

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RANDALL GERRITSON, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 1

No. 62749

PA(adv)-1

(Previously Case No. 02-0040-PC)

Decision No. 31234-B

Appearances:

Bruce M. Davey, Lawton & Cates, S.C., Attorneys at Law, 10 East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Appellant.

Kathryn R. Anderson, Assistant Legal Counsel, Department of Corrections, 3099 East Washington Avenue, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Respondent.

FINAL DECISION AND ORDER

Randall Gerritson seeks a determination of his remedy as a consequence of the Commission's Interim Decision and Order issued on June 14, 2005, which modified Respondent's action of demoting the Appellant from his Captain position, effective July 14, 2002, to a 20-day suspension.

Dennis P. McGilligan, as the designated Hearing Examiner, convened an evidentiary hearing on November 15, 2005, relating to the remedy issue. Mr. McGilligan retired from his employment with the Commission before preparing a proposed decision. Kurt Stege was subsequently re-designated as Hearing Examiner in the matter and reviewed the record, including the hearing on the merits as well as the hearing on remedy. On May 11, 2006 and upon agreement, the parties submitted supplements to their briefs and the Respondent submitted an additional exhibit. At that point the matter was ready for decision. The hearing examiner issued a proposed decision on July 13, 2006. By letters dated July 26, both parties stated they would not be filing any objections to the proposed decision.

The parties' disputes regarding the remedy in this matter are summarized in the following issues:

1. Is the back pay owed to the Appellant the difference between what he would have earned as a Captain and: a) the amount he actually earned during the back pay period, or b) the amount he would have earned as a Lieutenant during the back pay period if he had not initiated a second demotion to a Sergeant position?

Dec. No. 31234-B

2. Did the Respondent's offer to reinstate Appellant to a position as Captain on the second or third shift, effective November 6, 2005, terminate the period of Appellant's back pay, or does the back pay period continue to run until Appellant is offered a Captain position on the first shift?
3. Is Appellant entitled to interest on the back pay and, if so, how should it be calculated?
4. Is Appellant's entitled to reimbursement for his costs associated with pursuing his appeal?

For the reasons set forth below, the Commission concludes that: 1) the Appellant's second demotion, which he initiated, does not act to reduce his back pay; 2) the 2005 reinstatement offer terminated the back pay period; 3) Appellant is entitled to interest on any back pay; and 4) Respondent has no liability to reimburse Appellant for the costs of his appeal.

The Commission makes the following

FINDINGS OF FACT¹

1. Dodge Correctional Institution (DCI) is a maximum security prison operated by Respondent Department of Corrections (DOC) to house approximately 1500 convicted felons. Inmates who are in DCI for the purpose of assessment and evaluation generally stay about 60 to 90 days at which time they are assigned to another prison. Approximately 1600 inmates are processed yearly through DCI for assessment and evaluation. DCI also maintains a 64 bed health services unit which provides services for the entire State prison system. Because the prison operates 24 hours daily, there are three standard shifts for correctional officers, specifically 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m. Supervisors are also present for a half-hour "pre-shift" period. At all times material herein, the warden of DCI and the security director of DCI were John Bett ("Bett") and Dan Westfield ("Westfield"), respectively.

2. Randall Gerritson, hereinafter "Gerritson" or "Appellant", began his employment with the Department of Corrections ("DOC") as an Officer 1 in June 1992. After two years, his position was reclassified to an Officer 2. Gerritson was subsequently promoted to Sergeant, Lieutenant (Supervising Officer 1) and finally, in September 2000, to a Captain (Supervising Officer 2) position at DCI.

¹ The Commission incorporates Findings 1 through 18 of the Commission's Interim Decision and Order issued June 14, 2005. Those findings, modified where appropriate, are set forth below. Additional findings begin with paragraph 19.

3. Prior to the disciplinary action that serves as the basis for this appeal, Gerritson had an excellent work record and not been formally disciplined.

4. In his position as Captain at DCI, Gerritson was second shift commander. His immediate supervisor was Westfield. Gerritson was responsible for the operation of the entire prison during his shift, including supervising staff, conducting investigations as assigned by the security director, enforcing relevant policies and procedures of DCI and DOC, supervising inmates, and handling public contacts. Gerritson supervised two lieutenants as well as sergeants and correctional officers. He was the second level supervisor of Sergeant Jodi Mallas Schueneman ("Mallas").

5. No later than August of 2001, a romantic relationship developed between Gerritson and Mallas. At that time, Mallas was separated from her husband Doug Schueneman ("Schueneman"), who worked at DCI as a correctional officer on DCI's first shift.

6. DOC and DCI do not have any policies or work rules prohibiting a supervising officer from engaging in a relationship with an employee under direct or indirect supervision. Supervisors are not required to disclose the existence of any such relationship. However, DCI management strongly prefers being informed of such relationships. If informed, management can respond to and take appropriate action if other staff raise concerns or situations arise in the work environment. DCI is a closed environment with lots of rumors and personal relationships can affect the institution climate as well as the health and safety of officers and prisoners. DCI does not want a romantic relationship between staff to negatively affect the workplace. Other security supervisory staff at DCI have informed the security director when they have begun to date a subordinate. It is reasonable to expect that dating a subordinate will generate rumors within the facility.

7. Both Gerritson and Mallas sent and received e-mails during work hours that were unrelated to their work. The e-mails included a photo of Gerritson and Mallas in a social setting, a photo of an inmate from another institution with feces smeared on his face, and numerous e-mails of an implicitly sexual nature that were linked to their relationship. These e-mails were exchanged between August 5, 2001 and February 18, 2002.

8. DOC Executive Directive #50 prohibits certain uses of the e-mail system, including:

Knowingly accessing, creating, sending, saving, viewing, printing or downloading defamatory, abusive, obscene, pornographic, profane, sexually oriented, racially offensive, or any biased, discriminatory, or illegal material not specifically related to an approved work activity.

9. DCI policy, in the form of an administrative directive, provides that “DOC computer equipment and programs are to be used for official State, DOC, and work related purposes only.” The policy also prohibits the unauthorized use of computers and warns that the “use of programs or equipment for personal or entertainment purposes represents a work rule violation for misuse of State property and may result in disciplinary action.”

10. DOC Executive Directive 7 provides: “[A]ny employee who engages in harassment of any other employee, client or inmate on the basis of age. . . or arrest or conviction record violates state and/or federal laws.” It also provides that any employee who allows the harassment of an inmate “without intervening or reporting the harassment is condoning such activity and is subject to appropriate discipline in accordance with this policy.”

11. Sometime after Gerritson and Mallas had begun their relationship, Schueneman informed Warden Bett that he believed Gerritson was engaged in some type of a relationship with his wife. Bett then asked Westfield to determine if such a relationship existed and in November 2001 Westfield met with Gerritson and asked him if he was having a relationship with Mallas. Gerritson told Westfield, “No.” Westfield assumed Gerritson was being truthful. He reported to Bett that Gerritson was not involved with Mallas. Both Bett and Westfield’s interest in Gerritson’s response arose from their interest in the safe operation of DCI rather than out of a desire to provide information to Schueneman. Gerritson understood that Westfield posed the question for legitimate work-related reasons.

12. Early in 2002, Lt. Menne and Lt. Wojahn informed Westfield that Gerritson had a relationship with Mallas that was interfering with their efforts to supervise her. They identified several specific instances where they believed that Gerritson had intervened inappropriately: a) by trying to influence an investigation into Mallas’ use of sick leave; b) by allowing her to take long breaks; and c) by allowing her to wear an eyebrow ring in violation of the dress code. Ultimately, Mallas received counseling over the eyebrow ring, and her use of sick leave was monitored. No action was taken regarding the length of her breaks.

13. In light of the complaints by Menne and Wojahn, Westfield met again with Gerritson in February of 2002. Westfield described the concerns raised by the two subordinate officers and again asked Gerritson whether he had a relationship with Mallas. Gerritson failed to acknowledge that a relationship existed. Gerritson testified he told Westfield that it was none of his business who he dated as long as it did not interfere with how he did his job. Westfield testified that Gerritson denied any such relationship.

14. Respondent’s Bureau of Technology Management (BTM) learned that an e-mail with sexual content had been circulated by a DCI correctional officer to other DCI staff and in February, 2002, Respondent commenced an investigation into the use of e-mail by all DCI staff. During this investigation, Respondent uncovered the e-mails exchanged between

15. In May 2002 Gerritson met again with Westfield. During the course of this meeting, Westfield indicated that the investigation into use of the e-mail system had uncovered multiple e-mails between Gerritson and Mallas which indicated they had a relationship, contrary to what Gerritson had said in the two previous meetings. Gerritson confirmed that he was having a relationship with Mallas and apologized for not being truthful when previously asked. Respondent's primary concerns about Gerritson's e-mail use were the supervisor's highly suggestive language and the amount of work time that was taken up by the extensive e-mail exchanges while both Gerritson and Mallas were working the same shift.

16. The letter of demotion that is the subject of this appeal is dated July 11, 2002, and includes the following language:

This letter will serve as a formal notification of your involuntary demotion to a Supervising Officer 1 position effective Sunday, July 14, 2002. Please see attached appointment letter for further information regarding your new assignment. This action is being taken as a result of your having violated Department of Corrections work rules 2, 6, and 28. These work rules apply to all employees of the agency and specifically prohibit:

#2 "Failure to follow policy or procedure, including but not limited to the DOC Fraternalization Policy and Arrest and Conviction Policy." Specific policies not followed are the DOC Harassment Policy, Executive Directive 7, the DOC Internet and Email Use Policy, Executive Directive 50, and DCI policy #03.33, Employee Use of Computer Hardware and Software.

#6, in part, "knowingly giving false information . . . failing to provide truthful, accurate and complete information when required."

#28, in part, "Unauthorized or improper use of state property or services, including but not limited to electronic communications . . . computer, software . . . while in the course of one's employment."

This action is based on the following facts:

In November 2001, your supervisor received information suggesting you were romantically involved with a female staff member whom you supervised on your shift. You were asked directly by your supervisor if you had a personal relationship with this staff member and you denied any relationship with her. In early February 2002, your supervisor again asked you if you were in a relationship with this staff and you again denied it. Later, during the course of

an investigation regarding staff misuse of e-mail, multiple e-mail correspondence from you was found in the account of the female staff member.

Page 6
Dec. No. 31234-B

The content of the e-mail correspondence found was not work-related and indicated you were romantically involved in a relationship with her and it included sexually suggestive content. Some of these e-mails dated back to August 2001. There were numerous e-mail exchanges of this type and many of the e-mail exchanges spanned 20-30 minutes at a time. . . .

17. Approximately 60 DCI employees were formally disciplined as a consequence of the information discovered during BTM's investigation of e-mail usage. Gerritson was the only security supervisor who was found to have violated the e-mail policy. Management became concerned that large numbers of suspensions would have adverse consequences for staffing the facility so the discipline initially contemplated for many individuals was changed from suspension to a written reprimand that would have the same effect on any future discipline as a suspension. Discipline imposed ranged from counseling to a ten (10) day suspension. Among those disciplined:

a. Mallas was suspended without pay for one work day for forwarding inappropriate items including "video clips, pictures, jokes and e-mail exchanges with sexual connotations, some of which depicted nudity" using the State e-mail service and equipment to other employees. Mallas has grieved the suspension and the grievance was pending at the time of the hearing in this matter.

b. DCI word processing supervisor Julie Bassuener was given "a written reprimand equal to and carrying the weight of a three day suspension for violating Department of Corrections work rules numbers 2 and 28." This action was taken based on the following conclusions:

As the result of a lengthy investigation into the use of email [sic] by several employees at DCI, it was determined that you forwarded a number of inappropriate items, using state email service and equipment, to other employees. One of these employees is under your direct supervision. These items included jokes, pictures, video clips and conversational email messages with sexual connotations. One of these items was a picture, which, if in paper form, would be considered a "nude pin-up poster." Another item was a video clip of an animated snow sculpture of male genitalia.

c. DCI contract monitoring unit supervisor Karen Parenteau received a written reprimand equivalent to a one-day suspension. This action

was taken for the following reason:

Page 7
Dec. No. 31234-B

As the result of a lengthy investigation into the use of email [sic] by several employees at DCI, it was determined that you forwarded two inappropriate items, using state email service and equipment, to another employee. You originally received these items from an employee under your direct supervision. These items were cartoons inappropriate for the workplace, one of which had sexual connotations.

18. Bett contacted other correctional institutions operated by Respondent in an effort to locate a vacant Lieutenant position for Gerritson, on the theory that it would be less embarrassing for him if he did not have to return to work in the same institution where he had served as shift captain before the demotion. Due to pending layoff plans, no positions were available.

19. At the time of the discipline, Gerritson was in the midst of a divorce and had two sons, aged 7 and 9. Gerritson and his wife shared custody and the boys would alternate every week between spending 3 days and 4 days with each parent. It was difficult for Gerritson to both work second shift and manage the custodial arrangement. He would have been unable to maintain shared custody if he worked on the third shift. Gerritson shared this information with Security Director Westfield.

20. On Thursday, July 12, 2002, the day after he had received the letter of demotion, Mr. Gerritson reported to work. He was informed in the gatehouse that he was to be off work with pay on July 12, 13 and 14, and was to report to the transportation unit on Monday, July 15. Gerritson was assigned to work the 6:00 a.m. to 2:00 p.m. shift, Monday through Friday, transporting prisoners. This assignment was only intended to be temporary and he ended up working only one pay-period in the assignment. Gerritson was embarrassed by the demotion and became uncomfortable when he encountered his DCI co-workers.

21. On a later date, Gerritson learned that he would be reassigned to a 3rd Shift Line Officer (Lieutenant) position at DCI.

22. Gerritson wrote a memo to Warden Bett on July 16 requesting further demotion from Lieutenant to Correctional Sergeant "for personal and professional reasons." Gerritson sent a similar request to Gary McCaughtry, the Warden at Waupun Correctional Institution (Waupun CI). The following day, Tuesday, July 17, Gerritson formally accepted the demotion to a Correctional Sergeant position on the second shift at Waupun Correctional Institution, commencing July 28, 2002.

23. Gerritson began his employment as a second-shift sergeant at Waupun CI on July 28, 2002.

24. Appellant appealed the demotion from Captain to Lieutenant and it was reduced to a 20-day suspension by order of the Commission dated June 14, 2005.

25. After July 2002 but before October 31, 2005, Gerritson received custody of his two sons for 5 days each week. He was divorced at approximately year-end 2002.

26. During January or February of 2004, Gerritson transferred from his second shift Sergeant position at Waupun CI to a first shift Sergeant position at the same facility.

27. Between July 2002 and the evidentiary hearing held in November 2005, Appellant never sought promotion from the Sergeant position at Waupun CI.

28. Between July 2002 and October 2005, various changes occurred to the organization of personnel at DCI. Those changes that are relevant here are:

a. In November 2002, Charles Pearce was promoted from a Central Transportation Lieutenant position into what had formerly been Gerritson's 2nd Shift Line Captain position.

b. On January 3, 2003, Daniel Steckbauer retired from a first-shift position as DCI Training Captain. The following day, Charles Oleson, who had been serving as the DCI Programs Captain on first shift, transferred to fill the Training Captain vacancy.

c. Later in January 2003, John DeHaan, a Captain and a 1st Shift Line Supervisor, transferred into the first-shift Programs Captain position vacated by Oleson. Mr. DeHaan only stayed in the new position for two months before he returned to his former position as 1st Shift Line Supervisor.

d. When Mr. DeHaan left the 1st Shift Line Supervisor position in January 2003, Capt. Pearce transferred into the first shift position and vacated the 2nd Shift Line Supervisor.

e. Once Capt. Pearce vacated the 2nd Shift Line Supervisor position (which Mr. Gerritson had occupied prior to Respondent's disciplinary action), Rodney Menne was promoted from a 1st Shift Line Lieutenant position to fill it.

f. In March 2003, Capt. Pearce (1st Shift Line Supervisor) and Capt. DeHaan (Programs Captain) exchanged positions.

g. Captain Brian Tierney served as DCI's 3rd Shift Line Supervisor from 2002 until October 2005 when Respondent assigned him to the first shift. Tierney had been absent on a number of occasions which had been causing third shift staffing problems and he had indicated he would retire at the end of 2005. Tierney did not ask to be moved to the first shift and there

was no first shift vacancy at the time of the reassignment.

29. DCI exercised discretion when assigning and reassigning Lieutenants and Captains. Employees who sought reassignment had no assurance that their request would be granted and DCI sometimes reassigned Lieutenants and Captains for program reasons and irrespective of the convenience or request of the employee.

30. During the period from July 12, to July 27, 2002, Gerritson:

- a. Earned \$2,347.40 in his position as Lieutenant in the transportation unit at DCI;
- b. Would have earned \$2,671.88 (including overtime calculated based on his previous experience) as a Captain on the second shift at DCI.

31. During the period from July 28, 2002 through August 24, 2002, DOC would have imposed Gerritson's 20-day suspension ordered by the Commission.² Gerritson earned \$3,202.69 while employed in the Waupun CI Sergeant position during this period.

32. By letter dated October 31, 2005 (which was several months after the Commission issued its decision that modified the level of discipline but otherwise sustained the imposition of discipline) Respondent offered to restore Gerritson to a Captain position at DCI on either the second or third shift, effective November 6, 2005, "in accordance with the WERC decision to the appeal of your involuntary demotion." Gerritson declined the restoration offer, and insisted that he be assigned to a Captain position on the first shift.

33. During the period from August 25, 2002 to October 29, 2005,³ Gerritson:

- a. Earned \$142,355.03 (reflecting regular pay, overtime, holiday pay and differentials) as a second shift Sergeant at Waupun CI;
- b. Would have earned \$175,880.23 (reflecting regular pay, various forms of overtime, holiday pay and differentials) as a Lieutenant at DCI.
- c. Would have earned \$197,471.76 (reflecting regular pay, various forms of overtime, holiday pay and differentials) as a Captain on the second shift at DCI.

² While it might have been more reasonable to expect DOC to impose the suspension beginning July 14, 2002, or to have waited to impose it until the Commission finalized its decision on the issues of remedy, the parties' pay calculations are based on the suspension running from July 28 and the Commission will not disturb the assumptions upon which the parties appear to agree.

³ Although the Respondent's offer to employ Gerritson as a Captain on either the second or third shift would have been effective on November 6, the only wage calculations of record are premised on an October 30 effective date.

34. Gerritson's pay during this same period would also have been reduced by \$930 if he had worked as a Captain rather than a Sergeant because of the following adjustments: a) He would have received a \$250 general wage adjustment for fiscal year 04-05; b) he would not have received a \$100 length of service payment that was awarded to represented employees in 2004; c) he would not have received a \$100 general wage adjustment that was awarded to represented employees on August 18, 2005 for fiscal year 04-05; and d) he would have paid \$980 for health insurance premiums for the period from January 2004 through August 2005.

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

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to Sec. 230.44(1)(c), Stats.
2. For the purpose of determining the appropriate remedy in this matter, the Commission has the authority: a) to consider Respondent's proposal to reassign Appellant from a first shift to a third shift Lieutenant position; and b) to review the Appellant's action of initiating a second demotion, from Lieutenant to Sergeant, rather than remaining employed as a Lieutenant.
3. Respondent did not sustain its burden of showing that Mr. Gerritson failed to mitigate his back pay by initiating the second demotion.
4. Respondent sustained its burden of showing that it made an unconditional offer of reinstatement to Mr. Gerritson in October 2005.
5. Appellant's rejection of that offer was not reasonable.
6. Appellant is entitled to a back pay award of \$51,308.52, reflecting the following: a) \$324.48 for the period from July 12, to July 27, 2002; b) a deduction in the amount of \$3,202.69 for the four-week period from July 28 to August 24, 2002; and c) \$54,186.73 for the period from August 25, 2002 to October 29, 2005 (\$197,471.76, less \$142,355.03, less \$930).
7. Appellant is entitled to interest on his back pay award in an amount calculated according to the provisions of Sec. PC 5.07, Wis. Adm. Code.
8. Appellant's request for costs is denied.

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

ORDER⁴

Mr. Gerritson is awarded back pay and interest as set forth above. Appellant's request for costs is denied. Respondent is directed to again offer Gerritson a position as Captain on the second shift at DCI. The matter is remanded for action in accordance with this decision.

Within 20 days of the date of this Order, Respondent shall notify the Commission and Mr. Gerritson in writing as to the action they have taken to comply with the Commission's Order.

Given under our hands and seal at the City of Madison, Wisconsin, this 31st day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

⁴ Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Department of Corrections (Gerritson)

MEMORANDUM ACCOMPANYING FINAL DECISION AND ORDER

This matter is before the Commission on various disputes relating to the appropriate remedy in a successful appeal of a disciplinary action taken against a non-represented State employee in the classified service. Respondent's decision to demote Mr. Gerritson in July 2002 from his position at Dodge Correctional Institution as a Supervising Officer 2 (Captain) to a Supervising Officer 1 (Lieutenant) position was modified to a 20-day suspension by the Commission's Interim Decision and Order of June 14, 2005. The parties have reached agreement on certain aspects of the remedy question but questions remain relating to mitigation, an unconditional offer of reinstatement and whether the Appellant should receive costs under Sec. 227.485.

In an appeal filed under Sec. 230.44(1)(c), Stats., the Commission is required to apply the following statutory provisions relating to remedy:

Sec. 230.44(4)(c): After conducting a hearing or arbitration on an appeal under this section, the commission or the arbitrator shall either affirm, modify or reject the action which is the subject of the appeal. If the commission or the arbitrator rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. . . .

Sec. 230.43(4): Rights of employee. If an employee has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission or any court upon review, the employee shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification. Interim earnings or amounts earnable with reasonable diligence by the employee shall operate to reduce back pay otherwise allowable. . . .

As explained in *BRENON v. UW*, CASE NO. 96-0016-PC (PERS. COMM. 9/1/99); *AFFIRMED, BOARD OF REGENTS v. STATE PERSONNEL COMM.*, 2002 WI 79, 254 WIS.2D 148, 646 N.W.2D 759, “[o]ne of the purposes of back pay is to make the individual victim of an unlawful employment action whole by putting the victim in nearly the same financial position had the unlawful employment action not occurred.” However, the back pay award should not place the appellant in a better position that he would have been in absent the unlawful action. *EEOC v. ILONA OF HUNGARY, INC.*, 108 F.3D 1569, 1580 (7TH CIR. 1997) (addressing a Title

VII claim). The employing agency has the burden of proof to support its contention that an appellant has failed to exercise reasonable diligence in mitigating back pay, as required by Sec. 230.43(4). The decision in *BRENON* outlined the mitigation analysis as follows:

In *HUTCHISON V. AMATEUR ELECT. SUPP., INC. ET AL.*, 66 FEP CASES 1275 (7TH CIR. 1994), the court said that once a plaintiff has established the amount of damages resulting from the employer's conduct, the burden of going forward shifts to the defendant to show the plaintiff failed to mitigate damages or that the damages were, in fact, less than the plaintiff asserts; and that "[t]o establish the affirmative defense of a plaintiff's failure to mitigate damages, the defendant must show that: (1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence (citation omitted)." With [this and other cited] cases as guidelines, we address the issue of mitigation of damages and setoffs, since Appellant's gross back pay is not in dispute.

The present case is similar to *BRENON* in that the Department of Corrections has raised the affirmative defense that Mr. Gerritson failed to mitigate his damages. Respondent has raised additional affirmative defenses and the Commission will apply the burden of proof similarly to those defenses.⁵

Factual overview

In 2001, Respondent employed Mr. Gerritson as 2nd Shift Line Supervisor at Dodge Correctional Institution (DCI). He reported to Dan Westfield, DCI Security Director, and John Bett served as the Warden. When Respondent decided to demote Gerritson, effective July 14, 2002, from his Captain (Supervising Officer 2 or SO 2) position to Lieutenant (SO 1), he was temporarily assigned as an extra Lieutenant in DCI's transportation unit where he remained for only one pay period. Appellant initiated an additional demotion so he could fill a second shift Sergeant position at Waupun CI, effective July 28, 2002. He remained in a Waupun CI Sergeant position through the date of hearing, although he moved from a second shift to a first shift position in 2004. Absent the second demotion, Respondent would have reassigned Appellant, as a Lieutenant, to DCI's 3rd Shift Line Officer position. On October 30, 2005, after the Commission found the demotion to be excessive discipline for Appellant's misconduct and modified the level of discipline to a 20-day suspension, Respondent offered to restore Gerritson to a second or third shift Captain position at DCI but he declined the offer.

⁵ *GRAEFENHAIN ET AL., V PABST BREWING CO.*, 870 F.2D 1198, 1203 (7TH CIR. 1969) (the employer bears the burden of proof as to the adequacy of an offer of reinstatement).

The Commission has chosen to divide the potential period of back pay into four periods that reflect the demotion to the position at Waupun CI, the 20-day suspension that would have been imposed, as well as Respondent's offer to restore him to a Captain position at DCI. The following calculations are based upon two-week pay periods which serve as the basis for the State's compensation system.

Period 1 (July 14, 2002 to July 27, 2002)

Gerritson earned \$2347.40 while employed as a SO 1 in the DCI transportation unit during this period. He would have earned \$2671.88⁶ if he had been working as a SO 2. The difference is \$324.48.

Period 2 (July 28, 2002 to August 24, 2002)

Gerritson earned \$3,202.69 while employed as a Sergeant at Waupun CI during this period. He would have been serving the unpaid 20-day suspension if the Respondent had imposed the discipline ordered by the Commission rather than the demotion found to have been excessive.

Period 3 (August 25, 2002 to October 29, 2005)

Gerritson earned \$142,355.03 while employed as a Sergeant on the second shift at Waupun CI during this period, but he would have earned \$197,471.76 if he had been working as an SO 2. Certain additional adjustments would have reduced this difference by \$930.

Period 4: (October 30, 2005 to end-date)

The record does not reflect the Appellant's actual earnings as a Sergeant or his hypothetical earnings as an SO 2 for this period. However, there is nothing in the record to suggest the parties dispute that these amounts would reflect the same formulae that were used for the period from August 25, 2002 through October 29, 2005.

Affirmative defense of failure to mitigate

Respondent contends that Mr. Gerritson failed to mitigate his back pay by initiating a second demotion effective July 28, 2002, rather than remaining employed at the Lieutenant level. The July 28 transaction moved Appellant into a second shift Sergeant position at Waupun CI. If Respondent is able to sustain its burden of showing there was a failure to mitigate, then Appellant's back pay should be based on the difference between what his earnings would have been as a Captain rather than as a Lieutenant, instead of basing it on the difference between what his earnings would have been as a Captain and what he actually earned as a Sergeant.

⁶ This figure, as well as the other calculations of Appellant's hypothetical earnings that are set forth below, reflects the assumption that he would have continued to work the same number of overtime hours (15.76) per pay period as he had averaged while working as an SO 2 prior to his demotion.

In its initial post-hearing brief, Respondent raised a jurisdictional objection to any review by the Commission of Mr. Gerritson's July 28 demotion. In its reply brief, Respondent expanded its objection to include the more-or-less contemporaneous decision to reassign Appellant, as a Lieutenant, to DCI's 3rd Shift Line Officer position.

Respondent's jurisdictional objection is without merit. The Commission is not reviewing either of these actions as separate disciplinary appeals. The only reason the two transactions are subject to our analysis is because they enter into how Appellant's back pay should be calculated in his appeal of the disciplinary demotion that was effective on July 14, 2002. In light of the requirement that the Commission exercise its authority to determine the nature of the remedy that is to be imposed as a result of a successful appeal under Sec. 230.44(1), Stats., the Commission has inherent jurisdiction to make the findings of fact necessary for determining the appropriate remedy. Respondent's jurisdictional objection is rejected.

Appellant acknowledged that he was quite embarrassed when he returned to work at DCI and he mentioned his discomfort during one or more conversations with his superiors. Appellant appears to accept Respondent's contention that the embarrassment he would have experienced had he remained employed indefinitely as a Lieutenant at DCI after the July 14 demotion would not have provided a sufficient basis (for the purpose of fulfilling his responsibility to mitigate back pay) for taking the July 28 demotion to Waupun CI. It is unnecessary for the Commission to decide this question. We believe that Gerritson's children serve as a sufficient (and independent) reason for his decision to demote into a second shift position.

The Commission is guided in reaching this conclusion by two reported decisions interpreting the responsibility to mitigate back pay awarded as a remedy under the Wisconsin Fair Employment Act, subch. II, ch. 111, Stats. Like Sec. 230.43(4), Stats., the Fair Employment Act provides that an employee is to exercise "reasonable diligence" to mitigate back pay. In *MARTEN TRANSPORT V. DILHR*, 176 WIS. 2D 1012, 501 N.W.2D 391 (1993) the court held that a voluntary resignation terminated the accrual of back pay (as well as the obligation to reinstate) in a case arising under the Wisconsin Fair Employment Act. The employee in that matter had been discriminated against by the employer in terms of promoting into another position but had resigned in the interim. The employer's back pay liability ended when the employee voluntarily resigned. The employee did not contend that she had been constructively discharged. In a second case, *U.S. PAPER CONVERTERS V. LIRC*, 208 WIS. 2D 523, 561 N.W.2D 765 (CT. APP. 1997), the employee prevailed on a pregnancy discrimination claim arising from her discharge. The Court of Appeals affirmed the decision by the Labor and Industry Review Commission (LIRC) finding that the employer failed to meet its burden of proving that the former employee did not exercise reasonable diligence in mitigating her damages where she had been discharged by a subsequent employer, Hillshire Farms, for having more than two absences during her probationary period. Hillshire Farms had a rule

of the reasons given for the third absence. The employee had three absences during her five weeks of employment with Hillshire Farms: one was to help her family prepare for her father's wedding, the second was to visit her father-in-law who had just suffered a heart attack, and the third was due to her own illness. LIRC concluded that the employee "had adequately explained her absences and that each absence was reasonable under the circumstances." The Court affirmed LIRC's conclusion that the initial employer (found to have engaged in the discrimination against the employee) had not met its burden of proving that the employee had failed to exercise reasonable diligence in mitigating her wage loss.

The record in the present matter showed that Gerritson was separated from his wife at the time of the demotion and in the middle of divorce proceedings. The parents shared custody of their 7 and 9 year-old children. Gerritson would have been unable to maintain the custodial arrangement if he worked on the third shift. It is undisputed that he would have been assigned to the third shift if he remained at DCI as a Lieutenant, and that there were no second shift Lieutenant vacancies at Waupun CI or at any other nearby institutions. The Commission does not believe that it was unreasonable, under these circumstances, for Gerritson to have taken the July 28 demotion to the second shift Sergeant position at Waupun CI which allowed him to continue with the shared custody arrangement for his two children. Gerritson's circumstances are certainly no less compelling than those upheld in the U.S. PAPER CONVERTERS decision. As a consequence, we find that the Respondent's mitigation defense must fail.

Affirmative defense of an unconditional offer of reinstatement

Respondent also contends that DCI's November 6, 2005 offer to hire Gerritson to work as a Captain on either the second or third shift serves as a barrier to the accrual of any additional back pay subsequent to the offer. The standards for determining whether an offer of reinstatement is sufficient to "stop the bleeding" for an illegally discriminating employer were established in *ANDERSON V. LIRC*, 111 Wis. 2d 245, 330 N.W.2d 549 (1983):

First, the offer of reinstatement must be for the same position or a substantially equivalent position. Comparability in salary should not be the sole test of a reasonable offer of alternative employment; it is only one factor to be considered. Comparability in status is often more important, especially as it relates to opportunities for advancement or for other employment. . . .

Second, the offer of reinstatement must be unconditional. Any requirements attached to the offer must be the usual job requirements. . . .

Third, the employee must be afforded a reasonable time to respond to the offer of reinstatement. . . .

Finally, the offer should come directly from the employer or its agent who is authorized to hire and fire, rather than from another employee or other unauthorized individual. . . . [Footnotes and citations omitted.]

The same standards apply to a reinstatement offer made in the context of an appeal of a State civil service disciplinary action. *KLEINSTEIBER V. DOC*, CASE NO. 97-0060-PC (PERS. COMM. 8/25/99).

The only element of an unconditional offer to reinstate that is in dispute here is whether the offer was “for the same position or a substantially equivalent position.” The offer does not have to put the appellant in exactly the same overall situation he would have been in absent the employing agency’s illegal conduct. For example, in *FORD MOTOR CO. V. EEOC*, 458 U.S. 219 (1982) the Court held that an offer that did not include seniority retroactive to the date of the underlying transaction still tolled the employer’s back pay liability in a Title VII complaint of discrimination. However, if “special circumstances” exist, an offer to return to the same position will still not end accrual of an employer’s back pay liability. *FORD MOTOR*, 458 U.S. 219, 238-39. The Court offered the example of an employee who had been forced to move a great distance to find a replacement job after an illegal discharge so that accepting the reinstatement offer would entail significant relocation costs. *FORD MOTOR*, fn 27. A more typical example found in reported cases is the reasonable fear of continued harassment in a case arising from a hostile environment claim. *WILCOX V. STRATTON LUMBER, INC.*, 921 F.SUPP. 837, 75 FEP 555 (D.ME. 1996). Decisions after *FORD MOTOR* have clarified that a “refusal of a reinstatement offer is measured by an objective standard: ‘Generally, it is the duty of the trier of fact to weigh the evidence to determine whether a reasonable person would refuse the offer of reinstatement.’” *MORRIS V. AMERICAN NAT. CAN CORP*, 952 F.2D 200, 203 (8TH CIR. 1991), quoting *FIEDLER V. INDIANHEAD TRUCK LINE, INC.*, 670 F.2D 806, 808 (8TH CIR. 1982).

In the present matter, the Commission concluded that Respondent’s action of demoting Gerritson on July 14, 2002 from his Captain position as 2nd Shift Line Supervisor was excessive discipline and modified the discipline to a 20-day suspension. On October 31, 2005, Respondent offered to restore Gerritson to a 2nd Shift Line Supervisor position, as a Captain, effective November 6, 2005, but Appellant refused the offer.⁷ Gerritson contends that his action was reasonable because he had custody of his children in 2005 and because he believed he would have been working as a Captain on the first shift by then if the Respondent’s 2002 disciplinary action had not been excessive. Gerritson appears to take the position that these constitute “special circumstances” sufficient to make his decision rejecting the Respondent’s offer reasonable.

⁷ Respondent also offered Gerritson an alternative position as 3rd Shift Line Supervisor, but this second option has no effect on the Commission’s legal analysis.

The Commission does not believe that Gerritson's refusal was reasonable, given the circumstances existing at the time. In 2002, both before and after DOC's disciplinary action and during a period when Gerritson had custody of his children an average of 3.5 days per week, he was clearly willing to work on the second shift, despite his parental responsibilities at the time. By 2005, the custody arrangement had changed somewhat so that he had his children 5 days every week. This difference in custody between 2002 and 2005 is not a sufficient justification for a change in Appellant's flexibility where the second shift Captain position he was offered in 2005 would have made him eligible to move into first shift Captain openings as they might occur at DCI, Waupun CI, or any of the other facilities operated by DOC in the same geographic area. Warden Bett had explored the possibility in 2002 that Gerritson could work as a Lieutenant in one of the other institutions in the area. Because of anticipated layoffs at that time, all of the institutions were trying to protect the interests of their existing supervisory employees by not filling vacancies. There is no reason to believe that the same circumstances existed in 2005.

The second factor that must be considered is the very significant discretion available to (and exercised by) the highest levels of management at DCI in terms of making assignments to Captains and Lieutenants. Mr. Westfield testified that non-voluntary reassignments can occur in order to improve the operations of the institution. The record also shows that managers exercise substantial discretion when filling what are generally viewed as the more desirable first shift positions such as Administrative Captain, Programs Captain and Training Captain. In addition, the Commission's Interim Order in this matter did not absolve Gerritson of the charges of misconduct, it merely modified Respondent's action by reducing the level of discipline from a demotion to a 20-day suspension without pay, which is the longest suspension permitted by law.⁸ The suspension could have had a significant effect on DOC's willingness to slot Gerritson into a first shift position. Gerritson's potential interactions with other DCI staff would have been another element tending to limit the flexibility of the Warden and Security Director in terms of shift assignments. Lieutenants Menne and Wojahn expressed concern to Gerritson's superiors in 2002 that the Captain's relationship with Mallas was interfering with the Lieutenants' ability to properly supervise her. Gerritson clearly expressed antipathy toward Wojahn during his testimony in April 2004 and there is no reason to expect that the Security Director would have ignored Wojahn's prior interactions with Gerritson when reassigning DCI staff.

We recognize that we have drawn a relatively fine line by concluding that Gerritson's children supplied justification for his demotion from Lieutenant to Sergeant in 2002, yet the children were an insufficient basis to make his rejection of the Sergeant to Captain move reasonable in 2005. Nevertheless, there are some important distinctions between the

⁸ SMITH v. UW, CASE NOS. 84-0101, 0108-PC (PERS. COMM. 8/5/85), CLARIFYING 5/9/85 DECISION (Sec. 230.34(1)(b), Stats., limits the period of any suspension without pay to 30 calendar days rather than 30 work days).

circumstances, including the shifts that were in consideration as well as the fact that Gerritson was offered a two-step increase in rank in 2005 and was only seeking a one-step reduction in 2002. Given these distinctions and the factors outlined above, the Commission finds that Gerritson's decision in 2005 to reject DOC's reinstatement offer was not reasonable. As a consequence, Respondent's back pay liability stopped accruing at that time.

The Commission's conclusion is limited to the question of the accrual of back pay and, given the circumstances of this case, does not absolve Respondent of the need to (re)offer Gerritson a second shift Captain position at DCI once this decision is issued.

Interest on back pay

Although Appellant initially suggested that the parties were unable to agree in terms of whether to award Appellant interest on his back pay, Respondent's subsequent filings indicate DOC does not contest that Gerritson is entitled to interest as provided in Sec. PC 5.07, Wis. Adm. Code, and has no apparent objection to the method of calculation proposed by Appellant.⁹ The applicable administrative rule requires that the interest on the back pay be calculated by calendar quarter as reflected in the Appellant's method, even though the back pay itself is properly calculated based on the State's bi-weekly pay periods.

Dispute regarding reimbursement of costs under the EAJA

The final question before the Commission relates to Mr. Gerritson's request for costs pursuant to Wisconsin's Equal Access to Justice Act (EAJA), found in Sec. 227.485, Stats. Appellant initially filed his request by letter dated February 25, 2005, after the issuance of the Proposed Decision. He has subsequently re-filed and amended his request. The parties disagree in terms of whether the EAJA question should be addressed now or, as Appellant argues, only after the Commission has issued a ruling on all of the other issues relating to the appropriate remedy. In light of the Commission's conclusion, explained below, no advantage would be gained by deferring the question.

The criteria for applying the EAJA are set forth in Sec. 814.245, Stats., which provides in part:

(3) . . . [I]f an individual . . . is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 227.485(6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially

⁹ Appellant's calculations are reflected in Exhibit A attached to Appellant's initial post-hearing brief.

justified in taking its position or that special circumstances exist that would make the award unjust.

Page 20
Dec. No. 31234-B

As noted in *BRENON v. UW*, CASE NO. 96-0016-PC (PERS. COMM. 6/23/98), AFFIRMED, *BOARD OF REGENTS v. STATE PERSONNEL COMM.*, 2002 WI 79, 254 WIS. 2D 148, 646 N.W.2D 759:

The Commission must determine then whether respondent's position was "substantially justified." *SHEELY v. DHSS*, 150 WIS. 2D 320, 442 N.W.2D 1 (1989). Under *SHEELY*, to satisfy the "substantially justified" burden respondent must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.

This case is in substantially the same posture as was presented in *UNIVERSITY OF WISCONSIN (ROBINSON)*, DEC. NO. 30989-B (WERC, 4/2005), another matter arising from a disciplinary action. In that appeal we affirmed the agency's disciplinary action in all respects except that we modified the level of discipline from a discharge to a demotion after finding that the employee had engaged in the alleged misconduct and in doing so had violated an administrative rule as well as two work rules. We subsequently rejected Mr. Robinson's EAJA request for reimbursement of the costs associated with his appeal.

As reflected by our Interim Decision in the present matter, the Commission has likewise found that the employee engaged in all of the misconduct set forth in the letter of discipline and in doing so, violated the employer's work rules and policies. We found that the original level of discipline, demotion of Mr. Gerritson from Captain to Lieutenant, was excessive and we modified it to a 20-day suspension without pay. The record included evidence of discipline imposed against other DOC employees that provided "moderate support" for Respondent's decision to demote Gerritson. Based upon the decision on the merits, the Commission believes it is self-evident that Respondent had a reasonable basis in truth for the facts it claimed as justification for its position, had a reasonable theory of the law to support its position and that there was a reasonable and material connection between the facts asserted by DOC and the legal theory it relied upon. The relatively modest difference between a demotion and a 20-day suspension provides strong support for the conclusion that DOC was substantially justified, both in law and in fact, in terms of the original disciplinary action as well as the in the position it advanced in these administrative proceedings. *HERRING v. DHFS*, CASE NO. 01-0077-PC (PERS. COMM. 11/11/02) (No fees were awarded where a demotion was modified to a 30-day suspension without pay.)

We reach similar conclusions relating to the positions taken by DOC relative to the various issues of remedy that have been in dispute. Respondent presented evidence in support of its factual allegations and DOC's legal arguments were reasonable, especially in light of limited precedent and the complexity of the issues. In addition, Respondent's factual and legal assertions regarding the remedial issues were reasonably and materially connected. *BRENON v.*

Given the reasonable basis for the level of discipline originally imposed by Respondent and for Respondent's position regarding the issues of remedy, Gerritson's motion for costs must be denied.

Dated at Madison, Wisconsin, this 31st day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Chairperson

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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31234-B