STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 13

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Petitioner,

v. Case No. 99 CV 2959

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent.

DALE R. BRENON,

v. Case No. 00 CV 661

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent.

DECISION AND ORDER

In each of these consolidated cases, the petitioner seeks judicial review pursuant to Wis. Stats., ch. 227, of the November 19, 1999, final order of the Wisconsin Personnel Commission (Commission) in the administrative proceeding, Brenon v. University of Wisconsin System, Case No. 96-0016-PC. In that case Petitioner Dale R. Brenon (Brenon) challenged a 10 day suspension without pay and a subsequent termination of his employment with the University of Wisconsin-Milwaukee (UWM) police department under Wis. Stats. § 230.44(1)(c). The Commission rejected Brenon's suspension on due process grounds and then modified the termination to a 10 day suspension without pay. It ordered Brenon to be reinstated with back pay. In determining the amount of back pay, the Commission refused to consider "after-acquired evidence" of Brenon's misconduct while an employee. The Commission also denied

Brenon's various motions for costs and fees under Wis. Stats. § 227.485, ruling that although unsuccessful, UWM was substantially justified in the positions it took.

The Board of Regents, on behalf of UWM (hereafter collectively "UWM") seeks review of the Commission's decisions rejecting its suspension of Brenon, modifying its termination of Brenon to a suspension, and refusing to allow it to introduce after-acquired evidence of misconduct in the remedy proceeding. (Case No. 99 CV 2959). Brenon seeks review of the Commission's decisions denying him attorney fees and costs. (Case No. 00 CV 661)

FACTS

At the outset, it should be noted that UWM in its Petition For Review challenges the Commission's decisions on the suspension and termination (but not on the exclusion of evidence) on the basis that they were not supported by substantial evidence in the record. However, in its Brief, UWM states, "The Board and UWM do not contest the Commission's evidentiary findings." Brief, p. 2. Brenon's Petition For Review makes no challenge to the factual findings of the Commission, and his briefing never mentions the substantial evidence standard and never explicitly challenges any of the Commission's findings of fact. As a result, the facts outlined below, which are largely taken from the Commission's findings, will be deemed undisputed.

Brenon was a permanent, tenured employee of the UWM police department. He was a sergeant, and his immediate supervisor was Lt. Richard Sroka.

In November of 1995 an officer in the UWM police department wrote Lt. Pamela Hodermann of that department that Officer Dale Brenon had told him the following jokes earlier that month:

> What do you get when one million lesbians show up at the million man march? Two million people that don't do dick.

What was the best thing about the million man march? Only four people missed work.

Other officers subsequently informed Lt. Hodermann that Brenon had told them the same or similar jokes.

Lt. Sroka, who was on vacation until December 4, was provided with the reports and directed by UWM Police Chief Philip Clark to "continue the investigation" and get Brenon's side of the story Sroka then sent Brenon this email on December 5, 1995:

> Dale, I need to meet with you on Friday morning 12/08/95, regarding some recent personnel issues that I have just been made aware of. No big deal, won't take up much of your time, but; please wait.

When Brenon and Sroka met, after being told of the complaints regarding the "Million Man March" jokes, Brenon admitted telling some of them and apologized. Sroka then reprimanded Brenon, informed him that such conduct was unsatisfactory and told him to stop it. Brenon agreed and Sroka told him that he believed the matter was closed.

Upon hearing Sroka's report of the meeting with Brenon, Chief Clark directed Sroka to prepare a ten-day suspension letter Sroka passed this news to Brenon, and Brenon asked to and did meet with Clark to discuss the matter Clark would not, however, change his directive to Sroka.

Brenon received the ten day suspension letter on December 20. It stated, in pertinent part,

> This disciplinary action is based on your conduct, as related by four officers of this Department, that during the first week of November 1995, you related racially demeaning jokes to them while in the performance of your duties as a police sergeant. Regardless of the motivation for relating such jokes, this conduct exhibits unprofessional behavior, demonstrates a lack of sensitivity and creates a hostile environment within a diverse workplace.

The letter also included a warning of possible discharge for "any further work rule violation."

In late December a female police cadet and a female officer reported that Brenon had harassed them and made sexist and racist jokes and remarks. Brenon was suspended with pay on January 3, 1996, while these allegations were investigated.

On January 12, 1996, in an interview with Chief Clark and the UWM labor relations manager, Brenon admitted making crude remarks but denied telling racist jokes after notification of his suspension. On January 31, 1996, Brenon was notified to report to a pre-disciplinary hearing on February 5, 1996. The subject matter for the hearing was identified as allegations that Brenon made sexually explicit and demeaning comments and jokes to subordinates, allegations of retaliation against subordinates, and continued inappropriate activity subsequent to his suspension.

At the pre-disciplinary hearing Clark informed Brenon of the allegations and stated that disciplinary action under consideration ranged from a thirty-day suspension without pay to termination.

By letter dated February 9, 1996, UWM terminated Brenon's employment. That letter provided in pertinent part:

> On December 19, 1995, you were given a 10 day suspension for telling inappropriate ethnic and racially demeaning jokes to your subordinates during November, 1995 . This termination is based on other complaints of your conduct, untruthfulness uncovered in the course of the investigation of those complaints and your retaliation against subordinates who cooperated in those investigations. Specifically, complaints were received that subsequent to your learning of your 10 day suspension, you continued to tell jokes to subordinate officers substituting "Irishman" for other ethnic groups. Additionally, new complaints were received about your making sexually explicit and demeaning comments, telling ethnically and sexually demeaning jokes.
>
> In November of 1995, while talking to Officer Sorrell about his stay in a motel, you made a comment to the effect that Sorrell was too cheap to get two beds and that the three of them (Sorrell, his wife and infant son) probably slept in the same bed. You then made reference to them having sex or a menage a trois. You then said that, "No, it was

really (Security Officer) George Esler" or words to that effect (Esler, Sorrell and wife having sex) and made noises mimicking as if they were all having sex. This eventually became just Esler masturbating, you would do this "joke" grunting and making masturbating motions in front of both male and female employees. On other occasions, you referred to your penis as "Lucky", describing its size and making comments such as, "I'm going to drain Lucky," to both male and female employees.

Brenon timely appealed both the suspension and the termination contending that neither were based on just cause. At a pre-hearing deposition on June 24, 19996, Brenon was questioned about his practice of copying documents at work and keeping copies of these documents, which were often of a confidential nature, at his home. UWM demanded that Brenon produce these files and return all copies that he did not have specific authorization to remove from the department.

Hearings on Brenon's appeal were held over three days: August 1, 2 and 12, 1996. A proposed decision and order was issued by Commissioner Murphy who acted as examiner over a year later, on October 6, 1997, in which it was proposed that the ten-day suspension without pay be rejected and the termination be modified to a ten-day suspension without pay. This proposed decision and order was adopted by the full Commission on February 12, 1998, with minor modifications. The basis for this decision was that Brenon's due process rights had been violated by UWM's failure to provide him with adequate notice and a pre-disciplinary hearing prior to the suspension. As to the merits of the suspension, the Commission stated that Brenon's actions did warrant some disciplinary action but that a ten-day suspension without pay was excessive and a preferable sanction would have been an oral or written reprimand.

With respect to Brenon's termination, the Commission found that Brenon did engage in crude behavior by simulating masturbation in the presence of other officers but he did not tell racial jokes after his suspension, did not retaliate against other employees and was not untruthful

during the investigation except in denying that he engaged in the crude behavior. The Commission concluded that the discharge was excessive and a ten-day suspension without pay was the more appropriate discipline.

Brenon filed a motion for attorney's fees and costs, initially on November 4, 1997, and then submitted an amended motion on March 9, 1998. In an "Interim Ruling on Application for Fees and Costs" issued June 23, 1998, the Commission denied Brenon's motion for the following reasons: 1) although insufficient, with respect to the suspension Brenon was provided with notice and a limited opportunity to argue for a lesser penalty; and, 2) with respect to the termination, it was reasonable for UWM to rely on representations made by Brenon's co-workers, and termination was the next step in the progressive disciplinary process. Therefore, UWM's legal position satisfied the "substantially justified" standard described in Wis. Stats. § 227.485(3) and Sheely v. DHSS, 150 Wis. 2d 320 (1989).

After these decisions, the question remained as to what remedy was due to Brenon. On July 9, 1998, Brenon filed a motion that he be reinstated to his former job immediately. In a July 20, 1998, letter responding to this motion UWM's attorney included the following:

> In addition, the State of Wisconsin has a separate legal action pending against Brenon. Because of the circumstances of that litigation, his presence in the workplace would be disruptive and cause irreparable harm to the university. After Brenon was terminated, it was brought to my attention that during his employment, he very likely had copied and removed documents from the workplace containing confidential student and employee information which he had no right to remove. Informal attempts to convince him to return all copies of such documents were unsuccessful. In order to protect the privacy of individuals named in said records and mitigate potential liability for UWM because of Brenon's actions in this regard, the State of Wisconsin has commenced a replevin action in Milwaukee County Circuit Court.
>
> Brenon's presence in the workplace would give him access, in the course of fulfilling his job responsibilities, to the same types of confidential materials he has had access to in the past.

> If ordered to return Brenon to the workplace at this time, UWM would be forced to consider initiating a formal investigation, possibly resulting in disciplinary action against him, for unauthorized possession of university property with regard to the records issue. This would unnecessarily complicate all pending matters. In the interests of judicial efficiency the parties should be permitted to pursue the replevin action and the appeal process, accepting that an order to remit backpay may result. (Cited in Commissission's 9/1/99 Decision, pp. 8-9; Record 6)

The motion was noticed to be heard at the time of a previously scheduled Scheduling Conference on July 28, 1998, but there is no indication in the record of any action taken. In any event, no order for immediate reinstatement was issued.

On July 28, 1998, a letter from Brenon's counsel was sent to Commissioner Murphy regarding the parties' agreement on proceedings on remedy. It summarizes the telephone scheduling conference held that day, stating that the parties had agreed to the following schedule:

1 [Brenon] will respond to the written discovery request of UWM by August 7, 1998;

2. A deposition has been scheduled of [Brenon] for August 28, 1998 at 1:00 p.m.,

3. UWM shall submit a calculation of [Brenon]'s remedy for back pay and related fringe benefits, etc., by September 15, 1998;

4. [Brenon]'s objections, if any, to such calculation shall be submitted by Friday, September 18, 1998; and

5. UWM's reply to [Brenon's] objections shall be made by Friday, September 25, 1998.

> Based on the submissions, the Commission shall make a finding as to the remedy . If there are objections or further submissions, the Commission shall make finding on the submissions of the parties.

On September 15, 1998, UWM submitted its calculation of Brenon's remedy regarding back pay, with attached exhibits. While Brenon would have earned $114,628.54 in gross pay for the period from February 11, 1996, to September, 15, 1998, UWM contended that Brenon

did not do enough to mitigate his damages because he applied for jobs that did not match his skills and background and applied for a minimal number of positions. The letter concludes that the total adjusted back pay due to Brenon is $7,271.81. Finally, UWM stated that

> In the event that [UWM's] proposal for its total payment to [Brenon] is refuted or challenged, [UWM] reserves the right to present information about [Brenon's] earnings during the period in question . . ., [Brenon's] efforts to mitigate his damages, and [UWM's] rejection of employment offers during the period in question. [UWM] also reserves the right to update its calculation based on updated earnings information received from [Brenon].

Brenon objected to UWM's calculations of back pay. UWM responded that Brenon had failed to comply in good faith with discovery requests and that there were significant discrepancies between Brenon's reported income and the record of deposits to his bank account. By letter dated January 15, 1999, UWM renewed its request for a hearing (first made on September 24, 1998) on the issue of remedy, stating that "a hearing is imperative in this case because issues of material fact exist regarding wages earned from other sources." That letter goes on, "[t]he income discrepancy is a material issue of fact needed to accurately determine back pay obligations on the part of the State of Wisconsin."

On January 28, 1999, UWM filed a brief in response to Brenon's objections regarding mitigation of damages. Brenon submitted his brief on mitigation on February 4, 1999. UWM's Reply brief followed on February 15, 1999. At the same time, UWM filed a motion requesting that Commissioner Murphy find Brenon in contempt for his "refusal to answer questions completely and honestly under the law during the discovery process." The letter repeats that because of Brenon's noncompliance with discovery, "this necessitates the need for a hearing on the issue of back pay."

At this point, this case had been pending before the Personnel Commission for over three

years. On April 26, 1999, UWM filed a "Motion for *en banc* order compelling final decision of pending issues in Case 96-0016-PC." The motion noted that "[i]ssues relating to back pay and mitigation of damages have been pending since March, 1998," and asks that Commissioner Murphy be ordered to decide the pending issues, or in the alternative, that the Commission *en banc* issue a decision in the case.

A telephone prehearing conference was held on April 28, 1999, and memorialized in a "Conference Report." Under the heading "Issue" it states:

> Remedy.
>
> Sub-issues:
>
> 1. What is the sum of [Brenon's] back pay and other credits.
> 2. What is the sum of [UWM's] mitigation damages and setoffs.
> 3. What is the total sum of [Brenon's] remedy?

The hearing was scheduled for May 18, 1999. On May 13, 1999, the Commission received UWM's Motion in Limine to exclude evidence on grounds of relevance and failure to comport with the best evidence rule. The next day, May 14, 1999, UWM sent Brenon's counsel a written offer of settlement that stated in part:

> We believe this settlement offer is fair considering the amounts that we believe can be proven as setoffs to back pay. Please understand that if we proceed to hearing, after we obtain a final decision we will petition for review. We believe we have strong legal arguments. After the final decision we also intend to reinstate your client and initiate the discipline process because of his gross violation of the records policy. That will likely end in the termination of his employment.

At the beginning of the May 18, 1999, hearing on remedy, UWM called Brenon as a witness and asked him about his practice of making copies of documents while he worked at the UWM police department. After Brenon's attorney objected on the grounds of relevance, a colloquy between the Commissioner and counsel for UWM ensued, during which it became

apparent that UWM wanted to introduce after-acquired evidence of Brenon's misconduct as a basis for establishing an earlier date to cut off liability for back pay. UWM made an offer of proof to the effect that Chief Clark would testify regarding his discovery that Brenon had made and taken unauthorized copies of documents from the department and that such conduct was a serious violation of the records policy and would have resulted in Brenon's termination if the Chief had known about it at the time. Commissioner Murphy sustained the objection without explanation.

Commissioner Murphy's proposed decision and order regarding remedy was issued on June 18, 1999. It was proposed that UWM be ordered to pay $159, 533.64 in back pay, plus additional back pay and interest until Brenon's reinstatement. With respect to the after-acquired evidence, he ruled that it was excluded because "[t]o have ruled otherwise would have been in deprivation of [Brenon's] job property rights without due process of law." This ruling was affirmed by the Commission in its September 1, 1999, interim decision and order

On October 22, 1999, UWM filed a motion for the Commission to reconsider its interim decisions regarding reinstatement and back pay based on new information, namely copies of approximately 24,000 documents that Brenon had copied and taken from UWM during his employment. This material was turned over by Brenon on September 29, 1999, in compliance with the order of the replevin court in State of Wisconsin v. Dale R. Brenon, Milwaukee County, Case No. 98-CV-2690. UWM also filed a response opposing Brenon's October 1, 1999, motion for fees and costs related to the replevin action and additional discovery.

On November 19, 1999, the Commission issued its "Ruling on Motion for Reconsideration Ruling on Motion for Attorney's Fees Final Order." As in its September 1,

1999, interim order, the Commission held that concerns regarding lack of notice and waiver precluded UWM from raising the issue of the purloined documents at this point in the proceedings. It noted that UWM had known since June 1996 that Brenon had unauthorized documents in his possession and the mere fact that, as a result of the replevin order, the documents had been returned to UWM did not qualify as "newly-discovered" evidence which the Commission would consider now. Second, permitting the introduction of this "after-acquired evidence" as a tool to limit back pay would in effect be an unlawful retroactive discharge under State ex rel. Tracy v. Henry, 219 Wis. 53 (1935). The Commission concluded that UWM's sole remedy regarding Brenon's misconduct was to reinstate him and then pursue termination based on the purloined documents.

On the issue of attorney's fees, the Commission rejected Brenon's claims for fees and costs associated with the replevin action because those fees were not part of the contested case before the Commission. Further, the Commission concluded that UWM had a reasonable basis for discovery requests related to discrepancies in Brenon's financial records, and so Brenon was not entitled to any fees incurred regarding that issue. The Commission's Final Order required UWM to "immediately offer [Brenon] reinstatement to his former position or its equivalent with back pay and benefits from the date of his discharge to the date of his restoration. "

These consolidated petitions for judicial review followed. Additional facts will be noted in the discussion which follows.

ISSUES PRESENTED

1. Could the Commission reasonably reject Brenon's ten-day suspension on due process grounds because of UWM's failure to afford Brenon a pre-suspension hearing?

2. Did the Commission abuse its discretion by modifying the termination of Brenon's employment to a ten-day suspension?

3. Did the Commission abuse its discretion when it refused to consider the after-acquired evidence of Brenon's unauthorized removal of documents from UWM when the Commission heard evidence in order to craft its remedial order?

4. Did the Commission properly deny all of Brenon's motions for attorney's fees on the grounds that although ultimately unsuccessful, UWM was "substantially justified" in its legal positions before the Commission.

In summary, the Court concludes that the answers to these questions are: 1. It could. 2. It did not. 3. It did. 4. It did.

DISCUSSION

1. Could the Commission reasonably reject Brenon's ten-day suspension on due process grounds because of UWM's failure to afford Brenon a pre-suspension hearing?

As a public employee, Brenon has a constitutionally protected property interest in his employment and cannot be terminated without due process of law. *See* Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 546 (1985). The Commission's determination that UWM violated Brenon's due process rights when it suspended him is a conclusion of law because it involves the application of a legal standard to a set of facts. Dept. of Revenue v. Exxon Corp., 90 Wis. 2d 700, 713 (1979). When reviewing an administrative agency's conclusions of law, courts routinely employ one of three levels of deference: great weight, due weight or no deference at all. See Jicha v. DILHR, 169 Wis. 2d 284, 290-91 (1992).

Great weight deference is only warranted when:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its specialized knowledge or expertise in forming the interpretation; and (4) the agency's interpretation will provided consistency and uniformity in the application of the statute.

Tannler v. DHSS, 211 Wis. 2d 179, 184 (1997). Due weight deference is applied when "the agency decision is 'very nearly' one of first impression." Id. No deference, or *de novo* review is used for cases of first impression for the agency and the agency lacks expertise. Dept. of Transportation v. Wisconsin Personnel Comm., 176 Wis. 2d 731, 735-36 (1993).

In this case, both Brenon and UWM are silent as to the level of deference to be given to the Commission's conclusion. The Commission advocates that its conclusions of law in rejecting the suspension be reviewed under the due weight standard, presumably because of its experience and expertise in personnel matters, and the authority delegated to it under Wis. Stats. §§ 230.44 and 230.45.

Due weight is the appropriate standard for reviewing the Commission's legal conclusion on the due process issue. Nowhere is it argued that this is an issue of first impression justifying *de novo* review. On the other hand, the Commission has not asserted nor demonstrated that its experience with due process challenges is so extensive as to satisfy the requirements for great weight deference set forth in Tannler. Accordingly, the due weight standard will be applied and the Commission's decision will be upheld if it is reasonable unless the court determines that a more reasonable one is available. UFE Inc. v. LIRC, 201 Wis. 2d 274, 286-87 (1996).

The Commission stresses that its conclusion that Brenon's due process rights were violated is correct because before the meeting with Sroka, Brenon had no notice that the allegations were considered serious or that serious discipline could result. He did not know until the end of that meeting that a 10 day suspension was being considered and thus had no chance

to argue whether such discipline was warranted or appropriate until after Sroka was told by Chief Clark to draft the 10-day suspension letter. Even then due process was not afforded by the meeting between Brenon and Chief Clark because, in the view of the Commission, the Chief had already made up his mind.

The ultimate question of whether sufficient due process was provided requires balancing the employee's interest against that of the employer as set forth in Mathews v. Eldridge, 424 U.S. 319 (1976) and applied in Gilbert v. Homar, 520 U.S. 924 (1997). This test is comprised of three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." Mathews, 424 U.S. at 335. In Gilbert, the Court concluded that a pre-disciplinary hearing that would ordinarily be required was not necessary for a suspension without pay of a police officer charged with a felony. It observed that the government had a significant interest in being able to immediately suspend an employee who occupies a position of high public trust and visibility when felony charges are filed against that employee. Gilbert, 520 U.S. at 932. More importantly, in Gilbert, the fact that there had already been an arrest and that charges had been filed put to rest any concerns regarding the third Mathews factor, the risk of erroneous deprivation and the likely value of any additional procedures. Id. at 933-34. In such cases, it is safe to assume that the employer's decision to suspend the employee is not arbitrary because "an independent third party has determined that there is probable cause to believe the employee committed a serious crime." Id. at 934.

The Commission factually distinguished this case from Gilbert, concluding that where

a suspension results from mere allegations of wrongdoing and there is no independent assessment of probable cause, and still the employee is not given the chance to persuade his employer that the discipline was unwarranted and/or excessive, the evidence supports the conclusion that the due process provided was deficient.

UWM also cites Gilbert for the proposition that due process does not always require notice and a hearing before a tenured employee is suspended. While that clearly is a holding in Gilbert, the implied extension of this argued by UWM that due process never, or at least here, does not and did not require notice and a hearing is unsupported by any case.

UWM also argues that the Commission's findings and conclusions in response to Brenon's motion for fees and costs themselves amount to a conclusion that Brenon was afforded due process with regard to the suspension. UWM ignores that the Commission was acting under two different standards in reaching the two different decisions it did. It was entirely consistent for the Commission, on the one hand, to conclude that Brenon had been denied due process under the Mathews/Gilbert standard and, on the other hand, to conclude that UWM was "substantially justified" under Wis. Stats. § 227.485(3) in taking the position that it had not denied Brenon due process.

Under the due weight standard applicable here, "a court will not overturn a reasonable agency decision unless the court determines that there is a more reasonable interpretation available." UFE Inc. v. LIRC, 201 Wis. 2d 274, 287 (1996). Given the significant factual differences between this case and Gilbert, UWM's argument that the process Brenon received was sufficient and was a more reasonable conclusion than that reached by the Commission is unavailing. Telling racist jokes is simply not commensurate with the felony charges in Gilbert,

and the government's interest in prompt action was not as urgent as that case. Telling inappropriate jokes to co-workers does not present the same risk of undermining the public trust in the way that felony charges against a police officer does. For these reasons the Commission properly distinguished Gilbert and concluded that Brenon was entitled to a meaningful pre-suspension hearing and that the limited process afforded him was insufficient. This conclusion is reasonable and must be upheld.[1]

2. Whether the Commission abused its discretion when it modified the termination of Brenon's employment to a ten-day suspension.

Under Wis. Stats. § 227.57, Scope of Review,

> (8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

UWM asserts that the Commission abused its discretion by modifying Brenon's termination to a ten-day suspension. Like a court, an administrative agency exercises discretion when "it considers the facts of record and reasons its way to a rational, legally sound conclusion." Galang v. Medical Examining Bd., 168 Wis. 2d 695, 700 (Ct. App. 1992). Thus, discretion is "a process of reasoning" in which facts and the applicable law are considered in arriving at "a conclusion based on logic and founded on proper legal standards." Shuput v. Lauer, 109 Wis. 2d 164, 177-78 (1982). If the record establishes that the agency considered the facts of the case and reasoned its way to a conclusion that is both consistent with the

[1]Because the Commission's due process conclusion is sustained, the suspension must be rejected under Wis. Stats. § 230.44(4)(c); and UWM does not argue otherwise. It is, therefore, unnecessary to address the Commission's conclusion that the ten day suspension was excessive.

applicable law and one that a reasonable tribunal could reach, the court will affirm the agency, even if the court would have reached a different conclusion. Galang, 168 Wis. 2d at 700; Wis. Central Ltd. v. Public Service Comm., 170 Wis. 2d 558, 568 (Ct. App. 1992).

Wis. Stat. § 230.44(4)(c) provides as follows:

> 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. (emphasis added).

The statute expressly permits the Commission to modify the discipline imposed in a case presented to it for review. Here, the Commission argues that it properly considered the evidence before it and after weighing this evidence concluded that Brenon should have received a ten-day suspension rather than being terminated. The Commission reviewed Brenon's disciplinary history, his relationship with co-workers and the culture of the UWM police department. The Commission concluded that the evidence did establish that Brenon simulated masturbation and later denied doing so. However, the evidence did not fully support the other claims cited by UWM as reasons for terminating Brenon: that he told ethnic jokes after his suspension, that he retaliated against another officer or that he was otherwise untruthful during the investigation. While there was cause for some disciplinary action, the Commission reasoned that termination was excessive and the more appropriate discipline was a ten-day suspension.

UWM asserts that the Commission's decision that the termination suspension was excessive lacks a reasonable basis and therefore constitutes an abuse of the Commission's discretion. UWM submits that Brenon's "history of intemperate remarks and jokes," coupled

with his lying about the simulated masturbation incident demonstrate that the Commission clearly abused its discretion in modifying the termination to a suspension. UWM also takes issue with the Commission's determination that the telling of Irish jokes is not the basis for discipline.

The Commission's decision amply demonstrates that it considered all the grounds presented in support of Brenon's termination, evaluated the relevant evidence, and reasonably concluded that termination was inappropriate. As in all agency reviews, it is not the Court's function to reweigh the evidence or to second guess the agency's credibility determinations. Chilstrom Erecting Corp. v. Dept. of Revenue, 174 Wis. 2d 517 (Ct. App. 1993). Here, given the evidence of the culture at the UWM police department and the Commission's findings that there was insufficient evidence to support three of the four claims against Brenon, there existed sufficient grounds upon which the Commission could reasonably conclude that termination was an excessive discipline in this case. UWM merely emphasizes the significance that should be attached to the one reason for termination that the Commission sustained in connection with Brenon's disciplinary record to argue that discretion was abused. To adopt its reasoning, it would be necessary for this court to assign different weight to the undisputed evidentiary findings made by the Commission. This would be inappropriate for a court reviewing an administrative agency decision. Id. What UWM has failed to do is to identify any flaw in the reasoning process that reflects the exercise of the Commission's discretion. Where, as here, an agency has considered the facts and applied the correct legal standard to reach a reasonable conclusion, that conclusion must be affirmed.

3. **Did the Commission abuse its discretion when it refused to consider the after-acquired evidence of Brenon's unauthorized removal of documents from UWM when the Commission heard evidence in order to craft its remedial order?**

At the May 18, 1999, hearing on remedy, UWM attempted to introduce evidence regarding Brenon's unauthorized taking of documents from the UWM police department. UWM's intention was to argue that under McKennon v. Nashville Banner Pub. Co., 513 U.S. 532 (1995), Brenon's wrongdoing, once known, would have resulted in his termination, and therefore UWM's liability for back pay ended on June 24, 1996, the date that Brenon admitted at his deposition to having copies of UWM documents at his home. Brenon initially objected on relevance grounds. Later he claimed surprise. The Commissioner hearing the evidence sustained the objection without explanation, but he permitted UWM to make an offer of proof which revealed the nature of the evidence it planned to introduce and its significance to the remedy proceeding.

In its September 1, 1999, Interim Decision and Order, the Commission concluded that the ruling to exclude the after-acquired evidence was proper It reasoned that to allow introduction of this evidence would have been unfair to Brenon because he had received no prior notice that this alleged misconduct in taking documents from the workplace would be an issue. It further cited the fact that UWM had not requested a continuance at the May 18 hearing. Finally, the Commission raised legal concerns about whether the after-acquired evidence could even be properly considered, but it disclaimed these questions as a basis for its decision.

The removed document issue had been pending in the Milwaukee County Circuit Court since at least 1997. Apparently dissatisfied with Brenon's response to the directive first made at his June 24, 1996, deposition that he return all documents he had removed from the

workplace, UWM filed a replevin action in the circuit court. A second replevin action was, for reasons not clearly disclosed by the record, filed in 1998. Brenon vigorously defended against this action. However, in a September 9, 1999, letter, eight days after the Commission's decision, Brenon conceded on all issues in the replevin action; and pursuant to a September 20, 1999, order of the circuit court, Brenon turned over on September 29, 1999, ten boxes containing approximately 24,000 documents that he had taken from UWM during his employment.

On October 22, 1999, UWM filed a motion for reconsideration of the after-acquired evidence ruling based on the new evidence of the ten boxes of documents. On November 19, 1999, the Commission issued its final order in this case by which it denied the motion for reconsideration and also denied Brenon's latest motion for attorney fees and costs. As to the reconsideration motion, the Commission cited two reasons for its decision: (1) it again relied on the lack of notice and pointed out that the actual receipt of the ten boxes was not a material factor since UWM had contended as early as July 20, 1998, it had enough "removed document" evidence to terminate Brenon and (2) it concluded that the after-acquired evidence doctrine is inapplicable to a case involving an appeal of a discharge under the civil service code and that to rule otherwise would effectively contravene the decision in State ex rel. Tracy v. Henry, 219 Wis. 53 (1935). In essence it ruled that the after-acquired evidence was immaterial or irrelevant. UWM challenges both of these reasons.

The decision on whether to exclude evidence is entrusted to the discretion of the presiding official at an evidentiary hearing. State v. Pharr, 115 Wis. 2d 334, 342 (1983). The exercise of that discretion will be affirmed by a reviewing court if the official applies the proper law to

the established facts to reach a reasonable conclusion. Ritt v. Dental Care Associates, S.C., 199 Wis. 2d 48, 72 (Ct. App. 1995). Thus the standard for reviewing the Commission's decision to exclude after-acquired evidence in this case is abuse of discretion. However, the preliminary legal question of whether the doctrine is applicable in a case like this is reviewed *de novo*. This is clearly an issue of first impression for the Commission, and in fact has not been addressed by any reported decision of a Wisconsin court.

The leading case establishing the "after-acquired evidence rule" is McKennon v. Nashville Banner Pub. Co., 513 U.S. 532 (1995). In McKennon, a 62 year old employee sued her employer for age discrimination in violation of the Age Discrimination in Employment Act (ADEA). The employer successfully moved for summary judgment on the grounds that even assuming that it had discriminated against McKennon based on her age, the discovery during her deposition that she had copied and removed confidential financial documents from her employer constituted an independent justification for her termination and therefore no award of back pay based on the ADEA violation was warranted. The Supreme Court unanimously reversed the Sixth Circuit, which had affirmed the trial court, and held that because of the national policies regarding nondiscrimination in the workplace served by the ADEA, even with discovery of after-acquired evidence of employee misconduct, a complete bar on any recovery of back pay by the employee would undermine the policies of the ADEA. However, to balance the interests of the employer and employee, it ruled that any award of back pay in such a situation should cover from the date of the unlawful discharge to the date the subsequent evidence of wrongdoing was discovered. The Supreme Court also stressed that this principle applied only when the employer is able to demonstrate that the employee's after-discovered wrongdoing was so severe as to

warrant termination on that ground alone and that the employer would have in fact terminated the employee on that basis alone.

UWM contends in this case that McKennon should have been followed, and if the Commission had followed it, any award of back pay to Brenon would be limited to the period between his termination in February 1996 and the date it was discovered he had, without authorization, UWM documents in his possession. As to whether there was sufficient notice that Brenon's misconduct would be at issue, UWM argues that as the subject of the hearing was "remedy" and after-acquired evidence operates to limit the remedy available to the discharged employee, there are no additional notice requirements that must be satisfied. It goes on to assert that even in the event that Brenon was surprised by the introduction of this issue, the appropriate response by the Commission would have been to continue the hearing so Brenon could prepare, not to wholly exclude relevant evidence.

As noted earlier, the Commission concluded that it was bound by the Wisconsin Supreme Court's decision in State ex rel. Tracy v. Henry, 219 Wis. 53 (1935) which it read to prevent the use of the after-acquired evidence doctrine in the civil service setting. This legal conclusion is wrong, and because the Commission failed to apply the proper law in making its decision to exclude the evidence offered by UWM, it abused its discretion and the decision must be reversed. State v. Hutnik, 39 Wis. 2d 754, 763 (1968).

In Tracy, state deputy oil inspectors had been discharged without a reason being given, in violation of state statute. While the case was pending, the state conducted an investigation and sent a letter to a number of the oil inspectors indicating that good cause for their termination had existed at the time of their original discharge and specifying those reasons. None of this

group objected to these letters within a reasonable time, which had expired prior to the trial court's action. The Wisconsin supreme court rejected this attempt to discharge the inspectors for valid reasons and make this second discharge retroactive to the date of the illegal discharge. As explained by the court:

> [A]n attempted compliance by furnishing such reasons subsequent to the original illegal discharge could not become effective as a discharge until after such reasonable time for making an explanation had elapsed and such reasons and explanation had been filed and, in view of those consequences, it is manifest that a subsequently effective discharge, pursuant to subsequently furnished and filed legal reasons, could not possible operate retroactively so as to be deemed effective as of the date of the original illegal discharge.

Tracy, 219 Wis. at 61.

The court in Tracy was not addressing or deciding whether the after-acquired evidence doctrine was applicable in determining the proper remedy for the wrongly discharged public employees. It was addressing and did decide whether, as the state contended, a subsequent discharge for valid reasons could be applied retroactively so as to defeat the employee's right to be reinstated. It resolved that issue by concluding it could not. If anything, however, the decision in Tracy is entirely consistent with the decision in McKennon. The court affirmed the trial court's order that required reinstatement and back pay up to the time of reinstatement for all of the inspectors who had not been sent a subsequent discharge letter. But for those who had been sent such a letter, the trial court's order, also affirmed, provided that they receive back pay only up to the "date of the alleged subsequent discharges." 219 Wis. at 58. The legitimate interests of the employer were protected while the wrongful nature of the original discharge was not ignored. The state was not required to reinstate the employees and pay back pay up to the reinstatement only so that it could then terminate them for the subsequently discovered good reasons. The employees, on the other hand, were not deprived of any remedy for their clearly

illegal original discharge even though the state later discovered valid reasons to terminate them which had existed prior to that original discharge.

The Commission in this case explained its exclusion of the after-acquired evidence by reliance on Tracy as follows:

> This case [Tracy] is consistent with the proposition that [UWM] would have the right to proceed to discharge [Brenon] on the basis of the purloined documents, but only after first having restored him with back pay from the date of the original termination to the date of restoration. For the Commission to now deny restoration and limit [Brenon's] back pay to the time from the original discharge (February 11, 1996) to the date of the discovery of the missing documents (June 24, 1996) amounts effectively to an unlawful retroactive discharge of the nature involved in Tracy. (Final Order Decision, 11/19/99 p. 6.)

Both points the Commission draws from Tracy are mistaken. In Tracy the state had not been required to restore the employees to their former jobs before discharging them for the after-acquired reasons. The court expressly approved a court order that required no such artificial formalities. Second, to apply the after-acquired evidence doctrine to the calculation of Brenon's back pay award would not amount to an "unlawful retroactive discharge" like that in Tracy. In Tracy what the court found unlawful was the state's

effort to make the subsequently discovered valid reasons for discharge retroactive all the way back to the original discharge thereby defeating completely the claim of the employees. That is not what UWM seeks to do here; and if it is successful, that is not the effect that its effort would have.

The Commission for the first time on this judicial review contends that this case should be distinguished from McKennon on the basis that the employer there was a private business while here UWM is a public employer. There is no question that this difference is present, but it is a difference without significance. In McKennon the Supreme Court focused on the

equitable nature of the context within which a court operates in constructing a remedy for improper discharge. 513 U.S. at 360. It balanced legitimate interests that both employees and employers have in such circumstances, but none of them arose from the employer's status as a private business. More importantly, the "employer's legitimate concerns" that the Supreme Court was seeking to not ignore, id. at 361, are no different for UWM than they were for Nashville Banner Publishing Company; and the Commission does not argue otherwise. It is true that a tenured public employee like Brenon has greater substantive protection from discharge than does an at-will employee like Christine McKennon, but again this difference has no bearing on the rationale for the after-acquired evidence doctrine. Where an original discharge is improper, as it was in McKennon and was here, the employer, whether public or private, will still have the burden to demonstrate that "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."[2] Id. at 362-63. Because of this requirement, civil servants lose no protection when an attempt is made to use the doctrine and at-will employees are provided with a protection to avoid pretextual claims of after-acquired evidence of misconduct. This most assuredly is no reason why the balanced approach of the after-acquired evidence doctrine should not be applied in calculating back pay in wrongful discharge civil service cases. While no case has confronted the issue in Wisconsin, I predict that if and when that occurs, the appellate courts

[2]The Commission does not argue that this case should be distinguished from McKennon on the basis that here UWM did not formally discharge Brenon again while he was already discharged and his appeal was still pending while there the employer did so. As the Supreme Court makes clear in the portion of its decision cited in the text, that is not crucial. The burden is not to show that the employee was actually discharged a second time but only that he or she "would have been terminated." The Court made the same practical point earlier in rejecting the requirement that a subsequently discovered wrongdoer be reinstated, "It would be both inequitable and pointless to order the reinstatement of someone the employer *would have terminated*, and *will terminate* in any event and upon lawful grounds." (emphasis added) 513 U.S. at 362.

will conclude that the doctrine is applicable in this context.

Brenon argues that the Commission's decision should be upheld because UWM "cannot show by a preponderance of the evidence that Sgt. Brenon would have been fired." Response Brief, p. 10. This contention is easily addressed. UWM was denied the right to present evidence to establish that Brenon would have been fired. Until it is able to present evidence and the Commission is able to consider it, we will not know whether UWM can or cannot make the required showing. Certainly the offer of proof made at the May 18, 1999, hearing makes out a prima facie case that entitles UWM to go forward.[3]

In addition to concluding that the after-acquired evidence UWM sought to introduce was immaterial or irrelevant, the Commission based its decision to exclude it on the unfair surprise to Brenon of allowing this issue to be raised in the remedy hearing. The Commission and both parties devote considerable effort to arguing whether there was or should have been any surprise to Brenon, i.e., whether he should have been on notice that after-acquired evidence was going to be a theory at issue in the remedy hearing. Whether Brenon was or should have been surprised, and thereby prejudiced, by UWM's use of such evidence is a question of fact. The detailed recitation of the proceedings leading up to the May 18, 1999, hearing in the preceding FACTS section of this decision provide grist for the competing positions taken, but they also provide the basis for this court to conclude that there was substantial evidence in the record to support the Commission's finding that Brenon was in fact surprised and would have been prejudiced and that this finding was not clearly erroneous. That however, does not end the inquiry.

[3]Brenon's further contention that in order for UWM to meet its burden it must now show that it had previously fired someone for taking university documents to their home without authorization is wholly without merit. The single case Brenon cites for this proposition stands for no such rigid rule.

Our Supreme Court recently held, citing Fredrickson v. Louisville Ladder Co., 52 Wis. 2d 776 (1971), that the "drastic measure" of excluding relevant evidence in the case of surprise "should be avoided by giving the surprised party more time to prepare, if possible." Magyar v. WHCLIP, 211 Wis. 2d 296, 303-04 (1997). The court noted that this principle is based on "the policy of discovering all of the truth," and thus "continuance is usually the more appropriate remedy for surprise; exclusion should be considered only if a continuance would result in a long delay." Id. at 304. The court in Magyar went on to prescribe that a balancing test under Wis. Stats. § 904.03 be undertaken to assess whether the surprise was unfair and, if so, whether that unfair surprise outweighed the probative value of the evidence. Id. Here the Commission failed to engage in any balancing test.

While the Commission erroneously concluded that the after-acquired evidence was not material or relevant, it failed to note in any way the significance of the evidence on the issue at stake. If UWM is able to prove the elements of its claim, the back pay award it owes to Brenon may be as little as $17,514.43 rather than the $159,533.64 the Commission awarded in the absence of the after-acquired evidence. The probative value is obviously quite significant. While this probative value may not have been sufficient to outweigh the unfairness to Brenon of going forward on May 18, 1999, the Commission did not properly consider the "more appropriate remedy" of a continuance. In its September 1, 1999, decision, the Commission, responding to UWM's argument that Brenon should have been granted a continuance rather than excluding the evidence altogether, stated, "[UWM] did not request a continuance at the time when the issue of the after-acquired evidence was before the examiner." p. 11 UWM was not the surprised party The burden was not on UWM to ask for relief to ameliorate prejudice to

its opponent. More importantly, the duty was on the examiner himself to consider the "more appropriate remedy" of a continuance if the policy of discovering all of the truth were to be served at all. He obviously did not do so, as he simply excluded the evidence without explanation. It is noteworthy that in Magyar the surprised party did not request a continuance.

The Commission as a whole had the opportunity to engage in the balancing assessment that the examiner did not. Before issuing its September 1, 1999, decision, the Commission was expressly asked to continue the remedy hearing. As noted, its response was to attach significance to UWM's failure to request a continuance at the May 18 hearing; but the Commission also stated, "given the long and complex procedural history of this case, including the notice problem discussed above, further postponement was not indicated." p. 11. The obvious question is "Why?" The Commission provides no answer The exercise of discretion requires the use of a demonstrated rational process. Milwaukee Rescue Mission v. Milw. Redevelopment Auth., 161 Wis. 2d 472, 490 (1991). Here the Commission did not exercise discretion; it engaged in its opposite, unexplained decision making. The court in Magyar did not rule that a continuance must always be granted in the case of surprise. It did say that this alternative should be used "if possible" and should be discounted "only if a continuance would result in a long delay." 211 Wis. 2d at 304. The Commission did not explain why a continuance was not possible and made no finding as to how much delay would have resulted, i.e., whether the delay would be "long." Apparently any delay was deemed too long by the Commission. A reviewing court should look for reason in the record to sustain a discretionary decision. Unfortunately the record here provides no such reasons.

The hearing that would be continued was one before an examiner, not before a jury. The

Commission thus had the opportunity to use the evidence that was presented on May 18 to resolve the mitigation questions and all other issues relating to back pay calculations, except for the after-acquired evidence. A continued hearing could have been a single issue, focused proceeding where Brenon would have ample opportunity to respond to UWM's after-acquired evidence. The impact of delay on the institutional concerns of the Commission was a proper consideration, but the record does not support the view that this was a weighty matter in this case. The Commission itself took over eighteen months to issue its decision on "just cause' following the August, 1996, hearing. The Commission thereafter took over fifteen months to conduct a remedy hearing. A delay of several more months to conduct a single issue hearing that would allow the discovery of all of the truth hardly can be seen as harmful to the Commission's institutional concerns for the prompt adjudication of the cases before it. Especially is this so in the face of the substantial probative value of the after-acquired evidence that UWM proposed to introduce.

Finally, the Commission in its November 19, 1999, decision on UWM's motion for reconsideration alluded to a "waiver" issue. It is unclear what requirement of law or Commission rules that UWM supposedly violated by not expressly serving notice prior to May 18, 1999 of its intent to present after-acquired evidence to reduce its liability for back pay.[4] The record does not support the view that this failure was a violation of any express scheduling order in this case. More importantly, even if the course of proceedings imposed on UWM some obligation to notify Brenon of its intent, exclusion of the evidence as a sanction for a failure to comply with a scheduling order is an extreme response reserved for instances where

[4]Again, I sustain the Commission's implicit finding that Brenon was in fact surprised and would thereby have been prejudiced by the use of after-acquired evidence at the May 18 hearing.

noncompliance is "egregious" and without any clear and justifiable excuse. Schneller v. St. Mary's Hospital, 162 Wis. 2d 296, 311 (1991). The Commission did not even purport to impose exclusion of the after-acquired evidence as a sanction for violation of some ambiguous obligation of disclosure. More critically, the Commission did not suggest, much less find, that UWM's violation was "egregious." The record would not support such a finding even if it were made.

In summary, the Commission, in excluding the after-acquired evidence, abused its discretion. It applied an incorrect rule of law and it failed to properly engage in a balancing of interests as required by Magyar. The back pay award decision must be reversed and that matter remanded to the Commission for further evidentiary proceedings where UWM may offer its after-acquired evidence.

4. Did the Commission properly deny all of Brenon's motions for attorney's fees on the grounds that although ultimately unsuccessful, UWM was "substantially justified" in its legal positions before the Commission?

Brenon seeks judicial review of the Commission's decision that he was not entitled to attorney's fees under Wis. Stats. §§ 227.485(3). That statute provides as follows:

> In any contested case in which an individual . . 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.

The Commission's determination that UWM was "substantially justified" in its legal positions is a question of law. Susie Q Fish co. v. Dept. of Revenue, 148 Wis. 2d 862, 868 (Ct. App. 1989). As such, it is entitled to great weight deference because of the Commission's

long-standing interpretation of § 227.485(3), its expertise in evaluating legal arguments in employment appeals, the fact that it has been charged by the legislature with administering the statute, and because the Commission's interpretation will provide uniformity and consistency in the application of the statute. *See* Tannler, 211 Wis. 2d at 184. Moreover, deciding whether or not a legal position is substantially justified involves consideration of the public policies underlying those statutes the Commission is charged with enforcing. *See* Kannenberg v. LIRC, 213 Wis. 2d 373, 385 (Ct. App. 1997). Brenon does not argue otherwise. Therefore, the Court will affirm the Commission's decision if it is reasonable, even if a more reasonable interpretation exists. *See* UFE, Inc., 201 Wis. 2d at 286-87

The "substantially justified" standard requires the agency to demonstrate the following: 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. Sheely v. DHSS, 150 Wis. 2d 320, 337-38 (1989). There is no presumption that because a party's legal positions were not successful they were not substantially justified. Id. at 338.

Brenon submits that UWM was not substantially justified in arguing 1) that he received adequate due process before his suspension, 2) that his termination was warranted, 3) that the Commission could not award him costs for the replevin action, and 4) that UWM was entitled to a hearing on remedy. These arguments are without merit and unsupported by the record.

As to his first contention, as found by the Commission, although the due process provided Brenon by UMW was deficient, he did have notice of the charges against him, and was given an opportunity before the suspension was ultimately imposed to discuss the matter with

Chief Clark. Although the Commission correctly concluded that Brenon's situation was distinguishable from the felony charges in Gilbert, that case also recognized that the question of how much due process is required for a suspension as opposed to a termination was an open one: "we have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property " Gilbert, 520 U.S. at 930 (quoting Paratt v. Taylor, 451 U.S. 527, 540 (1981)). The Commission's discussion, in its decision of June 23, 1998, of what process UWM had in fact provided to Brenon and why there was a reasonable basis for it to argue that this process was due process under the circumstances of his case reveals a reasonable conclusion that UWM was substantially justified in taking this position. As a result, the Commission's decision must be sustained.

Brenon argues that the Commission's decision should be reversed for several reasons. To the extent he dwells on the Commission's conclusion in its earlier decision that he had been denied due process in the suspension, he makes the same error that UWM made in relying on the fee award decision to argue its due process challenge. He ignores that the Commission was acting under two different standards in reaching the two different decisions it did. Again, it was entirely consistent for the Commission to conclude, on the one hand, that UWM was "substantially justified" under Wis. Stats. § 227.485(3) in arguing that it had provided Brenon with due process and, on the other hand, to have previously concluded that Brenon had in fact been denied due process in his suspension under the Mathews/Gilbert standard. It is also entirely consistent for this court to sustain these two different decisions under the two different standards for review, "great weight" and "due weight."

To the extent Brenon seems to challenge the factual underpinnings of the Commission's findings regarding the fee award decision, his effort is unavailing for two reasons. First, as noted earlier, Brenon never asserted that the Commission's decision should be reversed because its factual findings were not supported by substantial evidence in the record. He has thus waived such a challenge. Second, the challenge he does lodge is based on his assertions concerning a conspiracy and vendetta within the UWM police department that the Commission did not find to be present or operating in his case. A court reviewing an agency's action assesses whether the findings actually made by the agency are supported by substantial evidence in the record, not whether there is evidence to support a finding that the agency could have made but did not.

As to Brenon's challenge to the Commission's conclusion that UWM was substantially justified in arguing that its termination decision should be sustained, the Commission's decision of June 23, 1998, reveals a reasonable rationale. The Commission pointed out that UWM had relied on the statements of witnesses who were other police officers and the Commission did not find reasons why UWM should have doubted their veracity. The proceedings before the Commission thus revolved around its findings concerning these witnesses' credibility and the weight the Commission would give to various factors such as Brenon's employment history and the culture within the UWM police department. Termination was the next step in the disciplinary hierarchy after suspension, and it was reasonable for UWM to act upon allegations of misconduct by Brenon that were fairly consistent with his past behavior and came from a number of witnesses. While not all allegations were substantiated at the hearing, the Commission still found that there was sufficient evidence of misconduct by Brenon to warrant a suspension. In short, the Commission's conclusion was reasonable and must be affirmed.

Brenon's challenge to the Commission's denial of attorney's fees he incurred in the replevin action in Milwaukee County Circuit Court is patently without merit. The sole authority under which the Commission can award attorney's fees is Wis. Stats. § 227.485. The statute limits an award to fees "incurred in connection with the contested case" before the agency. A replevin action in a separate court is not part of the "contested case." If Brenon wanted to recover fees in that matter, his remedy was to seek fees in the circuit court under Wis. Stats. § 814.245[5], not before the Commission.

Finally, with respect to whether UWM was substantially justified in arguing for a hearing on remedy, the discrepancies in Brenon's bank accounts and reported income are well documented in the record. It is undisputed that UWM was entitled to a setoff of the back pay award for any income that Brenon did earn during the period in question. Requesting further discovery and a hearing to resolve this issue was both prudent and reasonable and, under the stipulation of July 28, 1998, it was expressly anticipated that there would be further submissions and/or objections on the issue of remedy. Finally, given this court's reversal of the Commission's order on back pay, Brenon was not a "prevailing party" in any event.

[5]While the record from the replevin action is not before this court on this ch. 227 review, the portions of it that are part of the record before the Commission cast considerable doubt on whether Brenon had any basis for such a motion. Under § 814.245(3), fees may be awarded only to a "prevailing party." It does not appear that Brenon prevailed in any way in the replevin action.

For all of the foregoing reasons,

IT IS ORDERED that the Commission's Interim Decision and Order of February 12, 1998, and June 23, 1998, are affirmed.

IT IS FURTHER ORDERED that the Commission's Interim Decision and Order of September 1, 1999, and that portion of its Final Order of November 19, 1999, denying UWM's motion for reconsideration are reversed and remanded to the Commission for further hearing at which UWM shall be permitted to offer evidence in support of its after-acquired evidence theory. The other aspects of the Commission's Final Order are affirmed.

Dated this 31st day of May, 2001.

BY THE COURT:

Hon. Michael Nowakowski
Circuit Court Judge