STATE OF WISCONSIN PERSONNEL COMMISSION

BRENDA LYONS,

Appellant,

v.

Chairperson, WISCONSIN GAMING COMMISSION,

Respondent.

Case No. 93-0206-PC

INTERIM DECISION AND ORDER

A Proposed Decision and Order was issued in the above-noted case on August 29, 1994, with both parties having an opportunity to file written and oral arguments. On October 4, 1994, a telephone conference was held during which the examiner granted a request from the Department of Employment Relations (DER) to file an amicus curiae brief. The final brief was submitted on October 21, 1994. Oral arguments were heard before the full Commission on October 26, 1994.

After considering the arguments of the parties and consulting with the examiner, the Commission adopts the Proposed Decision and Order as its own, with changes denoted herein by lettered footnotes.

DECISION

A hearing was held in the above-noted case on March 17 and 18, 1994. The parties made arrangements for preparation of a transcript, a copy of which was shared with the Commission by letter dated April 19, 1994. The parties requested and were provided an opportunity to submit post-hearing briefs, with the final brief filed on July 14, 1994.

The hearing issue agreed to by the parties at a prehearing conference held on November 30, 1993, is shown below.

> Was appellant's layoff from her position of Steward 2, effective October 1, 1993, for just cause?

The record citations in the findings of fact are provided in an attempt to give examples of the evidence upon which the findings are based. The citations are not intended to be all-encompassing.

FINDINGS OF FACT

Lyons' Employment History with WGC

1. Ms. Lyons worked for WGC since about July 5, 1990. She began working at the Fox Valley Greyhound Park (FV track) on or about July 6, 1991. She was promoted to a Steward 2 position in an 85% position. (T 181) (Exh. R18, Lyons Depo., p. 9-11)[A]

2. Ms. Lyons attended school while employed at the FV track. WGC granted her requests for schedule changes to enable her to attend school, with one exception where changes could not be made due to a track emergency. Ms. Lyons planned to continue going to school, including during the two semesters starting in or around September 1993 and January 1994. (T 29, 102-104, 107-108, 123-127, 166-167, 198-199, 208-209)

Layoff Procedure Followed by WGC

3. Linda Minash was involved in the layoff procedure as WGC's Personnel Director. In July 1993, Ms. Minash received notice from the Division of Racing that the FV track was in financial trouble and in reorganization bankruptcy. She notified the union of the potential for closure of the FV track by letter dated July 22, 1993 (Exh. A7) (T 19).

4. Closure became certain on or about August 11, 1993, when the FV track changed to closure/liquidation bankruptcy. WGC Chairman Tries directed Ms. Minash to immediately meet with staff at the FV track. (T 19, 129-130).

5. Ms. Lyons' position was represented by the Wisconsin Professional Employes Union at the time of layoff but a collective bargaining agreement had not been negotiated. Accordingly, WGC conducted the layoffs under the administrative code provisions covering non-represented employes (Ch. ER-Pers 22, WAC). (Exh. R2) Ms. Lyons did not contend at hearing that WGC erred by proceeding in this manner.

A The reference to Exh. R18 was added to clarify that the deposition is part of the hearing record.

6. Ms. Minash and Scott Scepaniak, Administrator of WGC's Racing Division, met with FV track employes as a group on the evening of August 11, 1993. They met with each individual employe the following day. (T 19-20, 24, 130, 132, 159)

7. Ms. Minash covered several topics on August 11, 1993, during the group meeting. She tried to provide all information concerning the layoff process, as well as employe options. She discussed how long they would remain on payroll, what a voluntary layoff was, what their alternatives would be under the regular layoff procedure, eligibility for unemployment compensation (UC) benefits; as well as the supporting statutory and rule authorities. She also informed employes that WGC would pay moving expenses, a stipend and temporary lodging if any affected employe chose to relocate for another job. (T 22-23, 131, 134, 137, 209-210) (Exh. R17, Minash Depo, p. 12)[B] Ms. Lyons admitted she did not attend the entire meeting, or at least did not listen to all the information given at the group meeting. (T 155-156)

8. Ms. Minash explained at the group meeting that WGC would not contest any UC claim whether the employe chose voluntary layoff, or whether they chose to proceed with the regular layoff process. She cautioned, however, that UC eligibility might be affected for someone who chose to proceed with the regular layoff process and who later refused the employment options offered under that process. (See s. 108.04(8), Stats., regarding potential UC benefit reduction for refusal of certain work.) (T 42-48, 132)

9. Ms. Lyons was the most senior employe in her layoff group, which included Board Stewards only.[C] (T 41-42, 65) Mr. Ken McDaniel also was a Board Steward but at a lower classification and with less seniority than Ms. Lyons.

B The reference to Exh R17 was added to clarify that the deposition is part of the hearing record.

C Conflicting information existed in the record regarding the meaning of the term "approved lay off group". At oral arguments, the parties agreed the term means the Board Steward classification only. Changes were made to par. 9, to reflect the parties agreed-upon meaning.

10. Ms. Minash met with Ms. Lyons for an individual meeting. Mr. Scepaniak participated, but may have arrived late. (T 132-135, 157) The options available to Ms. Lyons were discussed. Ms. Lyons had the option to choose a voluntary layoff, or to proceed with the regular layoff process. Ms. Minash explained that if Ms. Lyons chose to proceed with the regular layoff process, then certain lateral-transfer opportunities would be available. Specifically, Ms. Lyons would have the option to transfer to a Steward 2 position at the St. Croix track in Hudson, or to some auditor positions and a racing assistant position in Madison, or to a Paddock Judge position in Wisconsin Dells. The position at the St. Croix track was held by a probationary employe who would have had no right to retain the job if Ms. Lyons chose to transfer, as provided in ER-Pers 22.04(3), Wis. Admin. Code (WAC). The transfer positions in Madison and Wisconsin Dells were vacant. Ms. Lyons said she did not wish to move. (T 24-29, 50-60, 64, 137-139, 158, 189-190, 192) (Exh. R17, Minash Depo, pp. 22-26, 39-40) Although Ms. Minash did not characterize the transfer opportunities as formal offers of work, Ms. Lyons correctly understood that because of her seniority, she essentially had the first choice of those jobs if she wanted them. (T 176-177, 200-202)

11. The probationary employe who held the position at the St. Croix track was Ms. Cheryl Giebel. If Ms. Lyons had chosen to transfer to the St. Croix position, Ms. Giebel could have bumped Mr. Wayne McKee, a Paddock Judge at the St. Croix track. The record does not indicate that Mr. McKee had rights to bump any other employe. (T 94-95, 97-102) (Exh. R5)

12. Within a few days after the individual meetings, all affected employes at the FV track including Ms. Lyons, received from Ms. Minash a document entitled "Alternatives to Layoff for Nonrepresented Employes". (Exh. R6) (T 39-40) (Exh. R17, Minash Depo, p. 12) The option of voluntary layoff was not described in the document. Rather, the document covered options available if an employe chose to proceed with the regular layoff process. (T 48-43) Ms. Minash distributed and discussed this document at the group meeting. (T 132-133)

13. The employes were given one week from the meeting on August 12, 1993, to decide if they wanted to chose voluntary layoff or to proceed

with the regular layoff process. (T 27, 71-72) After the one-week period, Ms. Minash made a follow-up call to Ben Suthard at the FV track asking for letters from the employes who wanted to opt for voluntary layoff, so she could proceed with making formal options/alternatives known to employes who wished to proceed with the regular layoff process. (T 70-73) Ms. Lyons misinterpreted Mr. Suthard's request as a supervisor's order to submit a voluntary layoff letter. (T 160-161, 165, 193-194) Ms. Lyons' confusion most likely was due to her failure to listen to the entire group presentation.[D] Ms. Lyons should have known that a letter requesting voluntary layoff was required only if Ms. Lyons' decision was to choose voluntary layoff. (Also, see Exh. R17, Minash Depo, pp. 26-27.)

14. WGC told each employe about available options at the group and individual meetings on August 11 & 12, 1994. Also, WGC expected the employes to make decisions based upon the information given. Further, ER-Pers 22.07, WAC, creates a duty for appointing authorities to keep employes advised of their options in layoff situations. Under these circumstances, WGC was obligated to give each employe correct information about his/her rights under the layoff procedure contained in Ch. ER-Pers 22, WAC; even though the individual meetings could be considered as a preliminary informal step taken prior to commencing the formal layoff process.

15. Ms. Lyons also claimed confusion about her UC benefits. Specifically, Ms. Lyons testified she thought her UC benefits could be jeopardized if she failed to tender the requested voluntary layoff memo mentioned in paragraph 13 above.[E] (T 162-165) Again, WGC had provided correct information about UC benefits and had made no representation that failure to tender a voluntary layoff letter could jeopardize entitlement

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[D] The following material is deleted from par.13: "Ms. Minash, however, provided Ms. Lyons with the correct information. In short, . . .". The deleted material was misinterpreted by WGC to mean that all information provided by Ms. Minash was correct, which was not the intended meaning.

[E] Par. 15 previously contained an incorrect reference the "prior paragraph", rather than a reference to par. 13.

to UC benefits. Ms. Lyons should have been aware of the correct information.

16. On August 20, 1993, Ms. Minash sought and received approval for a temporary layoff plan. (Exh. R1) (T 20, 105-106) Approval was granted by the Division of Merit, Recruitment and Selection (DMRS) in the Department of Employment Relations (DER). The temporary plan provided, in part, as follows:

> Due to the sudden closure of the Fox Valley Greyhound Park, the Wisconsin Gaming Commission is requesting approval to temporarily lay-off four non-represented employees effective August 27, 1993. ... The closure of the Fox Valley Greyhound Park only affects the staff that are employed at that specific track. The classifications of these four positions are: Board Steward, Paddock Judge and Auditor.

17. Ms. Minash sought approval of the final layoff plan by letter dated September 13, 1993. Approval was granted by the DMRS on September 15, 1993. (Exh. R2) The final plan provided, in part, as follows:

> Due to the closing of the [FV track], the [WGC] finds it necessary to layoff a Board Steward 1, Board Steward 2, Paddock Judge 2 and Auditor. . . .
>
> * * *
>
> Georgie Last, Paddock Judge; Linda Berton, Auditor; Brenda Lyons, Steward 2 and Ken McDaniel, Steward 1; will be placed on permanent layoff effective September 24, 1993. These employes are currently on temporary layoff and have been called back to provide backup at other tracks.
>
> * * *
>
> Several meetings have been conducted with the affected staff and their options and alternatives in lieu of layoff were explained, i.e., transfer, demotion or displacement. All of the affected employes were offered alternative positions, outside of the employing unit, in lieu of layoff and chose a voluntary layoff to avoid the hardship of relocation. ...

Lyons' Voluntary Layoff and Resulting Last Day of Work

18. Ms. Minash received a letter from Ms. Lyons, dated August 20, 1993, (Exh. R7) (T 26) which stated as follows:

> Due to the closure of [the FV track], my current work site for the State of Wisconsin, [WGC], and the fact that there is not reasonable employment available (I do not wish to move) through the State of Wisconsin, [WGC], I accept voluntary lay-off. I wish to be considered for any and all position vacancies that occur in the Fox Valley-Oshkosh-Fond du Lac areas.
>
> I am willing to do any and all work available to me through the [WGC]. Please remember that I have an extensive education and have served as back up to many positions at [FV track]. I offer my services at any of the Wisconsin tracks and or in Madison at either [WGC] locations.
>
> I wish to have my leave time continue to be accrued until it is exhausted or until further instructed by me to change the procedure previously stated.

19. Ms. Minash interpreted the second paragraph of Ms. Lyons' letter (as shown in the prior paragraph) to mean Ms. Lyons was willing to work anywhere but only on a temporary, fill-in basis. (T 28, 86-87) Such was Ms. Lyons' intended meaning. (T 178)

20. Ms. Lyons' option of voluntary layoff was formally accepted by WGC by letter dated September 15, 1993, with an effective date of October 1, 1993. (Exh. R8) (T 32-33) Pertinent portions of the letter are shown below.

> This letter is your official notification of [WGC's] acceptance of your choice of a voluntary layoff effective October 1, 1993. [WGC] offered you comparable positions in other employing units and understands your choice to decline the offers due to the necessity to relocate. ...
>
> As previously discussed with you, [WGC] will contact you to work in a backup capacity at other racetracks, when needed. ...
>
> * * *
>
> A restoration register will be maintained for a period of three years from the effective date of the layoff in accordance with Wis. Admin. Code [ER-Pers] 22.10.

21. The layoff date recited in the permanent layoff plan was September 24, 1993. The effective date for Ms. Lyons' layoff was October 1, 1993, because she was chosen to continue working in a temporary, special project. Mr. Scepaniak chose Ms. Lyons for the special project because

he felt she was a capable employe. (T 26, 130-131, 135-137) Her last day of work was on or about September 6, 1993, but she remained on the payroll until October 1, 1993, to exhaust her earned vacation time. (207-208)

22. Ms. Lyons claimed she personally did not know that writing a letter for voluntary layoff disallowed other options, such as demotion under ER-Pers 22.08(2), WAC. (T 156) The claimed misunderstanding may be true. However, Ms. Minash explained the voluntary layoff concept to Ms. Lyons. In short, Ms. Lyons should have known that by choosing voluntary layoff, she would forego alternatives available under the regular layoff process.

23. Ms. Minash offered employment assistance efforts to Ms. Lyons which went beyond Ms. Lyons' entitlement under restoration rights. For example, Ms. Minash offered to contact the Department of Corrections (DOC) on Ms. Lyons' behalf in regard to a training officer vacancy. (T 36, 108-109, 174-175, 187-188)

Voluntary Layoff Concept

24. ER-Pers 22.06, WAC, is the authorizing rule for what Ms. Minash called "voluntary layoffs". (T 83-85, 90-96) The rule refers to these transactions as "voluntary terminations". The rule is shown below in pertinent part with underlining added for emphasis.

> **Procedure for making layoffs.**
> * * *
> (3) The ... employes ... in the layoff group, shall be ranked by seniority ... according to their total continuous service in the approved layoff group. ... Employes shall be laid off according to their continuous service ranking, with the employe with the least continuous service laid off first.
>
> (4) ... [A]n employe with more continuous service in the layoff group may volunteer to be terminated from employment in lieu of the layoff of an employe with less continuous service, with the guarantee that the appointing authority will not challenge the volunteering employe's eligibility for unemployment compensation, unless that employe later refuses a reasonable offer of reappointment.

Alternative Positions--applicable administrative rules

25. A familiarity with certain sections of the administrative code might be helpful in understanding later sections of this decision which discuss Ms. Lyons' options under the regular layoff process. The applicable code sections are noted in the following paragraphs for easy reference.

26. The alternatives available under the regular layoff process are described in ER-Pers 22.08, WAC, which is shown below in pertinent part. The term "employing unit" in ER-Pers 22.08(1)(a)1., WAC, means the FV track only. (T 104) (Exh. R2, p. 1) The term "agency" in ER-Pers 22.08(1)(a)2., WAC, means WGC (T 97); and the term "approved lay off group" includes the classification of Board Steward.[F] (T 42, 65) (Exhs. R1 & R2) (ER-Pers 22.035(1)(a), WAC) The underlining below was added for emphasis.

> **ER-Pers. 22.08 Alternatives to termination from the service as a result of layoff.** If an employe with permanent status in class has received a notice of layoff . . . these alternatives shall be available in the order listed below until the effective date of the layoff. Employes in the same layoff group who are laid off on the same date shall have the right to exercise the following alternatives to termination from the service as a result of layoff in direct order of their seniority, most senior first.
>
> (1) TRANSFER. (a) All employes who have received a notice of layoff have the right to transfer:
>
> 1. Within the employing unit, to any vacancy in the same or counterpart pay range for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in the position; or
>
> 2. Within the agency, to any vacancy in the approved layoff group from which the employe is being laid off for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in the position.
>
> * * *
>
> (2) DEMOTION AS A RESULT OF LAYOFF. If no transfer under sub. (1) is available and if there is a vacancy available for which

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F Par. 26 was amended to reflect the parties' agreed-upon meaning of "approved layoff group".

the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions, in a higher level position than could be obtained through displacement under sub. (3), an appointing authority shall offer the employe a demotion to that vacancy. This offer shall be subject to the criteria for a reasonable offer of appointment under s. ER-Pers 22.09 and the following:

(a) *Within an agency.* An employe may demote to a position in a lower classification in the same agency in lieu of being terminated as a result of layoff.

* * *

2. For pay provisions regarding an employe who is demoted by the appointing authority, as a result of a layoff to the highest level vacancy available for which the employe is qualified, see s. ER 29.03(8)(c).

3. For pay provisions regarding an employe who chooses, with the approval of the appointing authority, to be demoted as a result of layoff to a vacancy which is at a lower level than other available vacancies to which the employe could be demoted, see s. ER 29.03(8)(f) [apparently re-numbered ER 29.03(8)(d)].

27. Reasonable offers of appointment for layoff purposes is described in ER-Pers 22.09, WAC, which is described in pertinent part below. WGC conceded that the "reasonable offer" provisions apply to the alternatives of transfer and demotion under the regular layoff procedure; as well as to offers made after separation from employment due to the layoff. (T 221) The underlining was added for emphasis.

ER-Pers 22.09 Failure to accept reasonable offer of appointment. (1) An employe who has been notified of layoff and fails to accept a reasonable offer of permanent appointment within the agency ... forfeits any further rights to an appointment under ss. ER-Pers 22.08 [see prior paragraph] and 22.10 [restoration rights].

(2) An offer of appointment shall be considered reasonable if it meets the following 5 conditions as of the date of the offer:

(a) The position is one which the employe would be qualified to perform after customary orientation provided to new workers in the position;

(b) The position is the highest level position available within the agency to which the employe could either transfer or demote;

(c) The number of work hours required does not vary substantially from the number of work hours previously worked; and

(d) The position is located at a work site that is within reasonable proximity of the original work site.

(e) The pay range of the position offered is no more than 2 pay ranges or counterpart pay ranges lower than the pay range of the position from which the employe was laid off, unless the employe's rate of pay at the time of layoff is maintained in the position offered.

28. Pay upon demotion is governed by ER 29.03(8), WAC, which provides in pertinent part, as follows:

(8) PAY ON DEMOTION. . . . (b) An employe who voluntarily demotes may receive any base pay rate within the new pay range which is not greater than the last rate received . . .

(c) An employe who exercises a mandatory right of demotion as a result of layoff to the highest level vacancy available for which the employe is qualified within the agency from which the layoff occurred, and an employe who exercises displacement rights and demotes pursuant to s. ER-Pers 22.08(3) shall retain his or her present rate of pay. If the present rate of pay is above the maximum for the new class, it shall be red circled . . .

(d) An employe's pay rate shall be established pursuant to par. (b) if he or she chooses to demote:

1. Within the agency as a result of layoff to a vacancy other than the highest level vacancy available for which the employe is qualified within the agency; ...

Transfer Opportunities Were Not "Reasonable Offers"

29. If Ms. Lyons had decided to proceed through the regular layoff process, she would have had the opportunity to transfer laterally (meaning to a position of the same or counterpart pay range) to positions in Hudson, Madison and Wisconsin Dells (hereafter, collectively referred to as the "Transfer Positions"). (See par. 10 above.) The only Transfer Position meeting the criteria of ER-Pers 22.08(1)(a)2., WAC, as a transfer opportunities "within the agency" to positions in the "approved layoff group" was the Board Steward position at the St. Croix track.[G]

[G] Changes were made to pars. 29-32, to reflect the agreed-upon meaning of "approved layoff group".

30. The St. Croix position also met[H] 4 of the 5 criteria of a "reasonable offer" of work, as listed in ER-Pers 22.09(2)(a), (b), (c) and (e), WAC. In other words, Ms. Lyons would be qualified to perform the Board Steward job, it was the highest level position available for transfer, it involved about the same number of hours as she previously worked and no pay cut would have resulted from Ms. Lyons' acceptance of the St. Croix position.

31. The St. Croix position, however, did[I] not meet the 5th criteria of a "reasonable offer" of work, as required in ER-Pers 22.09(2)(d), WAC. The Hudson position is 241 miles one-way from Ms. Lyons' original work site at the FV track. The distance is too great to expect Ms. Lyons to commute and, therefore, her acceptance would necessitate moving. At hearing, Ms. Minash agreed this was not a "reasonable offer". (T 69-71)

32. [Deleted.][J]

AA3 Positions at the Green Bay District Office

33. No reasonable offer of transfer was made to Ms. Lyons, within the meaning of ER-Pers 22.08(1)(a) and 22.09(2), WAC. Therefore no transfer under ER-Pers 22.08(1)(a), WAC, was available; leaving demotion as a potential option under the regular layoff process, pursuant to ER-Pers 22.08(2), WAC.

34. The Green Bay district office had two vacant AA3 positions at the time of Ms. Lyons' layoff. They were one pay range lower than Ms. Lyons' Steward 2 position and, therefore, were potential demotion opportunities.[1]

H Ibid.

I Ibid.

J Par. 32 is deleted. The paragraph contained a discussion of whether Transfer Positions other than the St. Croix position were "reasonable offers" of work. The agreed-upon meaning of the term approved layoff group, however, does not include these other positions. Accordingly, the paragraph was no longer needed.

1 It appears Ms. Lyons incorrectly believed prior to hearing that the AA3 positions were at the same pay range as her Steward 2 position and, therefore, were potential transfer opportunities for her in lieu of layoff. (T 14)

35. On August 11, 1993, when Ms. Minash conducted the group meetings, she informed the FV track employes that the two Administrative Assistant 3 (AA3) vacancies at WGC's Green Bay district office would not be offered as alternatives to layoff. Rather, those positions were to remain vacant so WGC could redeploy the positions for other uses in WGC. (T 73-82, 205) Furthermore, the Green Bay district office was expected to close and, in fact, did close on November 29 or 30, 1993. (Exh. R17, Minash Depo., p. 28, 46)

36. The AA3 vacancies in Green Bay had not been redeployed for other uses prior to Ms. Lyons' layoff. They had not even been redeployed by the time of hearing, although WGC had been in the process of drafting a reorganization plan. (T 81)[2]

37. WGC made the decision on or about October 1, 1992, not to fill the AA3 positions in any district office as they became vacant and such policy was made to enable WGC to redeploy the positions for other uses. (T 89-90) (Exh. R17, Minash Depo, p. 34-35) The decision affecting all district offices the same and having been made 10 months in advance of WGC's knowledge that FV track would close tends to dispel an inference that such decision was made for the purpose of keeping the opportunities out of range for laid off employes at the FV track.

38. If WGC had chosen to fill the AA3 positions, WGC could have done so. Since the positions had not been redeployeded, WGC had the authority to initiate an action to fill the AA3 positions, as well as the authority to make a permanent appointment to the position.

39. The AA3 vacancies in Green Bay were available vacancies to which Ms. Lyons could have exercised her demotion rights in lieu of lay off. WGC should have presented the vacancies as options to her. She would have

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K/2 WGC contended that the AA3 positions in Green Bay have been "reallocated", meaning "redeployed" or "used for some other purpose" (as opposed to its technical meaning in personnel cases, as noted in ER 3.01(2), WAC). (See Respondent's Reply Brief, p. 5). WGC cited as support, certain testimony from Ms. Minash's deposition. There is a portion of the cited deposition testimony which could be interpreted in support of WGC's assertion. However, Ms. Minash's contrary hearing testimony (T 81), dispels such inference. The first sentence of this footnote was changed to clarify WGC's use of the term "reallocation". Also, the word "reallocation" when used in this context in the text of the proposed decision has been changed to "redeployed".

considered such vacancy, at least until the Green Bay district office closed at the end of November in 1993.[3]

Storekeeper Position at Green Bay District Office

40. Even if the Commission were found to be incorrect regarding the AA3 positions discussed above, WGC still failed to advise Ms. Lyons of her right to demote to the Storekeeper 2 position. The analysis in this section (through paragraph 47) would apply if the Commission is in error regarding the AA3 positions.

41. Ms. Lyons felt she should have been offered a vacant Storekeeper 2 position at the Green Bay district office, which was moved to Milwaukee when the Green Bay district office closed. The storekeeper position [pay range (PR) 7] was seven pay ranges below Ms. Lyons' Steward 2 position (PR-14) at the FV track, and six pay range below Mr. McDaniel's Steward 1 position (PR-13) at the FV track. (T 214-215, Exh. R5)[L]

42. The storekeeper position was presented to Mr. McDaniel as an alternative to layoff, but not to Ms. Lyons. Ms. Minash said the information was not given to Ms. Lyons because it involved a demotion of more than two pay grades and, therefore, would not have been considered a "reasonable offer" for Ms. Lyons under ER-Pers 22.09(2), WAC. (T 204, 214-215, 221-222) Ms. Minash is incorrect.

43. ER-Pers 22.09(2), WAC, contains a general rule that a reduction of more than 2 pay ranges is not a "reasonable offer" of employment. However, the rule goes on to state an exception. Specifically, a job involving a reduction of more than 2 pay ranges would be considered a "reasonable

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[3] Ms. Minash stated at her deposition that Ms. Lyons indicated on August 12, 1993, that Ms. Lyons was not interested in demotion opportunities. (Minash depo, p. 32-33) Ms. Lyons denied she made such a statement at her deposition and it appeared that a misunderstanding arose when Ms. Lyons told Ms. Minash she did not want to take a step backwards. (Lyons' depo, p. 48-49) The examiner concluded that Ms. Lyons' statement was not intended as a blanket rejection of demotion opportunities. (Lyons' depo, p. 48-49) Rather, the reference pertained to her personal reasons for not wanting to move to Wisconsin Dells. (T 189)

[L] Changes were made to par. 41, to correctly reflect the noted pay ranges and related record citations.

offer" if the employe's rate of pay would be maintained in the position offered.

44. Ms. Minash testified that Ms. Lyons' pay would not have been maintained in the storekeeper position because her pay already exceeded the maximum wage for storekeepers. (T 221-222) However, Ms. Lyons' pay would have been retained pursuant to ER 29.03(8), WAC, if this were a voluntary demotion to the highest level vacancy available. (Also see Exh. R3, p. 2) Ms. Minash's incorrect opinion that Ms. Lyons' pay would not have been retained in the storekeeper position was based on Ms. Minash's belief that the storekeeper position was not the highest level vacancy available due to the potential Transfer Positions which were rejected by Ms. Lyons.[M]

45. The storekeeper position was the highest available vacancy for Ms. Lyons. As discussed in paragraphs 29-31 above, no reasonable offer of transfer positions existed within Ms. Lyons' approved lay off group.[N] Also (assumed arguendo), she was not entitled to demote to the AA3 positions in Green Bay. Accordingly, Ms. Lyons' pay would not have been reduced had Ms. Lyons chosen to demote to the storekeeper position.

46. WGC should have told Ms. Lyons that the storekeeper vacancy in Green Bay was available to her as a demotion option in lieu of termination. WGC's failure in this regard was due to human error and not to any impermissible intent on WGC's part.

47. Ms. Lyons would have been willing to consider this demotion opportunity, at least until the end of November, 1993, when the Green Bay district office closed and the storekeeper position was moved to Milwaukee.[4]

M Parenthetical sentence deleted in par. 44, as unnecessary because the Madison and Wisconsin Dells transfer positions were not in the approved lay off group of Board Stewards.

N Amendments were made to par. 45, to reflect the agreed-upon meaning of the term approved lay off group.

4 See footnote #3.

Post-Layoff Opportunities Brought to Ms. Lyons' Attention

48. After the layoffs, WGC informed Ms. Lyons of vacancies to which she was eligible for hire pursuant to her restoration rights. The positions, locations and dates of notification letters are shown in the chart below. (Exh. R9) (T 28-29) Ms. Lyons received the notifications letters. (T 119)

Position	Notice Date	Location
Auditor - Entry	12/21/93	Delevan
Telephone Sales Rep.	1/ 4/94	Madison
Paddock Judge 1 or 2	1/19/94	Wis. Dells
Program Asst. 3	2/17/94	Madison
Program Asst. 2	2/21/94	Milwaukee

49. [Deleted.][O]

50. [Deleted.][P]

CONCLUSIONS OF LAW

1. This case is properly before the Commission, pursuant to s. 230.44(1)(c), Stats.
2. WGC has the burden of proving that the layoff has been conducted in accordance with the applicable statutes and administrative code provisions and that the layoff is not the result of arbitrary and capricious action.
3. WGC failed to met its burden of proof.
4. WGC failed to follow ER-Pers 22.08(2), WAC, by failing to inform Ms. Lyons of demotion opportunities.

O The text in par. 49 was deleted. The offers of work under Ms. Lyons' restoration rights were beyond the scope of hearing, and were offered only to attempt to rebut any inference of bad faith which appellant might raise.

P Ibid.

DISCUSSION

Evidence Rulings-Post Hearing

This section discusses evidence objections on which the examiner reserved ruling at hearing. The first objection related to the post-layoff offers of work noted in the final section of the findings of fact. Counsel for appellant objected to the related testimony and exhibits on the basis of relevance. Counsel for respondent argued such information was probative to dispel bad-faith claims by appellant. Specifically, counsel for respondent felt the continued offers of work made pursuant to the restoration rights section of the administrative code, were inconsistent with claims of bad faith. Bad faith was alleged in appellant's post-hearing brief (App. Brief, p. 9).

The testimony and documents relating to the post-layoff notices of available work as found in the final section of the findings of fact, are admitted as part of the record. The information is relevant (but not determinative) to the claim of bad faith.

Counsel for Ms. Lyons objected to evidence and documentation of a temporary fill-in position for September 17-19, 1993, which Ms. Lyons agreed to work but (allegedly) failed to appear. This objection involves the testimony of Mr. Castells, as well as pages 2 and 5 of Exh. R13. Arguably, such information could be relevant to appellant's claim of bad faith. The potential for prejudice due to the alleged failure of Ms. Lyons to appear, however, outweighs the useful value of the evidence. Accordingly, the information noted in this paragraph is not made part of the record.

Credibility Observations - Ms. Lyons

Ms. Lyons' testimony regarding information given to her by Ms. Minash on August 11, 1993, was not as reliable as Ms. Minash's testimony. Specifically, Ms. Lyons admitted she did not listen to the entire group presentation. Therefore, Ms. Lyons' testimony that WGC failed to provide certain information was insufficient to rebut contrary testimony from Ms. Minash.

The examiner also felt Ms. Lyons attempted to provide misleading testimony as to what was explained to the FV track employes on August 11 and 12, 1993. The examiner felt Ms. Lyons was purposefully misrepresenting those

facts in an attempt to better picture herself as an uninformed victim of the layoff process.

As one example, Ms. Lyons' testified at her deposition that WGC did not discuss or offer to pay moving expenses at the meetings on August 11 and 12, 1993. (Lyons' Depo, p. 15-16). At hearing, she initially omitted moving expenses as a topic discussed at the August meetings. (T 157-158) After further probing, it became apparent that the topic of moving expenses was discussed and offered by WGC. (T 170, 194-195, 209-211)

Another example involves Ms. Lyons' testimony about the transfer opportunities mentioned to her on August 12, 1993. The examiner felt Ms. Lyons provided misleading testimony in an attempt to picture those transfer opportunities as mere possibilities of employment, as opposed to the fact that these were really probabilities of employment. (Compare T 157-158, with T 174-175 and T 201-202.)

Because of the above-noted credibility concerns, the hearing examiner carefully considered Ms. Lyons' testimony concerning her willingness to take positions in Green Bay, including demotion opportunities. Ms. Lyons' tone of voice and demeanor impressed the hearing examiner as credible when Ms. Lyons' testified that school was a secondary goal to her career. (T 198) Further, Ms. Lyons consistently testified she was willing to work in Green Bay.

Legal Analysis

The ultimate issue presented is whether WGC had "just cause" for Ms. Lyons' layoff, within the meaning of s. 230.44(1)(b), Stats. The pertinent legal analysis was stated by the Wisconsin Supreme Court as follows:

> While the appointing authority indeed bears the burden of proof to show "just cause" for the layoff, it sustains its burden of proof when it shows that it has acted in accordance with the administrative and statutory guideline and the exercise of that *authority has not been arbitrary and capricious.* Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52, 327 N.W.2d 183 (1975)

WGC did establish that the layoffs were initiated for a legitimate reason; to wit: closure of the FV track. However, as noted in the decision, WGC failed to

establish that it acted in accordance with the administrative code. Therefore, it failed to show "just cause" for the layoff, as detailed below.

Did the transfer opportunities in Madison and Wisconsin Dells constitute "reasonable offers", within the meaning of ER-Pers 22.09(2)(d), WAC?

[This section is deleted.Q]

Were the AA3 positions in Green Bay a "vacancy", within the meaning of ER-Pers 1.02(34), WAC?R

Ms. Lyons contended the examiner should find WGC's action of withholding the AA3 opportunities at the Green Bay district office as arbitrary and capricious. She cited the following case as support for her argument. Givens v. DILHR, 87-0039-PC (3/10/88). The Commission agrees.

Givens involved a potential transfer opportunity for an employee affected by a layoff. The position was vacant and the employer had filed a certification request with DER to fill the position. Prior to the employee's actual layoff, the employer rescinded the certification request. The Commission rejected the employer's argument that a "vacancy" within the meaning of the administrative code, did not exist because the certification request no longer existed.

WGC and DER contend in Ms. Lyons' case, that a vacancy for an AA3 position in Green Bay did not exist because no certification request was pending. The contention is incorrect. The existence of a vacancy is not determined by the existence of a certification request.

Ms. Lyons' demotion rights as an alternative to layoff, are contained in ER-Pers 22.08(2), WAC, the text of which is shown in par. 26 of the Findings of Fact (on p. 9 of this decision). This code section provides (in pertinent part) that a demotion opportunity in lieu of layoff arises if a vacancy exists, within the meaning of ER-Pers 1.02(34), WAC, the text of which is shown below.

Q *This section of the discussion is deleted as no longer necessary due to the* parties' agreement at oral arguments about the meaning of the term "approved lay off group", which does not include the non-Board Steward positions in Madison and Wisconsin Dells.

R This section of the discussion is expanded because it appears WGC and DER remain unpersuaded that the Givens case is applicable to Ms. Lyons' case.

> "Vacancy" means a classified position to which a permanent appointment may be made after the appointing authority has initiated an action to fill that position.

The plain language of the above definition is contrary to the interpretation urged by WGC and DER. The definition provides the basic premise that a vacancy is a classified position, rather than an unclassified position (under s. 230.08, Stats.). The definition further provides that only classified positions eligible for permanent appointment are included as vacancies (as opposed to positions created and funded to last only a specified period such as appointments for limited term employment, under s. 230.26, Stats.). The final clause in the definition "after the appointing authority has initiated an action to fill that position" provides further description of the first part of the preposition clause "to which a permanent appointment may be made". The final clause does not further limit or define the types of classified positions included in the term vacancy.

The definition of vacancy would need to be rewritten to reflect the meaning urged by WGC and DER. For example, it would be rewritten to include an additional prepositional clause, such as: "a classified position to which a permanent appointment may be made and for which the appointing authority has initiated an action to fill that position".

Furthermore, the interpretation urged by WGC and DER would create absurd results for other code sections. For example, ER-Pers 12.01, WAC, provides as shown below.

> **Action by appointing authority.** To fill a vacancy, the appointing authority shall submit a request on the prescribed form to the administrator.

The parties agree that the "prescribed form to the administrator" is a certification request sent to DER. This section of the code would have no meaning if WGC and DER were correct in asserting that the definition of vacancy in ER-Pers 1.02(34), WAC; subsumes the directive to file a certification request with DER. The illogic of their argument was addressed already in Givens. (Givens, Id., p. 5)

One purpose of the code chapter covering layoffs is to protect employee rights in layoff situations. ER-Pers 22.01, WAC. The purpose is not furthered by allowing employing units to avoid rights which employees otherwise would have under the code by acting like the employing unit in Givens which made the unilateral decision to rescind its certification request. The purpose also is not served where, as in Lyons, the employing unit has continued need for the services and the position is funded and vacant; or by other unilateral action or nonaction of the employing unit which declares certain positions unavailable to employees affected by layoff. This is the crux of the Givens decision.

WGC further argued that the rationale of Givens should not apply to Ms. Lyons' case because the record does not indicate that WGC was motivated by some bad intent in its unilateral decision not to fill the AA3 positions. The Commission disagrees. The plain meaning of the code provisions discussed previously, contain no distinction based on the employing unit's motive. Further, on a policy basis, the employe's right to a vacant position in lieu of layoff under ER-Pers 22.08, WAC, does not contain exceptions for positions which the employer wishes to utilize elsewhere for any reason; and certainly not for the reason advanced by WGC, to wit: WGC's desire to use the positions for some unknown purpose at some unknown time in the future and the duties of which continue to be performed by outside contractors and limited term employes.

The Commission in Givens rejected the arguments raised again in Ms. Lyons' case, based on the plain language and meaning of the pertinent code sections, as re-explained above. The Commission concluded (on page 4-5) in Givens, as follows:

> In the Commission's opinion, such language [used to define "vacancy"] requires that the appointing authority have the authority to initiate an action to fill the position and the authority to make a permanent appointment to the position once such an action is initiated in order for the position to be considered vacant. In other words, it is the existence of this authority, not the exercise of it, which triggers the language of the code provision. ... (Emphasis appears in the original text.)

The unfilled AA3 positions in Green Bay meet the definition of "vacancy" as interpreted by the Commission in Givens. The positions were not

yet redeployed for other uses at the time of the layoffs (and even at the time of hearing). WGC, at the time of Ms. Lyons' layoff, had the authority to initiate an action to fill the positions and the authority to make a permanent appointment, even though such authority was not exercised.

The Commission further notes that keeping qualified individuals employed is consistent with a second purpose of the layoff code provisions, as stated in ER-Pers 22.01, WAC. In Ms. Lyons' case, her continuation in the demotion positions (either the AA3 or the storekeeper position) would have furthered such purpose even if the demotion offered only temporary employment until the end of November 1993, when the Green Bay district office closed.

WGC's failures in this case were due to human error. The record does not support a conclusion that such failure was motivated by bad intentions. The examiner believed Ms. Minash's testimony regarding her concern over the impact which lay off would have on the affected employees. She attempted to alleviate their concerns by promptly providing what she thought was accurate information to the layoff group. The examiner further believed Ms. Minash's testimony about her multiple contacts with DER as part of her efforts to ensure the process was being conducted properly.

ARGUMENTS RAISED BEFORE THE FULL COMMISSION[S]

WGC's Objections to the Proposed Decision

a. Voluntary layoff letter: WGC contended Ms. Lyons' submission of her voluntary lay off letter should end the inquiry because the letter foreclosed layoff alternatives available under under ER-Pers 22.08, Wis. Admin. Code (WAC). (See p. 2-3 of WGC's brief). WGC's argument ignores the import of the proposed decision as a whole.

The Commission first notes its surprise to hear this post-decision argument raised because it is contrary to the the way the parties presented the

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S This portion of the decision addresses new arguments raised by the parties and DER in briefs filed after the proposed decision was issued, as well as new arguments raised by the parties during oral arguments before the full Commission.

case at hearing, contrary to WGC's post-hearing briefs and contrary to WGC's admission at oral arguments before the full Commission, as noted below.

WGC confirmed at oral arguments that it agrees with all findings in paragraph 14 of the Findings of Fact. In other words, WGC agreed it had an obligation under ER-Pers 22.07, WAC, to provide correct information to Ms. Lyons about her alternatives to layoff prior to the time Ms. Lyons was expected to decide based on the information provided by WGC, whether to tender a voluntary layoff letter or to proceed with her options. WGC failed in its duty to provide correct information to Ms. Lyons. Accordingly, Ms. Lyons' decision to elect voluntary termination is a nullity.

The same result is reached under an equitable estoppel analysis. Individuals claiming equitable estoppel against a state agency must show the following elements: 1) that the claiming individual relied, 2) to his/her detriment, 3) upon an action or inaction by a state agency, 4) that resulted in a serious injury, and 5) the public's interest would not be unduly harmed by application of estoppel. Dept. of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 634 & 638, 279 NW 2d 213 (1979).

Ms. Lyons' situation meets all the elements of an equitable estoppel claim. She relied on information given by Ms. Minash in deciding whether to tender a voluntary layoff letter or to pursue the layoff options. The information given by Ms. Minash was incorrect resulting in the injury to Ms. Lyons that she was deprived of demotion opportunities which Ms. Lyons, as the most senior in her approved layoff group, would otherwise have had. Furthermore, application of this doctrine does not unduly harm the public's interests. In fact, the public's interest is served by preserving employee rights in layoff situations as intended under the administrative code provisions of Ch. ER-Pers 22, WAC.

b. AA3 positions: WGC contends the examiner quoted passages from the Givens decision out of context. (See p. 3-8 of WGC's brief.) In particular, WGC argues (WGC, p. 7) the examiner failed to give import to the following language from Givens:

> If, for example, a position was authorized but not funded, the appointing authority would not have the authority to fill it and the position could not be considered vacant. If for example, the

> governor imposed a hiring freeze, the appointing authority would not have the authority to fill an unfilled position and the position could not be considered vacant.

The examiner did not address the cited language above because it was not pertinent to the record established at hearing. The record indicates (through WGC testimony) that the positions were vacant, funded and not redeployed even as of the hearing dates (T76-81 & Exh. R17, Minash Depo., p. 34-35). There is no record evidence of a lack of funding or lack of authority to fill the AA3 positions. The record evidence merely indicates WGC chose not to fill the positions.

At oral argument, WGC further asserted WGC had no need to fill the AA3 positions. However, the record shows the work continued to be performed by contract using non-state employees, and limited term employees. (Exh. R17, Minash Depo., p. 36).

c. WGC's request to expand the record: WGC, at oral arguments, requested that the hearing record be reopened to allow WGC to present information contrary to testimony given at hearing by its own witness to the effect that the AA3 positions were unfunded and that WGC lacked authority to fill the positions because a hiring freeze existed. The Commission denies this request because WGC offered no reason why the information could not have been presented at the hearing already held in Ms. Lyons' case, or any other persuasive reason to reopen the record.

Also, WGC asks the Commission to take "judicial notice" of exhibits WGC tendered in a different case (Rentmeester), which were not offered at Ms. Lyons' hearing. The Commission denies this request too. WGC could have presented such information in Ms. Lyons' case but now seeks to graft the information into the record thereby depriving Ms. Lyons of the opportunity to present rebuttal information. Further, exhibits in other cases are not "rules published in the Wisconsin administrative code or register", within the meaning of s. 227.45(4), Stats., of which the Commission could take administrative or official notice. Nor could the existence or content of those exhibits be considered as "generally recognized fact", within the meaning of s. 227.45, Stats.

DER's Disagreement with the Proposed Decision

DER raised some of the same arguments as WGC, which are not repeated here. Only DER's additional arguments are addressed below.

a. Interaction between ER-Pers 22.08(1), WAC, transfer offers and ER-Pers 22.09, WAC, reasonable offer criteria. DER contends (p. 7-8 Brief) that transfers in lieu of lay off offered under ER-Pers 22.08(1), WAC, are not required to meet the reasonable offer criteria of ER-Pers 22.09, WAC. This is an important legal issue because if DER were correct, Ms. Lyons' refusal of the St. Croix position would have extinguished her rights to demotion opportunities. The language of these provisions is quoted in paragraphs 26 & 27, of the Findings of Fact.

DER's contention is based upon the fact that ER-Pers 22.08, WAC, contains a cross-reference to the reasonable offer criteria of ER-Pers 22.09, WAC, only for demotions in lieu of layoff (ER-Pers 22.08(1)(d), WAC) and not for transfers in lieu of layoff (ER-Pers 22.08(1)(a), WAC). DER recognizes that the code provision for reasonable offer criteria contains no limiting language (i.e. as being applicable only to demotions). DER, however, argues that under rules of statutory construction, the more specific rule provisions of ER-Pers 22.08, WAC, should control the Commission's interpretation. The Commission disagrees.

The plain language of the administrative code provisions is not ambiguous. ER-Pers 22.09, WAC, says all "offer[s] of appointment" to an employee affected by a layoff shall be considered reasonable, only if the 5 criteria of ER-Pers 22.09(2), WAC, are met. The term "appointment" is defined in ER-Pers 1.02(2), WAC, to include all actions of appointing authorities to place a person in a position; except for acting assignments under ER-Pers 32. The term "appointment" is not limited to demotions and, therefore, would include transfers as well. Accordingly, the plain meaning of ER-Pers 22.09(2), WAC, in the context of this case is that the transfer offers given to Ms. Lyons were subject to the reasonable offer criteria of ER-Pers 22.09(2), WAC.

Nor does the Commission agree with the significance DER places on the fact that ER-Pers 22.08, WAC, references the reasonable offer criteria in the section pertaining to demotions and not in the section pertaining to transfers. The demotion provision (ER-Pers 22.08(2)(d), WAC) references the reasonable

offer criteria (in ER-Pers 22.09(2), WAC) out of necessity. Specifically, the demotion provision states that demotion opportunities are subject to the reasonable offer criteria in ER-Pers 22.09(2), WAC; and to additional factors enumerated in the demotion section. If the additional factors did not exist for demotions, the reference to the reasonable offer criteria in ER-Pers 22.09(2), WAC, would be unnecessary and, therefore, probably nonexistent. In sum, it does not appear that the reference was intended to exclude transfers from the reasonable offer criteria in ER-Pers 22.09(2), WAC. This conclusion is supported by the policies behind the administrative rules as well, as explained in the following paragraph.

ER-Pers 22.01, WAC, provides that a purpose and intent of the layoff procedure is to be fair to all employes. The Commission does not believe it would be fair to all employes to interpret ER-Pers 22.08(1), WAC, in a manner which would require, for example, all employes in Madison to either accept a transfer to a vacant position in Superior, or to suffer the loss of restoration rights.

Furthermore, Ms. Minash's testimony conflicts with DER's contention. Specifically, Ms. Minash said she had several discussions with DER about reasonable offers. (T69) She further testified it was her understanding that the reasonable offer provisions of ER-Pers 22.09, WAC, apply to the alternatives in ER-Pers. 22.08, WAC. (T 70)

DER requested that if the Commission retained its interpretation of the rules, that the Commission provide guidance regarding the travel distance criteria of reasonable offers contained in ER-Pers 22.09(2)(d), WAC. The specific language which troubled DER was found in par. 32 of the Findings of Fact in the Proposed Decision, which has been deleted from the decision issued by the full Commission.

The full Commission's decision retains the finding that the St. Croix position was too far from Ms. Lyons' prior work site to be considered a reasonable offer. This finding was conceded by WGC testimony at hearing. (T 70-71) The provision of further guidance is unnecessary to the resolution of Ms. Lyons' case and the Commission, therefore, reserves those issues for resolution in future cases.

b. DER's assertion that it would not have approved a layoff plan which offered Ms. Lyons the AA3 position in Green Bay: DER contended in its brief (p. 13) that its Division of Merit Recruitment and Selection (DMRS) would not have approved a layoff plan which provided the AA3 opportunity to Ms. Lyons because: 1) it was a temporary position, 2) in a different employing unit thus requiring a probationary period, and 3) it would not be fair to require Ms. Lyons to accept the position or risk losing her restoration rights for refusing a reasonable offer of employment.

The Commission first notes the record does not indicate that DER would have disapproved a layoff plan which offered Ms. Lyons employment in the AA3 position in Green Bay. In fact, the record suggests the contrary. The other Board Steward, Mr. McDaniel, was offered a demotion opportunity to the storekeeper position which also was in a different employing unit and viewed as a temporary opportunity because the position would exist a short time only in Green Bay and then would be transferred to Milwaukee. The hearing record suggests this offer was approved by DER as part of WGC's layoff plan and such approval contradicts DER's present assertions. (See T 61-62, where Minash testified she consulted with DER when McDaniel wanted to rescind his initial decision of voluntary termination to enable him to accept the storekeeper position.)

Regarding the last point raised by DER, the Commission is unpersuaded that a "reasonable offer" for purposes of determining what jobs an employee has a right to be informed about as alternatives to lay off, must necessarily also be a "reasonable offer" in determining what actual offers rejected by an employee would result in the loss of restoration rights. The purposes underlying the lay-off code provisions as stated in ER-Pers 22.01, WAC, may justify different results. In other words, Ms. Lyons may have had the right to know about more positions as alternatives to layoff, than she would be forced to accept after layoff to retain her restoration rights. Such result could be viewed as furthering the rule purposes of retaining the most effective personnel while being fair to employees. In any event, this is an issue which is not presented in Ms. Lyons' case and the Commission, therefore, declines to resolve it here.

c. Lyons qualifications to perform the AA3 work: DER argued (p. 14 of its Brief) that "it is not at all apparent that the appellant would be

qualified to perform the duties" of the AA3 position. This is an argument which was not raised by WGC at hearing or in post-hearing briefs.

The record suggests, and it was the examiner's impression, that WGC conceded Ms. Lyons' ability to perform the AA3 and storekeeper jobs by WGC's unconditional characterization of Ms. Lyons' at hearing as a good employee (T 26 and cites noted in par. 21 of the Findings of Fact) and as having abilities in multiple areas of work (See, T 25 where Minash testified that Lyons had a lot of different skills and could have worked in Madison as an Auditor, Paddock Judge or Racing Assistant. Also see, T36 where Minash described her willingness to intercede for Lyons in obtaining a Training Officer position at the Department of Corrections. Also see, Exh. R16, Ms. Lyons' resume. And see, p. 8 WGC's post-hearing brief which states: "[Lyons] was an exceptional employe who had received a series of promotions during her tenure. [Cites omitted here.]")

WGC had the burden of proof to establish at hearing that Ms. Lyons was unqualified to perform the AA3 positions; a burden which clearly was not met. Even at oral arguments, WGC would not say that WGC doubted Ms. Lyons' abilities; only that WGC's counsel was making the argument on behalf of DER. Under these circumstances, the Commission rejects DER's assertions as speculative and contrary to the record.

d. Significance of red-circling and demotion opportunity to the Storekeeper position: DER contended (p. 15 of its brief) that every demotion taken in lieu of layoff results in red-circling of the affected employe's pay and, therefore, red-circling alone is an insufficient criteria to determine if the demotion is a reasonable offer of work. DER urged the Commission to interpret the red-circling provision in a manner which would not exclude consideration of other factors such as the fact that the storekeeper position was 7 pay ranges below Ms. Lyons' Board Steward job. The Commission believes this argument has some merit, but is not persuasive.

Resolution of this issue involves ER-Pers 22.08(2)(a), WAC, the text of which is shown in par. 26 of the Findings of Fact; and ER 29.03(8), WAC, the pertinent text of which is shown in par. 28 of the Findings of Fact.

The Commission first notes that DER is incorrect is stating that every demotion in lieu of layoff would result in red-circling of the affected employe's pay. The administrative code provisions covering demotions within an agency in lieu of layoff are ER-Pers 22.08(2)(a)2. & 3., WAC, which are

shown in par. 26 of the Findings of Fact. Reference is made therein to ER 29.03(8)(c), WAC, for demotions to the highest level vacancy available, and to ER 29.03(8)(f), WAC, for demotions to a position other than the highest level vacancy available. The referenced provisions allow red-circling for demotions to the highest level vacancy available, but not for other demotions.

The Commission further notes that the Storekeeper demotion opportunity was offered to Mr. McDaniel even though it was a 6 pay grade reduction for him. His situation was not significantly different than Ms. Lyons' in this regard, yet DER apparently approved the offer to Mr. McDaniel. The Commission further notes that the Storekeeper position was also offered to Ms. Last even though it was a reduction of four pay grades for her. (T 17 & 196) (Exh. R17, Minash Depo., p. 31-33).

e. DER's request to reopen the record: Some arguments raised in DER's amicus brief contain information which is not in the record and, accordingly, could be interpreted as a request to reopen the record. The Commission denies the potential request for the same reasons as noted in the previous section denying WGC's request to reopen the record.

The Commission further notes that DER's main disagreement with the proposed decision in Lyons, is the discussion and holding relating to the AA3 positions. Apparently, DER claims the proposed decision will create dire consequences in layoff situations due to WGC's (and other state agencies') difficulty in claiming that certain vacant, funded positions are unavailable as alternatives to layoff. This portion of the decision, however, is based on the Commission's prior decision in Givens, which was issued in 1988. The holding is not new. If DER had intended to correct what it viewed as a problem, it had time to attempt to do so through its statutory and/or rule making authority.

Peculiar to DER's brief is DER's request for the Commission to take administrative notice of DER's manual sections relating to the procedure DER follows in reviewing an agency's request to fill a position. The Commission declines to do so.

DER's manual sections are not "rules published in the Wisconsin administrative code or register", within the meaning of s. 227.45(4), Stats., of which the Commission could take administrative or official notice. Nor could the existence or content of the manual sections cited by DER be considered as a "generally recognized fact", within the meaning of s. 227.45, Stats. Surely if

WGC had been aware of those manual sections, they would be part of the record already. In short, the Commission sees no authority in Ch. 227, Stats., to support DER's request to take administrative notice of the cited manual sections.

ORDER

This matter is remanded to respondent WGC for action in accordance with this decision. The Commission will retain jurisdiction to resolve the following matters: 1) to provide Ms. Lyons an opportunity to file an application for costs and to resolve any application which she might file, 2) to conduct hearings or by other methods resolve pending motions on issues involving matters other than the merits of Ms. Lyons' case, and 3) to issue a final decision and order after the first two items are resolved.

Dated December 5, 1994.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR/jmr

cc: K. Artis
M. Plaisted