130, 3/27/81

A transfer does not fall within the categories of transactions in Sec. 230.43(4), Stats., for awarding back pay. STASNY V. DOT, 78-158-PC, 10/12/79 (NOTE: THIS CASE WAS AFFIRMED BY THE DANE COUNTY CIRCUIT COURT IN ALL RESPECTS EXCEPT FOR RESTORATION OF SICK LEAVE. DOT V. PERS. COMM. (STASNY) DANE COUNTY CIRCUIT COURT, 79-CV-6102, 6130, 3/27/81

7. Remedies for career executive appeals

As a remedy to a successful appeal from a reassignment decision for a career executive, respondent was ordered to reinstate the appellant to his former position within 30 days. Respondent could then attempt to remedy the defect in notice (which caused the original

decision to be illegal) and re-effectuate the reassignment, but not on a retroactive basis. BASINAS V. DHSS, CASE NO. 77-121 (PERSONNEL BOARD, 6/16/78)

C. Enforcement of a remedial order

In an earlier decision, the Commission had ruled in favor of the appellants in a dispute over the proper effective date of a reclassification. Appellants subsequently disputed the payroll calculations used by respondents in determining the amount of back pay and the appellants' hourly rate. The Commission held that it lacked the authority to enforce its own orders and dismissed the appeals. GUZNICZAK & BROWN V. DHSS & DER, 83-0210, 0211-PC, 4/6/88

III. Wisconsin's Equal Access to Justice Act (EAJA) applied to PA cases

"One of the purposes of the EAJA is to encourage challenges to agency action and to provide a disincentive to agencies to prolong the litigation process. . . ."
STERN V. DHFS, 212 WIS. 2D 393569 N.W.2D 79 (CT. APP. 1997)

A. Relevant statutes and rules

1. Sec. 227.485, Stats.:

Costs to certain prevailing parties.
(1) *The legislature intends that hearing examiners and courts in this state, when interpreting this section, be guided by federal case law, as of November 20, 1985, interpreting substantially similar provisions under the federal equal access to justice act, 5 USC 504.*
(2) *In this section:*
(a) "Hearing examiner" means the agency or hearing examiner conducting the hearing.
(b) "Nonprofit corporation" has the meaning designated in s. 181.0103 (17).
(c) "Small business" means a business entity, including its affiliates, which is independently owned and operated, and which employs 25 or fewer full-time employees or which has gross annual sales of less than $5,000,000.
(d) "Small nonprofit corporation" means a nonprofit corporation which employs fewer than 25 full-time employees.
(e) "State agency" does not include the citizens utility board.
(f) "Substantially justified" means having a reasonable basis in law and fact.
(3) *In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.*
(4) *In determining the prevailing party in cases in which more than one issue is contested, the examiner shall take into account the relative importance of each issue. The examiner shall provide for partial awards of costs under this section based on determinations made under this subsection.*
(5) *If the hearing examiner awards costs under sub. (3), he or she shall determine the costs under this subsection, except as modified under sub. (4). The decision on the merits of the case shall be placed in a proposed decision and submitted under ss. 227.47 and 227.48. The prevailing party shall submit, within 30 days after service of the proposed decision, to the hearing examiner and to the state agency which is the losing party an itemized application for fees and other expenses, including an itemized statement from any attorney or expert*

witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The state agency which is the losing party has 15 working days from the date of receipt of the application to respond in writing to the hearing examiner. The hearing examiner shall determine the amount of costs using the criteria specified in s. 814.245 (5) and include an order for payment of costs in the final decision.

(6) *A final decision under sub. (5) is subject to judicial review under s. 227.52. If the individual, small nonprofit corporation or small business is the prevailing party in the proceeding for judicial review, the court shall make the findings applicable under s. 814.245 and, if appropriate, award costs related to that proceeding under s. 814.245, regardless of who petitions for judicial review. In addition, the court on review may modify the order for payment of costs in the final decision under sub. (5)*

(7) *An individual is not eligible to recover costs under this section if the person's properly reported federal adjusted gross income was $150,000 or more in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the case. This subsection applies whether the person files the tax return individually or in combination with a spouse.*

(8) *If a state agency is ordered to pay costs under this section, the costs shall be paid from the applicable appropriation under s. 20.865 (1) (a), (g) or (q).*

(9) *Each state agency that is ordered to pay costs under this section or that recovers costs under sub. (10) shall submit a report annually, as soon as is practicable after June 30, to the chief clerk of each house of the legislature, for distribution to the appropriate standing committees under s. 13.172 (3), the number, nature and amounts of the claims paid, the claims involved in the contested case in which the costs were incurred, the costs recovered under sub. (10) and any other relevant information to aid the legislature in evaluating the effect of this section.*

(10) *If the examiner finds that the motion under sub. (3) is frivolous, the examiner may award the state agency all reasonable costs in responding to the motion. In order to find a motion to be frivolous, the examiner must find one or more of the following:*

(a) The motion was submitted in bad faith, solely for purposes of harassing or maliciously injuring the state agency.

(b) The party or the party's attorney knew, or should have known, that the motion was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

2. Sec. 814.245(5), Stats.:

(5) *If the court awards costs under sub. (3), the costs shall include all of the following which are applicable:*

(a) The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the case and reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon

prevailing market rates for the kind and quality of the services furnished, except that:
1. No expert witness may be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency which is the losing party.
2. Attorney or agent fees may not be awarded in excess of $150 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.
(b) Any other allowable cost specified under s. 814.04(2).

3. Sec. 814.04(2), Stats.

(2) Disbursements. *All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified and other copies of papers and records in any public office; postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery; depositions including copies; plats and photographs, not exceeding $100 for each item; an expert witness fee not exceeding $300 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.*

4. Sec. PC 5.05, Wis. Adm. Code:

(1) *GENERALLY. Each party seeking an award of fees, costs or both shall file a motion and all of the following supporting documentation:*
(a) The number of hours for which compensation is sought, itemized according to the work that was performed, the date it was performed, the hours claimed for the work and the individual who performed the work;
(b) The hourly rate customarily charged by each individual for whom compensation is sought;
(c) Other factors that affect the computation of fees or costs, as determined by the judiciary and by decisions of the commission;
(d) Documentation of costs for which the party seeks reimbursement.

(3) *MOTION RAISED UNDER S. 227.485, STATS. Motions for fees and costs raised under s. 227.485, Stats., shall be heard under the standards and procedures noted in s. 227.485, Stats.*

B. Applicability of EAJA to "PA" appeals brought under 230.44 and .45, Stats.

The Commission has authority to award attorney's fees against respondent state agencies after finding liability under the Fair Employment Act and to award fees under the Equal Access to Justice Act, irrespective of the decision in WIS. DEPT. OF TRANS. V. WIS. PERS. COMM., 176 WIS.2D 731, 500 NW2D 664 (1993), which held that the Personnel Commission lacked the authority to order a state agency to pay costs and attorney's fees related to a discovery motion. KEUL V. DHSS, CASE NO. 87-0052-PC-ER (PERS. COMM. 2/3/94)

C. Gross Income Eligibility Requirement

The fee request was denied where, in response to request, Respondents identified Appellant's failure to satisfy gross income eligibility requirement and Appellant, who appeared pro se, did not respond. DNR & OSER (SOLIN), DEC. NO. 31424-A (WERC, 3/06); CITING SHOWSH V. DATCP, CASE NO. 87-0201-PC (PERS. COMM. 11/28/88); REHEARING DENIED 3/14/89; REVERSED ON OTHER GROUNDS BY BROWN COUNTY CIRCUIT COURT, SHOWSH V. WIS. PERS. COMM., 89-CV-445, 6/29/90; AFFIRMED BY COURT OF APPEALS, 90-1985, 4/2/91.

D. The particular costs that may be included or are excluded

1. Where were the costs generated? (Which forum?)

The Commission lacks authority to award fees that arose from ancillary proceedings before another agency that were undertaken in connection with the contested case. BRENON V. UW, CASE NO. 96-0016-PC (PERS. COMM. 11/19/99); AFFIRMED, BOARD OF REGENTS V. STATE PERSONNEL COMM., 2002 WI 79; 254 WIS.2D 148, 646 N.W.2D 759; ALSO, DUELLO V. UW-MADISON, CASE NO. 87-0044-PC-ER (PERS. COMM. 3/9/90); MCCREADY & PAUL V. DHSS, CASE NO. 85-0216, 0217-PC, (PERS. COMM. 9/10/87)

However, costs incurred in connection with judicial review proceedings which resulted in the reversal of the Commission's adverse decision are implicitly authorized. KUMRAH V. DATCP, CASE NO. 87-0058-PC (PERS. COMM. 4/17/90)

The attorneys fees that were attributable to the proceedings before the Commission but were not directly related to the Appellants' successful motion for summary judgment are recoverable. MCCREADY & PAUL V. DHSS, CASE NO. 85-0216, 0217-PC (PERS. COMM. 9/10/87)

2. Who generated the fees?

Attorney fees incurred by an employee in preparing his case (even though the employee appeared *pro se* at hearing) are reimbursable where there was evidence of a valid attorney-client relationship. BROOKE V. UW & DER, CASE NO. 99-0034-PC (PERS. COMM. 5/15/00)

Law clerk and paralegal services may properly be awarded under the EAJA's reference to attorney fees. DER V. WIS. PERS. COMM. (ANDERSON), DANE COUNTY CIRCUIT COURT, 87CV7397, 11/7/88

It is not unreasonable to allow recovery for hours spent by a more senior attorney who was serving in a supervisory capacity to the appellants' attorney where it could reasonably be assumed that the involvement by the senior attorney was part of the delivery of legal services to the client and served to advance the client's interests. MCCREADY & PAUL V. DHSS, 85-0216, 0217-PC, 9/10/87

To the extent that a party is properly represented by a non-lawyer, these are the "agents" referred to in Sec. 814.245(5)(a)2. DER V. WIS. PERS. COMM. (ANDERSON), DANE COUNTY CIRCUIT COURT, 87CV7397, 11/7/88

But a professional investigator's fees cannot be recovered. HIGGINS V. WIS. RACING BD., CASE NO. 92-0020-PC (PERS. COMM. 3/31/94)

And fees for a pro se litigant as compensation for the time he or she spends on the case are not authorized for payment under §227.485, Stats. HEIKKINEN V. DOT, CASE NO. 90-0006-PC (PERS. COMM. 4/16/90)

3. Exceeding the statutory base rate for attorney fees (can be premised on either an increase to the cost of living or a "special factor")

[Note: The statutory fee amount was increased from $75 to $150 per hour by 200 Wis. Act 145, which was enacted March 15, 2004.]

The base date for determining an increase in the cost of living is the date the law (now amendment) was enacted (now March 2004). The formula for calculating the appropriate cost of living increase is $x/150 = CPI_b/CPI_a$, where a = the month of enactment and b = the month of the most recent CPI figure available. CPI is based on the "All Items" portion of the Consumer Price Index for All Urban Consumers. STERN V. DHFS, 222 WIS.2D 521, 588 N.W.2D 658 (CT. APP. 1998) (FN. 3)

"Special factor," including a "limited availability of qualified attorneys" is applied in STERN V. DHFS, 222 WIS.2D 521, 588 N.W.2D 658 (CT. APP. 1998); HIGGINS V. WIS. RACING BD., 92-0020-PC, 3/31/94

But the prevailing market rate and the presence of a form of contingency fee contract are not "special factors." ARNESON V. UW, 90-0184-PC, 5/14/92

4. Other recoverable costs

a. The $50 fee for filing the appeal with the Commission. BROOKE V. UW & DER, CASE NO. 99-0034-PC (PERS. COMM. 5/15/00)

b. Postage. SHEW V. DHSS, 92-0506-PC, 3/29/94

5. Other non-recoverable costs[1]

The "allowed by law" language restricts the costs recoverable to those categories specified in §814.04(2), Stats. DER V. WIS. PERS. COMM. (ANDERSON), DANE COUNTY CIRCUIT COURT, 87CV7397, 11/7/88:

> Sec. 814.245(5)(b) allows for recovery of "Any other allowable cost specified under s. 814.04(2)." As noted above, this section qualifies the costs recoverable by use of the phrase "allowed by law." If any costs expended which could be found to be necessary were recoverable, there would be no need for the legislature to have listed any specific items. This court reads the "allowed by law" language to restrict the costs recoverable to the categories specified in the listing that follows. The qualifier "necessary" which precedes it acts as a check on the awarding tribunal to insure that only a cost in that listing which is truly necessary in the particular case will be allowed, and the word "all" is intended to make clear that any and all of the costs listed, if incurred in a particular case, may be recovered in that action.

a. Cost of preparing a hearing transcript and a copy of the transcript. HIGGINS V. WIS. RACING BD., 92-0020-PC, 3/31/94

b. Costs associated with duplication of hearing tapes. BROOKE V. UW & DER, CASE NO. 99-0034-PC (PERS. COMM. 5/15/00)

6. Apportioning costs (when there has been something less than total success for the employee)

In an appeal from two suspensions which was decided in favor of the appellant on the ground that respondent failed to provide adequate hearings prior to imposing the suspensions, where the parties stipulated to an issue that did not include a separate due

[1] The Personnel Commission's ruling in RENTMEESTER V. WIS. LOTTERY, CASE NO. 91-0243-PC (PERS. COMM. 9/9/94) that rejected a request for photocopying costs has been superseded by changes to Sec. 814.04(2), Stats.

process issue, the respondent's contention that appellant's costs should be limited to so much of the costs as could be apportioned to the procedural due process question because the Commission did not reach the just cause question, was rejected. RENTMEESTER V. WIS. LOTTERY, CASE NO. 91-0243-PC (PERS. COMM. 9/9/94)

In an appeal from two suspensions, where there was no factual dispute about the pre-disciplinary procedures that were involved, there were only a few witnesses as to the alleged facts which served as the basis for the discipline and the law in these areas was rather straightforward, the appellant's allocation of 1/3 of her total legal costs and fees to her appeal was excessive where the appeal was heard on a consolidated basis with two other cases with respect to which appellant did not prevail and the issues surrounding the other cases were much more complicated from both a factual and legal perspective. Appellant's request for 131.5 attorney hours was reduced to 60 hours which was what respondent contended was the maximum amount of time necessary to litigate the appeal. RENTMEESTER V. WIS. LOTTERY, CASE NO. 91-0243-PC (PERS. COMM. 9/9/94)

E. Procedural topics

1. Timing of the request

Where the Appellant failed to submit the application within 30 days of the commencement of the filing period, the Commission lacked subject matter jurisdiction to consider the request. SONNLEITNER V. DHSS, CASE NOS. 94-1055-PC & 96-0010-PC (PERS. COMM. 4/19/00); ALSO SEE DOYLE V. DNR & DMRS, CASE NO. 86-0192-PC (PERS. COMM. 2/8/89), REHEARING DENIED, 3/17/89.

Sub. (4) requires a party who prevails in an agency's proposed decision to seek costs within 30 days of the proposed decision, thereby permitting the hearing examiner to make appropriate findings on entitlement to, and amount of, costs to be awarded. Any disputes regarding that decision can then be resolved, along with the merits of the underlying matter, in one final decision. GORDON V. STATE MEDICAL EXAMINING BOARD, 225 WIS. 2D 552, 593 N.W.2D 481 (CT. APP. 1999)

But see DOYLE V. DNR & DMRS, CASE NOS. 86-0192-PC, 87-0007-PC-ER (PERS. COMM. 11/3/88) (Appellant's request was premature in that it was filed before a decision on the merits was issued but he was permitted to renew his request.)

2. Amending the request or supplementing it

The statutory framework which provides for the submission of an application for costs within 30 days after service of the proposed decision and for submission of a response within 15 working days of respondent's receipt of the application does not prohibit either amendments or replies. Appellants were permitted, more than 30 days after the decision on the merits of their appeal, to file an amendment to their fee application to

address respondent's assertion that their application was fatally defective because it did not establish that appellants met the maximum income criterion. OLSON ET AL. V. DER, CASE NO. 92-0071-PC, ETC. (PERS. COMM. 12/5/94)

The Commission lacked the authority to consider appellant's supplementary motion for attorney's fees and costs arising from attempts by appellant's counsel to obtain full compliance or a compromise settlement with respect to the remedy ordered by the Commission where the decision and order was served on May 15 and the supplementary motion was filed on August 26. ARNESON V. UW, CASE NO. 90-0184-PC (PERS. COMM. 11/13/92)

*3. **Determining costs when there was no hearing on the merits***

When a case is decided on a due process question without reaching the merits of the just cause question, it is nevertheless appropriate to determine whether the discharge decision was substantially justified for purposes of deciding the question of fees. KRANIAK V. DHFS, CASE NO. 02-0027-PC (PERS. COMM. 2/21/03); VACATED ON OTHER GROUNDS, KRANIAK V. DHFS, CASE NO. 02-0027-PC (WERC, 10/04)

The letter of discipline became a moot issue when appellant accepted a voluntary demotion and respondent withdrew the letter, but at the subsequent hearing on the question of fees and costs, respondent met its burden of showing it was substantially justified in imposing the disputed discipline. KLEMMER V. DHFS, CASE NO. 97-0054-PC, (PERS. COMM. 10/9/98)

Where the record was insufficient to conduct the analysis of whether appellant was a prevailing party and whether respondent's position was substantially justified, the parties were directed to participate in a conference with the Commission to determine whether an economical method existed for further proceedings. The appeal arose from a disciplinary action. Respondent rescinded the discipline after the appeal was filed when appellant voluntarily demoted to a lower-classified position in a different institution. KLEMMER V. DHFS, CASE NO. 97-0054-PC, (PERS. COMM. 10/9/98)

When a case is resolved in a way that does not permit an adequate record to be made regarding the issue of substantial justification under the EAJA, such as on a motion to reinstate based on alleged errors of process, there should be a means of supplementing the record but without requiring a second “trial within a trial” in the main case. The Commission chose to rely on the record made in an unemployment compensation case arising from the same discharge decision. KRANIAK V. DHFS, CASE NO. 02-0027-PC (PERS. COMM. 6/3/03); VACATED ON OTHER GROUNDS, KRANIAK V. DHFS, CASE NO. 02-0027-PC (WERC, 10/04)

F. General standards for analyzing whether the agency was "substantially justified"

1. Overview

BRACEGIRDLE V. BOARD OF NURSING, 159 WIS. 2D 402, 425-26, 464 N.W.2D 111 (CT. APP. 1990):

> *In evaluating the government's position to determine whether it was substantially justified, we look to the record of both the underlying government conduct at issue and the totality of circumstances present before and during litigation. . . . To satisfy its burden the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. (Citations omitted.)*

2. Burden of persuasion and standard of analysis

The agency has the burden of establishing that its position was substantially justified. DER V. WIS. PERS. COMM. (ANDERSON), DANE COUNTY CIRCUIT COURT, 87CV7397, 11/7/88; ESCALADA-CORONEL V. DMRS, CASE NO. 86-0189-PC (PERS. COMM. 4/2/87)

Where appellant did not appear at the hearing on whether she was entitled to fees and costs under the Equal Access to Justice Act, she was deemed to have admitted the accuracy of the evidence adduced at the hearing, pursuant to Sec. PC 5.03(8), Wis. Adm. Code. KLEMMER V. DHFS, CASE NO. 97-0054-PC (PERS. COMM. 10/9/98)

The standard of proof falls between an arbitrary and frivolous action and an automatic award to the prevailing party. The standard is not whether the agency's action had some arguable merit. A "novel but credible extension or interpretation of the law" is not grounds for finding that a position lacks substantial justification. See ESCALADA-CORONEL V. DMRS, 86-0186-PC, 4/2/87. HIGGINS V. WIS. RACING BD., CASE NO. 92-0020-PC (PERS. COMM. 3/31/94); SHEELY V. DHSS, 150 WIS. 2D 320, 338 N. 10, 426 N.W.2D 367 (CT. APP. 1988)

3. Scope of the conduct and legal theories that are analyzed

The Commission will look to both the position of the agency on the underlying transaction that triggered the administrative proceeding and its position in the administrative proceeding for purpose of determining whether the agency's "position" was substantially justified as provided in the law. DAVIS V. ECB, CASE NO. 91-0214-PC (PERS. COMM. 12/5/94); ESCALADA-CORONEL V. DMRS, CASE NO. 86-0189-PC (PERS. COMM. 4/2/87)

Where it was concluded that respondent was substantially justified in taking its primary positions during the administrative proceeding, it was unnecessary to analyze each specific argument advanced by the respondent in the case. DAVIS V. ECB, CASE NO. 91-0214-PC (PERS. COMM. 12/5/94)

G. Examples of EAJA rulings according to the jurisdictional basis for the PA action

1. Generally

Costs were awarded where the agency had violated the unequivocal language of separate administrative rules that had been adopted by the same agency. STERN V. DHFS, 212 WIS. 2D 393, 569 N.W.2D 79 (CT. APP. 1997)

An appellant before an administrative agency such as the Commission can anticipate that the respondent agency will follow its precedents unless it provides a rational and reasonable basis for departing from them. However**,** if the agency takes a position contrary to a Commission precedent, while it presumably would be subject to rejection by the Commission, it would not be subject to the imposition of costs pursuant to Sec. 227.485, Stats., as long as it had a reasonable basis in law for its position. PEARSON V. UW, CASE NO. 84-0219-PC (PERS. COMM. 2/12/97)

There were sufficient plausible analogies in case law to support a reasonable argument that respondent had the lawful authority not to enforce a statutory provision prohibiting a nonresident from competing for a position in the absence of a determination of a critical need, where respondent relied on an attorney general's opinion that the provision was unconstitutional. Respondent was substantially justified in its reliance on the attorney general’s opinion. SMITH V. DMRS, CASE NO. 90-0032-PC (PERS. COMM. 1/5/96); AFFIRMED BY DANE COUNTY CIRCUIT COURT; SMITH V. SHAW ET AL., 90 CV 5059, 96 CV 283, 12/10/96

Costs were denied where there was a reasonable basis in law for respondent's argument that a previous decision of the Commission was inapplicable to the appellant's situation and where a second question presented by the case was apparently one of first impression. LYONS V. WGC, CASE NO. 93-0206-PC (PERS. COMM. 2/20/95)

Appellant's petition for attorney's fees and costs was granted where respondent narrowly read the meaning of the word "act" in Sec. 230.36(3)(c)3., Stats. for which it did not have a "reasonable basis in law for the theory propounded." SHEW V. DHSS, CASE NO. 92-0506-PC (PERS. COMM. 3/29/94)

An example of an EAJA analysis where the parties had submitted the merits of their dispute on a stipulation of fact: SHEW V. DHSS, CASE NO. 92-0506-PC (PERS. COMM. 3/29/94)

An example of an EAJA analysis addressing the reasonableness of Respondent's posture during disputes arising in the remedy portion of the case. BRENON V. UW, CASE NO. 96-0016-PC (PERS. COMM. 11/19/99) [BOARD OF REGENTS V. STATE PERSONNEL COMM. (BRENON), 2002 WI 79, 254 WIS. 2D 148, 646 N.W.2D 759, affirmed the decision on fees that was issued in an interim decision on 6/23/98, as well as the subsequent decision on fees dated 11/19/99]

2. EAJA rulings in appeals filed pursuant to 230.44(1)(b): classification

In an appeal of a reallocation decision arising from a survey, the Commission examined the reasonableness of DER's conduct at the time of the survey process and the reallocation itself, as well as the period after the reallocation, which includes the appeal. OLSON ET AL. V. DER, CASE NOS. 92-0071-PC, ETC. (PERS. COMM. 3/9/95)

Where the determining factual issue in the case was whether appellants had the requisite supervisory duties, respondent was substantially justified where the documentary evidence lent strong support to respondent's case but the testimony of a witness lent strong support to the appellants' case. VON RUDEN ET AL. V. DER, CASE NOS. 91-0149-PC, ETC. (PERS. COMM. 11/17/95)

No costs were awarded to appellant relating to his successful appeal of the decision to deny his request for reclassification of his position where respondent was substantially justified in relying on information gained from appellant's previous supervisor regarding the time spent by appellant on certain duties and significant areas of dispute existed throughout the administrative proceedings which were unresolved by the hearing record. BRIGGS V. DNR & DER, CASE NO. 95-0196-PC (PERS. COMM. 10/22/96)

Respondent lacked a reasonable basis for its decision to deny reclassification where, inter alia, respondent's personnel specialist had little knowledge about the specific responsibilities of those "comparable" positions that were presented by the agency as evidence of the correctness of its decision. ANDERSON ET AL. V. DER, CASE NO. 86-0098-PC, (PERS. COMM.11/18/87); AFFIRMED IN PART, REVERSED IN PART BY DANE COUNTY CIRCUIT COURT, DER V. WIS. PERS. COMM., 87CV7397, 11/7/88 (the effect of the decision was to affirm the Commission's decision in all respects except as to the award of copying charges and the charge for tape recordings of the hearings)

The inconsistency between the recollection of Respondent's key witness and Respondent's own hearing exhibits should have been evident to Respondents prior to hearing. BROOKE V. UW & DER, CASE NO. 99-0034-PC (PERS. COMM. 5/15/00)

An example of a thorough review of the various contentions advanced by the Respondent is OLSON ET AL. V. DER, CASE NOS. 92-0071-PC, ETC. (PERS. COMM. 3/9/95)

Appellant was not entitled to fees where the underlying legal question turned on an interpretation of a policy which the agency had promulgated and administered, there were no provisions in any of the statutes, rules or policies potentially governing the transaction which specifically addressed the question presented by the case, and in its brief of the merits, the employee acknowledged that the "existing regulatory scheme [was] of debatable applicability and . . . highly ambiguous as regards the situation presented by this appeal." ZENTNER V. DER, CASE NO. 93-0032-PC (PERS. COMM. 8/18/94)

Fees were denied where respondent followed its standard practice in terms of analyzing positions for reallocation and relied on the appellants' official position descriptions as well as management's opinion as to the nature of the work performed and class level. OLSON ET AL. V. DER, CASE NOS. 92-0071-PC, ETC. (PERS. COMM. 3/9/95)

The appellants were not entitled to fees and costs where the application of the classification specifications to the duties and responsibilities of appellants' positions did not lead to an obvious result, the positions were not specifically identified in the position standard and the language of the position standard was general and required the exercise of discretion in its interpretation and application. CHRISTOFFERSON ET AL. V. DER & UW, CASE NO. 90-0058-PC, ETC. (PERS. COMM. 2/7/91)

Respondent was substantially justified in taking its position relating to the reallocation of the appellants' positions, where respondent conducted the survey in its usual manner, where the type of analysis involved required weighing of evidence, opinion, and argument, distinguishing ANDERSON ET AL. V. DER, CASE NO. 86-0098-PC (PERS. COMM. 11/18/87). MANTHEI ET AL. V. DER, CASE NO. 86-0116,ETC.-PC (PERS. COMM. 1/13/88)

Additional examples: BROOKE V. UW & DER, CASE NO. 99-0034-PC (PERS. COMM. 5/15/00)' FREDRICK V. DPI & DER, DEC. NO. 30879-A (WERC, 7/04)

3. EAJA rulings in appeals filed pursuant to 230.44(1)(c): discipline cases

Respondent had failed to sustain its just cause burden with respect to two of the three incidents of alleged misconduct but still had a reasonable basis for its action where the Commission had disagreed as to whether certain statements made by the appellant were actually threatening and where the respondent had relied on the information available to it at the time the decision was made to impose discipline. SHOWSH V. DATCP, CASE NO. 89-0043-PC (PERS. COMM. 7/2/90); AFFIRMED BY BROWN COUNTY CIRCUIT COURT, SHOWSH V. WIS. PERS. COMM., 90 CV 1001, 7/25/90

Fees and costs were denied where the case turned on what had occurred during an altercation involving appellant and another employee between whom there had been a long history of animosity and whose accounts of the incident were diametrically opposed. Although the Commission concluded that respondent failed to sustain its

burden of proving the appellant had pushed or tripped the other employee, both witnesses had credibility problems and the agency had made its suspension decision after conducting an internal investigation and making its own credibility determinations with respect to the differing accounts. POWERS V. UW, CASE NO. 88-0029-PC (PERS. COMM. 6/27/90)

In an appeal from a demotion, the determination of whether there is a reasonable connection between the facts alleged and the legal theory advanced is whether the underlying facts provided a reasonable basis for the imposition of a demotion (subsequently reduced by the Commission to a 30 day suspension). HERRING V. DHFS, CASE NO. 01-0077-PC (PERS. COMM. 11/11/02)

Costs were denied where the agency's rule interpretation, which served as the basis for the underlying layoff decision, had a reasonable basis in law, where there were several identifiable policy concerns that served as the basis for the respondent's interpretation and where the respondent's interpretation was relatively longstanding. GIVENS V. DILHR, CASE NO. 87-0039-PC (PERS. COMM. 3/28/88); AFFIRMED BY DANE COUNTY CIRCUIT COURT, DILHR V. WIS. PERS. COMM. (GIVENS), 88-CV-2029, 1/6/89

In an appeal of a constructive demotion, the agency's underlying action and the positions it advanced during the administrative proceeding were substantially justified, in part because the concept of constructive demotion is not found in the literal language of the civil service code, but relies on an extension of a court decision. DAVIS V. ECB, CASE NO. 91-0214-PC (PERS. COMM. 12/5/94)

In an appeal of a layoff decision, costs were granted where there was no basis on which to conclude that DMRS had actually approved the specific rule interpretation that led the agency to take the appealed action. KUMRAH V. DATCP, CASE NO. 87-0058-PC (PERS. COMM. 4/17/90)

Attorney fees were denied where a one-day suspension was reduced to a written reprimand. The one-day suspension was consistent with respondent's progressive discipline policy and a second rationale for respondent's decision, though not convincing, was not without some reasonable degree of support. LARSEN V. DOC, CASE NO. 90-0374-PC (PERS. COMM. 8/26/92)

Respondent's agents misled one appellant as to the severity of the matter and as to whether management was going to pursue a particular work rule violation. As to both appellants there were various failures of notice and failure to follow internal policy as to predisciplinary procedures. MCCREADY & PAUL V. DHSS, CASE NO. 85-0216, 0217-PC (PERS. COMM. 9/10/87)

Additional examples: OFFICE OF JUSTICE ASSISTANCE (GROHMANN), DEC. NO. 31021-A (WERC, 5/05); UNIVERSITY OF WISCONSIN SYSTEM (ROBINSON), DEC. NO. 30989-B (4/05); RENTMEESTER V. WIS. LOTTERY, CASE NO. CASE NO. 91-0243-PC (PERS.

COMM. 9/9/94) (failure to provide adequate hearings prior to imposing the suspensions); ARNESON V. UW, CASE NO. 90-0184-PC (PERS. COMM. 5/14/92) (failure to provide the employee with notice of the charges against him and to warn him that disciplinary action of any kind was being considered)

4. EAJA rulings in appeals filed pursuant to 230.44(1)(d): hiring decisions

Respondent was substantially justified in taking its position where the Commission did not resolve any factual disputes between the parties but relied upon an earlier decision of the Commission in another matter to analyze the legal issue and respondent's concerns that an interpretation (such as was ultimately adopted by the Commission) would interfere with its management prerogatives was not without some reasonable basis. PEARSON V. UW, CASE NO. 84-0219-PC (PERS. COMM. 2/12/97 B)

H. Rulings on costs after a case has gone up on review and been remanded to the Commission

Fees and costs were denied after the circuit court had reversed the Commission's conclusion that the predisciplinary hearing provided to the appellant had been adequate where the threshold question of the applicability of the due process clause to the subject personnel transaction turned on a legal issue as to which there was conflicting precedent and even upon application of the due process clause, it was by no means obvious that respondent failed to provide appellant with adequate notice of the charges against him. SHOWSH V. DATCP, CASE NO. 87-0201-PC (PERS. COMM. 9/5/91)

A circuit court's decision, in the context of a review under ch. 227, Stats., that the Commission's determination in a classification appeal regarding appellant's managerial status was unreasonable, must be taken into consideration in deciding appellant's subsequent fee petition but is not conclusive. In reviewing the request for costs, the issue is not whether the Commission reached an erroneous conclusion of law, but, first, whether respondent relied on a particular contention (cited by the court as legal error by the Commission) as part of its case, and second, if so whether such reliance was substantially justified under the circumstances. MURRAY V. DER, CASE NO. 91-0105-PC (PERS. COMM. 4/6/95); AFFIRMED BY DANE COUNTY CIRCUIT COURT, MURRAY V. WIS. PERS. COMM., 95-CV-0988, 12/15/95

Fees were denied despite a reviewing court's conclusion that the Commission's decision on a mixed question of law and fact did not pass muster under the standards applicable to review under ch. 227, Stats., where the record reflected that respondent's position with respect to the underlying controversy had a reasonable basis in fact and in law. Although the court concluded that the Commission had reached an erroneous conclusion of law, this conclusion was never advanced by, and could not be attributed to, the respondent. MURRAY V. DER, CASE NO. 91-0105-PC (PERS. COMM. 4/6/95); AFFIRMED

BY DANE COUNTY CIRCUIT COURT, MURRAY V. WIS. PERS. COMM., 95-CV-0988, 12/15/95

The appellant was entitled to fees arising from an appeal of a layoff decision where a reviewing court reversed the Commission's decision affirming the respondent's decision and called the Commission's (and by necessary implication, respondent's) interpretation of the administrative rule underlying the respondent's action "unnatural and contorted." KUMRAH V. DATCP, CASE NO. 87-0058-PC (PERS. COMM. 4/17/90)

Appellant's motion for fees and costs in an appeal of a decision with respect to appellant's starting salary was denied where the Commission's decision upholding the respondent's posture that equitable estoppel should not be applied was reversed upon judicial review and where there was nothing in the reviewing court's decision on which to conclude that the Commission's decision did not have some arguable merit. SIEBERS V. DHSS, CASE NO. 87-0028-PC (PERS. COMM. 6/15/90)

I. Counter motion for costs (agency contends the prevailing party's EAJA request was frivolous)

The Commission concluded that appellant's motion for costs was not frivolous where in its underlying decision on the merits the Commission concluded there was no rational basis for the inconsistent treatment of applicants resulting from exceptions to a stated policy and where the appellant's motion generated a matter of first impression. The Commission, therefore, denied respondent's counter-motion for costs. ESCALADA-CORONEL V. DMRS, CASE NO. 86-0189-PC (PERS. COMM. 4/2/87)