

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVID A. HUNTLEY, Appellant,

vs.

**SECRETARY, DEPARTMENT OF TRANSPORTATION,
(STATE OF WISCONSIN)**, Respondent.

Case 5
No. 63557
PA(adv)-37

Decision No. 31459

Appearances:

Jeff Scott Olson, Attorney at Law, 131 West Wilson Street, Suite 1200, Madison, WI 53703, appearing on behalf of the Appellant.

Paul E. Nilsen, Assistant General Counsel, Department of Transportation, 4802 Sheboygan Avenue, Room 115-B, P.O. Box 7910, Madison, WI 53707-7910, appearing on behalf of Respondent.

INTERIM DECISION AND ORDER

David A. Huntley appeals the imposition of a 10-day disciplinary suspension without pay from his employment with the Wisconsin Department of Transportation (hereafter referred to as the Agency or DOT) arising from: 1) a trip he took with two other DOT employees on a plane owned by a contractor doing business with the agency; and 2) his action to advise a subordinate employee that the employee's father could be hired by the same contractor without violating DOT's ethical standards. The appeal was filed with the Wisconsin Employment Relations Commission on April 7, 2004. The parties agreed to the following statement of the issue for hearing:

Whether there was just cause for the suspension of David Huntley that was imposed by the Department by letter dated March 11, 2004.

Dec. No. 31459

The matter was heard on January 14, 2005, before Hearing Examiner Sharon A. Gallagher of the Commission's staff. The parties submitted their briefs by April 7, 2005. The hearing examiner issued a proposed decision on September 16, 2005. DOT requested oral argument which was held on January 9, 2006.

The Commission has consulted with the examiner. Except as specifically noted, the Commission adopts the Findings of Fact, Conclusions of Law and Order that were set forth in the proposed decision. Revisions to those portions of the proposed decision are noted by alphabetical footnotes. The Commission has modified the Memorandum section to better reflect our analysis.

The Commission makes and issues the following

FINDINGS OF FACT

1. At the time of the suspension that is the subject of this appeal, Appellant David A. Huntley (Huntley) had been employed by DOT for 18 years and for the last 11 years, he had worked as a Civil Engineer-Transportation Supervisor 2 (CE-Trans SUP 2). Prior to the suspension, Huntley had never been disciplined by DOT for any reason.

2. Huntley's duties in 2002 included the supervision of six employees (including Jeff Gustafson) who were assigned to oversee county crews, road maintenance staff and environmental staff. His position description includes the following summary:

. . .

As a member of the District One Systems Planning and Operations Team, the District Traffic Engineer functions under general supervision and reports directly to the Systems Planning Chief. This position performs administrative and supervisory functions relative to the planning, development, implementation and evaluation of the traffic planning and operations program and activities within the district and is primarily responsible for the traffic engineering work group. As the District Traffic Engineer, [sic] provides supervisory and functional guidance within the Systems Planning and Operations business area as well as to other business areas and the District Director relative to traffic operations. Additionally the District Traffic Engineer represents the district on traffic matters.

The District Traffic Engineer utilizes quality and leadership principles to strive for ongoing improvement in traffic planning and operations processes, products and services to the public and other agencies as well as within DOT.

The responsibilities assigned to this position require professional and technical judgement [sic] which carry significant consequence [sic] of error.

. . .

In 2002, Huntley's direct supervisor was Patrick Fernan. Pat Jackson-Ward was then the Manager of Business Services District 1, for DOT. Jackson-Ward has never been Huntley's supervisor or in his chain of command.

3. The State of Wisconsin issues requests for proposals (RFPs) when it determines it will need a product or service on an on-going basis; these RFPs have a maximum dollar amount but no minimum or maximum number of orders. DOT has issued RFPs to purchase electronic variable or changeable message signs (VMS), which consist of large electronic changeable message boards where messages can be displayed advising drivers of up-coming roadway and traffic conditions.

4. In 2002, Huntley was responsible for supervising the implementation of the traffic sign program (including VMSs), supervising the design and preparation of plan specifications and estimates for traffic sign projects, recommending supplies to be ordered for the program and reviewing and proposing equipment needs to accomplish traffic sign needs in DOT District 1. Huntley's responsibilities regarding the traffic sign program did not include recommending the purchase of these signs or component parts from any vendors.

5. ADDCO is a Minnesota corporation, with offices located in St. Paul, Minnesota, which manufactures and sells VMSs and component parts. At all times relevant hereto, ADDCO's Regional Sales Manager was Blake Balzart. Since at least 1999, ADDCO has sold VMSs to the DOT District 1. Jeff Nicholson is an owner of ADDCO who lives in St. Paul, Minnesota. He owns and flies a turbo-prop airplane.

6. Jeff Gustafson (Gustafson) has been employed by DOT for the past 19 years, all of which he has served in the Traffic Unit. At all times relevant, Gustafson has been represented by WSEU. In 2002, Gustafson was responsible to coordinate the delivery of VMSs for DOT use in District 1 on State roadways. DOT employee Bernie Lisner was responsible to check all VMSs delivered to the DOT District 1 shop, located in Sun Prairie, Wisconsin, and Gustafson assisted Lisner in checking the VMSs after delivery, using a checklist (which Gustafson had been involved in creating along with other DOT employees) to assure that the message signs met State specifications. Although Gustafson has served on the statewide committee which developed recommendations for contract specifications for these signs (along with four other DOT employees), he never had the authority, on his own, to purchase, negotiate for the purchase, or to reject delivery of VMSs. Gustafson has been Blake Balzart's contact regarding VMS sales at DOT since the 1990s.

7. On March 24, 2000, Huntley signed an acknowledgement that he had received and reviewed DOT's Employee Handbook:

I hereby acknowledge that I have received adequate time to review and read the contents of the Department of Transportation Employee Handbook.

I have read the section on the Department's policies on Affirmative Action and Equal Employment Opportunity.

I have also read and understand the section on Responsibilities and Personal Conduct including:

- ⇒ Work Rules
- ⇒ Code of Ethic
- ⇒ Security of Computerized Resources
- ⇒ Computer System Access, including E-mail
- ⇒ Employee Safety
- ⇒ Violence and Threats in the Workplace
- ⇒ Additional Employment
- ⇒ Political Activities
- ⇒ Drug-Free Workplace Act
- ⇒ Whistleblower Law
- ⇒ Telephone Use
- ⇒ Postal Use

I am aware that it is my responsibility to become acquainted with and adhere to all policies and procedures in this handbook.

I understand that it is my responsibility to keep abreast of any changes or modifications that are made to the handbook by either reviewing those changes online on the DOTnet version of the handbook or updating a hard copy as new materials are issued. I agree to return any hard copies of the handbook to my immediate supervisor upon the termination of my employment with the Department of Transportation.

8. Larry Gustafson is Jeff Gustafson's father. Sometime prior to early 2002, ADDCO's Balzart asked (Jeff) Gustafson to recommend contractors who could deliver ADDCO signs from a drop off point to the DOT District 1 shop. Gustafson went to Huntley in early 2002 and asked whether it would violate the DOT Code of Ethics (COE) if ADDCO hired his father to deliver ADDCO signs to DOT. Huntley pulled out his DOT Handbook and looked at the COE contained therein, which was the version revised in 1997. Huntley asked Gustafson some questions and stated that because Gustafson's father was not an "immediate family" member as defined by the Code, there would be no problem if ADDCO hired Larry Gustafson to deliver signs to DOT. The COE section reviewed by Huntley on this occasion read as follows:

CODE OF ETHICS

POLICY

The DOT Code of Ethics is intended to prevent possible conflicts of interest, improve standards of public service and promote and strengthen the faith and confidence of the people of Wisconsin in their government. Responsibility and accountability for recognizing and avoiding all conflict-of-interest situations, whether actual or apparent, remain with each employee.

CONFLICTS OF INTEREST

Employees may not use their positions to engage in activities which result in personal gain for themselves, their immediate families or any businesses in which they may have a personal and private interest.

The following examples of activities which may result in personal gain are prohibited.

1. You may not accept anything of value which influences or appears to influence the manner in which you perform your work, make decisions or otherwise carry out your job duties. The examples below may be interpreted as actions which could influence your behavior or judgment:
 - a. Accepting lunch from a contractor.
 - b. Accepting a piece of office equipment from a vendor for personal use.
 - c. Accepting a bottle of liquor from a vendor for personal use at holiday time.
 - d. Accepting food, travel or lodging at a vendor's expense or at the expense of a consultant or bidder or association of bidders on contracts let by the Department.

2. Your position with the Department of Transportation may not be used to gain any special advantage or privilege beyond the compensation you receive for employment with the Department because it may be construed as a personal gain for you or your immediate family.* Some examples are:
 - a. Using influence of position to acquire or accept tickets to a football game.
 - b. Using confidential information to recognize and take advantage of a personally profitable land acquisition.
 - c. Intimidating a salesperson by inferring you have the ability of ensuring that the State of Wisconsin will purchase no more of the company's product, unless given an unusually good buy.

*NOTE: Immediate family is defined as the employe's spouse and legal dependents.

. . .

9. At the time Huntley and Gustafson had their conversation in early 2002, Huntley had not updated his Employee Handbook. No later than November 15, 2001, DOT had revised its on-line version of the COE to reflect a change in the definition of “immediate family” so that it read:

Immediate family is defined as the employee’s spouse and an employee’s relatives by marriage, consanguinity or adoption, and any other person who directly or indirectly receives more than one-half of his or her support.

...

DOT did not notify Mr. Huntley of the change.^A

10. Larry Gustafson delivered 20 ADDCO signs from February to November, 2002, for ADDCO and he received a total of \$500.00 therefor.

11. On July 23, 2002, Huntley received (by e-mail) a revised conflict of interest policy including changes to Transportation Administration Manual (TAM) 20 covering gifts from vendors and the definition of immediate family. The TAM read in relevant part as follows:

...

Purpose and Responsibility

A State employee holds his or her position as a public trust. Any effort to realize personal gain (beyond ordinary compensation) through official conduct, whether through action or inaction, is a violation of that trust. The Code of Ethics set forth in Chapter ER-MRS 24 of the Wisconsin Administrative Code is intended to help state employees avoid conflicts of interest between their personal interests and their public responsibilities, to improve standards of public service, and to promote and strengthen the faith and confidence of the people of this state in their civil service. The Department of Transportation recognizes that codes of employee ethics and conduct must be relevant to an individual’s every day work situation and are most effective when supplemented by the employee’s use of common sense and discretion. However, the employee remains responsible and accountable

^A The Commission has modified this finding to more accurately reflect the record. The document that reflects a change in the COE, Exhibit R 4, is merely an electronic copy of a portion of the COE as it was maintained on the internet on November 15, 2001. No part of the exhibit suggests that the new definition of “immediate family” was actually promulgated on November 15.

for recognizing and avoiding all substantial and material conflicts of interest, whether actual or apparent. Intentionally violating the Code of Ethics is a criminal act, punishable by a fine of up to \$5,000 or imprisonment for up to one year, or both a fine and imprisonment, as provided in s.19.58, Wis. Stats.

Who's Affected

The Code of Ethics set forth in Chapter ER-MRS 24 of the Wisconsin Administrative Code applies to any person who is paid for services rendered to the State under an employer-employee relationship in the classified service or in the unclassified service of the State of Wisconsin, except state public officials appointed by the governor and others who are subject to a statutory Code of Ethics. Both Code of Ethics require employees to avoid situations in which their individual personal interests conflict with their public responsibilities.

General Consideration

To recognize and avoid conflicts of interest, each employee should consider the relationship between his or her private interests and public responsibilities. Basic consideration include:

1. Would I receive this benefit if I did not work here?
2. Who is giving this benefit to me? Could the giver think that I can help them or repay them through my official duties?
3. Will accepting this benefit affect my best performance of my official duties? Could others reasonably think that it might?
4. Could performing my official duties in this manner produce a private benefit for my family or me?
5. Do my family or I have any substantial interest that could be affected – adversely or beneficially – by my performance of my official duties?
6. Would I be professionally embarrassed if some relevant fact unknown to my supervisor became known?

Definitions

. . .

Immediate Family: The employee's spouse and legal dependents.

1. An employee's spouse;
2. An employee's parents, children, siblings, grandparents, grandchildren, aunts, uncles, nieces, nephews, great grandchildren, individuals related to the employee by adoption to that same degree of kinship, and the spouses of any of those individuals; and

3. Any other individual who directly or indirectly receives more than one-half of their support from the employee, or from whom the employee directly or indirectly receives more than one-half of his or her support.

. . .

Thing of Value: Any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the State, certain reportable fees, expenses and honoraria, reportable political contributions, or hospitality extended for a purpose unrelated to State business by a person other than an organization.

General Provisions

Integrity: No employee may use or attempt to use their public employment, the prestige or influence of public employment, or State property to gain any benefit, advantage or privilege for themselves, their immediate family or others.

. . .

12. On October 2, 2002, Supervisor Fernan sent Huntley an e-mail regarding conflicts of interest, the definition of immediate family and accepting “gifts from vendors”

I believe that Division Office will be coming out with some more formal guidance, etc. . . in the near future. Hence, I won't be sending this out to the entire district.

However, in the interim, just thought I would pass along a document that I put together after reviewing the issue.

This whole issue takes on a special significance as careers, relationships, opportunities intertwine. We have to be sure we do all we can to avoid even the appearance of impropriety. The sum total of all this is, when in doubt, any WisDOT employee should talk to their supervisor/chief. If you have a relative involved with a firm we might give business to, make sure someone else makes the final call. If you are looking for another job/second job, be sure to provide proper notification where necessary, etc. . .

Again, this isn't for distribution as a division letter will be coming out, but in the meantime, you may (or may not) find this helpful.

. . .

III) FAMILY CONSIDERATIONS ON CONFLICT OF INTEREST ISSUES

Immediate family is broadly defined as spouse, children, parents, grandparents and grandchildren, aunts/uncles/nieces/nephews and spouses of any of these, and/or someone deriving more than 50% of support from employee (or from whom the employee derives more than 50% of their support).

Generally, no employee may use or attempt to use their employment or influence to gain any benefit or advantage for themselves or family or others. If you are uncertain about a conflict of interest or have a family member working in a firm that WisDOT does business with, you should notify your supervisor so steps can be taken to avoid any potential conflict.

IV) GIFTS FROM VENDORS/CONSULTANTS/CONTRACTORS/ETC. OR ACTIONS TAKEN FOR PERSONAL GAIN WHILE CONDUCTING OFFICIAL BUSINESS

You may not solicit or accept or agree to accept any thing of value for any matter connected with your employment. Examples of prohibited activities that may result in personal gain include:

- Scheduling of non-state activities during work hours
- Using copy machine for private use
- Making formal presentation to fellow workers to sell product
- Taking home state supplies for personal use
- Using state cars for unapproved personal use
- Using WisDOT position to acquire tickets to sporting or other events
- Using confidential information to recognize and take advantage of a personally profitable land acquisition
- Accepting lunch from a contractor, vendor or consultant
- Accepting other things of value from a consultant, vendor, contractor or bidder on contracts.

13. On November 22, 2002, Division of Transportation District (DTD) Management Team issued a memo concerning “conflict-of-interest policies” in question and answer form delivered by e-mail to all DTD employees (including Huntley) which read in relevant part as follows:

...

Now, more than ever, it is important for Wisconsin Department of Transportation (WisDOT) employees to understand and respect our Code of Ethics.

As we work to maintain the public's trust and confidence, we need to continue conducting our business in a manner consistent with state statutory and administrative Code of Ethics policies. State employees are often held to a higher standard than private-sector workers because state positions are considered a public trust. Intentional violations of the state Code of Ethics are criminal offenses as provided in s.19.58 Wis. Stats.

The Transportation Administrative Manual (TAM) policy contains good guidance on the overall Code of Ethics (TAM 20) and procedures for dealing with supplemental employment, but has been less specific about those procedures guiding employees who seek substitute employment.

A new TAM policy (TAM 19) fills this gap. It is definitely not the intent of this policy to prohibit or discourage employees from seeking other employment. Instead, it is intended to prevent improprieties – real or perceived – from occurring. The new policy assists employees in identifying potential conflict-of-interest situations and outlines employee and employer responsibilities for preventing these conflicts. The TAM 19 and 20 policies are available on dotnet:

- Substitute employment (work that replaces WisDot position), TAM 19 <http://dotnet.dot.state.wi.us/tam/19.htm>
- Secondary employment (work in addition to WisDot position), TAM 20 <http://dotnet.dot.state.wi.us/tam/20.htm>
- Family considerations on conflict-of-interest issues, TAM 20 <http://dotnet.dot.state.wi.us/tam/20.htm>
- Gifts from vendors, consultants or contractors and actions taken for personal gain when conducting state business, TAM 20 <http://dotnet.dot.state.wi.us/tam/20.htm>

...

We know you have questions about some of the conflict-of-interest policies and we would like to provide some hypothetical questions with the appropriate answers. Please do not hesitate to come to us with further questions.

Questions and answers

...

Question: I'm a project manager who oversees work done by consultants. I am interested in seeking a position with a consultant firm that has no involvement with my current project work. Do I have to notify my supervisor of this?

Answer: As you begin to consider a job change, you must review TAM 19 to evaluate if you might be involved in a situation where there is perceived or real conflict of interest. The possibility exists that you could favor, purposely or accidentally, a prospective employer or disfavor, purposely or accidentally, a prospective employer's competition.

If, after reviewing the TAM, you have any questions about whether your situation could present a conflict of interest, you should speak with your supervisor. Your supervisor and the department do not want to interfere with your career goals and choices. However, your supervisor is a resource you can use to ensure that you are not placed in a situation where conflict of interest might exist.

. . .

Question: I'm a supervisor and interested in exploring opportunities with consulting firms. Do I have to notify my manager about this? If so, should I provide that notice before I interview, after I interview or when I get an offer? Also, if I interview, how will that impact my supervision of these contracts? Frankly, my whole job consists of working with these firms because consultants do about 80% of my unit's work. If I can't deal with these people while I'm interviewing, I don't know who will, and I don't know what I can do during this time.

Answer: TAM 19, "Seeking Substitute Employment," requires you to consider certain questions dealing with the potential for real or perceived conflict of interest. If you answer yes to any of these questions, you should notify your immediate supervisor (in your case the section manager) before approaching the consultant firms about prospective employment. This notification should occur before making an application or inquiry with the consulting firms.

Because your position involves oversight and authority over the consultants you are approaching about employment, it will be your supervisor's responsibility to work with you to ensure that no conflict of interest exists between the potential new job and your current job duties. You must be careful not to suggest or imply that you could favor them if they choose you, or disfavor them if they do not.

More questions? Please contact your supervisor or manager.

. . .

14. Jay Obenberger (Obenberger) has been employed by DOT for the past 13 years as a Civil Engineer. Huntley has never been Obenberger's supervisor or in Obenberger's chain of command. Obenberger has at all relevant times been represented by the SEA. In 2002, Obenberger had five tickets to the Sunday, December 8, 2002, Green Bay Packer-Vikings football game in Green Bay. Gustafson, Huntley and Obenberger decided to go to the game together but they needed two others to make the party. Gustafson invited Balzart of ADDCO because he knew that Balzart was a Vikings fan and Balzart had told Gustafson in the past of his wish to someday attend a Vikings game. Balzart asked Gustafson whether ADDCO owner Jeff Nicholson could use the fifth ticket. Balzart explained that as Nicholson had an early meeting in St. Paul on Monday, December 9, 2002, Nicholson would have to fly to the game in his private plane in order to make his Monday morning meeting but that he would pick

up passengers in Madison.^B Gustafson and Obenberger then went to Huntley and asked if the flight would violate DOT's COE if the three of them paid for all five of the football tickets and for a rental van to transport the group from the airport to and from the game, for parking, and for food and drinks at the game. Each of the five participants would pay for their own hotel rooms on December 8th. At least until the discipline was imposed, Huntley, as well as Gustafson and Obenberger, never attempted to ascertain the value of the round-trip flight between Madison and Green Bay. Huntley told Obenberger and Gustafson that he would have to take the question whether the Packer trip violated the COE to managers above his level, and he would get back to Gustafson and Obenberger.

15. Huntley went to then-District 1 Business Manager Pat Jackson-Ward, who was overall supervisor of Human Resources for the District but not Huntley's supervisor, and asked her the following hypothetical question, without identifying the involved DOT employees by name: Would there be a conflict of interest/COE violation for three DOT employees to accept an airplane ride to a football game from two vendors if the DOT employees paid for the game tickets, van transportation, parking and a meal. Jackson-Ward initially responded that no conflict was present because all participants were contributing fairly and equally.

16. Huntley then gave Jackson-Ward the names of the participants and she stated that she would have to consult her colleagues and would get back to Huntley. Jackson-Ward later told Huntley that she and her colleagues all agreed that no COE violation would occur because all participants were to share equally as far as cost regarding the game.

17. Huntley relayed this information he received from Jackson-Ward to Gustafson and Obenberger, indicating that there was no conflict because no one was in a position to gain from the trip. Huntley never asked his supervisor (Fernan) or anyone in his chain of command for an opinion regarding the advisability of the trip, relying on Jackson-Ward's opinion instead.

18. On December 8, 2002, Nicholson flew his plane from St. Paul, Minnesota, to Madison, Wisconsin, (with Balzart) and picked up Obenberger, Gustafson and Huntley at the airport; Nicholson then flew the group to Green Bay, Wisconsin, where Obenberger, Gustafson and Huntley rented a van (paying \$30-35 each therefor) and they all drove to the Packer-Viking game. Obenberger, Gustafson and Huntley paid for parking the van (no cost was shown for parking) and they also split the cost of five game tickets (five tickets at \$51 each, or \$85 each); the three also paid for a meal for all participants (\$32 each) and Huntley paid for a round of drinks at the game for the group (\$20). Huntley's share was from \$167 to \$172, excluding his hotel room and the unknown cost for van parking.

^B The Commission has modified this sentence so that it better reflects the record.

19. No evidence was submitted to show the value of the flight from Madison to Green Bay and return, or that Obenberger, Gustafson and Huntley were ever told the value of the flight by ADDCO officials. Although Balzart had met Huntley on business prior to December, 2002, Huntley had never met Nicholson prior to December 8, 2002. Neither Nicholson nor Balzart had a personal relationship with Huntley in 2002 or at any other time.

20. In the Fall of 2003, Huntley's supervisor, Fernan, spoke to Systems Planning & Operations/Engineering Chief John Vesperman (Vesperman) about reports/rumors from DOT employees that Huntley, Gustafson and Obenberger had violated DOT's COE in 2002, by accepting free air travel and that Huntley had also wrongly advised Gustafson that it would not violate the COE if Gustafson's father were hired by ADDCO as a delivery driver.

21. Respondent commenced an investigation of the matter during the Fall of 2003 after these rumors circulated. Human Resources Director Christopher decided that Huntley should receive a 10-day suspension without pay for violating the following policies and work rules:

...

- **Department Code of Ethics TAM 20—Integrity:** No employee may use or attempt to use their public employment, or State property to gain any benefit, advantage or privilege for themselves or immediate family or others; **Conflict of Interest Examples: 4.D. Acceptance of anything of value from someone who does business with the Department—**Accepting food, travel, or lodging at a vendor's expense or at the expense of a consultant or bidder on contracts let by the Department.
- **Department Work-rule I.1 Work Performance—Insubordination:** (including disobedience, failure or refusal to follow written or oral instructions of supervisory authority, or to carry out work assignments).

...

22. On March 11, 2004, Vesperman sent Huntley a disciplinary notice which specifically cited the above-quoted policies and work rules and suspended him for 10 days. The notice also read as follows:

...

This action is being taken based on the following two incidents. In December 2002, the former District 1 Business Manager informed you that a ride in a contractor's plane by you and two subordinate staff to a Green Bay Packer game would violate the Department Code of Ethics. You informed both Jay

Obenberger-CE Advanced and Jeff Gustafson-ETT Advanced that the trip was approved. The three of you flew in ADDCO's plane along with two of their staff to the Packers game on December 8, 2002, with a return flight on December 9, 2002. ADDCO is a contractor with a statewide procurement contract to provide changeable message signs and dynamic message signs for the Department. The second incident involves your giving Jeff Gustafson approval in 2002 for ADDCO to hire his father to transport message signs from a drop off site to the District warehouse.

In the first investigatory meeting on October 13, 2003, where you, John Vesperman-SPO Manager and Spring Sherrod-Human Resource Supervisor were in attendance, you stated that you informed Mr. Obenberger and Mr. Gustafson that the trip was approved. You also stated that the information you received from the Business Manager was that your contribution for Packer tickets, meals, transportation from the airport and parking were of equal value, and the trip was approved. However, the information we received, from the former Business Manager and the two Business Managers that she contacted, contradicts that statement.

Also in the October 13th meeting, you were asked about the existence of family relationships between ADDCO and Department staff and you stated there were none. In the second investigatory meeting on December 9, 2003, you acknowledged that Jeff Gustafson's father was hired by ADDCO to transport signs to the District warehouse. You stated that you informed Mr. Gustafson in 2002 that his father working for ADDCO did not violate Department policy after you reviewed an outdated version on the Department Code of Ethics policy.

As a Supervisor you are responsible for being aware of the most current policies for assistance in responding to questions from staff. The Department holds management to a high level of responsibility and expects that they provide proper guidance to staff. Upholding the Code of Ethics is one of those responsibilities. The Department must ensure that all relationships with contractors adhere to the Code of Ethics standards. The Department Code of Ethics was distributed by e-mail to all staff in late November 2002.

...

At no time during the investigation of his conduct did the Agency tell Huntley its estimate of the value of the flight Huntley accepted from Nicholson/ADDCO. The Agency considered the fact that Huntley had never before been disciplined by the Agency in determining his penalty for the violations of policy and work rules it found.

23. Respondent notified Gustafson that he would receive a 5-day suspension without pay. WSEU grieved the discipline but DOT unilaterally reduced Gustafson's discipline to a 1-day suspension due to problems with the investigation, which included the fact that the Agency never told Gustafson its estimate of the value of the free flight he received. Gustafson's grievance is pending arbitration on the reduced penalty.

24. On March 4, 2004, Respondent issued Obenberger a "letter of reprimand with the weight of a 3-day suspension" for accepting the roundtrip flight to the Green Bay Packer game in December, 2002, in violation of COE TAM 20 Integrity. Obenberger was not disciplined for failing to get his supervisor's prior approval or opinion of the ethics of the trip. Obenberger grieved the discipline pursuant to the SEA contract. DOT unilaterally reduced Obenberger's discipline to a letter of reprimand because during the investigation, he was never given an estimate of the value of the flight he accepted from Nicholson. Obenberger's case is awaiting arbitration on the reduced discipline.

25. Huntley did not violate Work Rule I.1-Work Performance of the COE in 2002, when he failed to keep abreast of changes in the COE and TAM 20 that were posted on the internet. Huntley did not violate Work Rule I.1 - Work Performance or the COE by failing to update his DOT Handbook in November, 2001, as Huntley was not notified in any way that DOT had modified the Handbook. Huntley did not violate Work Rule I.1 or the COE in early 2002 when he advised Gustafson that his father was not a member of Gustafson's "immediate family."^C

26. Huntley was never informed by Jackson-Ward "that a ride in a contractor's plane by you and two subordinate staff to a Green Bay Packer Game would violate the Department Code of Ethics" (Finding 22). Huntley approved Gustafson's participation. Huntley received the requisite supervisory approval before he traveled on Nicholson's aircraft between Madison and Green Bay (and return) on December 8 and 9, 2002.^D

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Sec. 230.44(1)(c), Stats.

2. Respondent DOT has the burden to demonstrate that there was just cause for the imposition of discipline and for the degree of discipline imposed.

^C The Commission has clarified this finding.

^D This finding has been modified to make it clear that the Commission's ruling on just cause does not extend to the conduct of Gustafson and Obenberger which is not at issue in the instant matter.

3. Respondent failed to meet its burden as to the allegations set forth in the letter of discipline issued on March 11, 2004.
4. There was no just cause to discipline Huntley.

ORDER

Respondent's disciplinary action set forth in its March 11, 2004, letter to Mr. Huntley is rejected and the matter is remanded to Respondent for restoration of Appellant Huntley with compensation, less any mitigation pursuant to Sec. 230.43(4), Stats. The Commission will retain jurisdiction for the purpose of addressing any application for attorney's fees and costs.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate

Department of Transportation (Huntley)

MEMORANDUM ACCOMPANYING INTERIM DECISION AND ORDER

The Commission succinctly summarized the parties' and its own responsibilities in a discipline case, in a recent case, *DEL FRATE V. DOC*, DECISION NO. 30795, SLIP OP AT PAGE 10 (WERC, 2/04), as follows:

On appeal of a disciplinary matter the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. Section 230.34, Wis. Stats., requires that suspension of an employee with permanent status in class, such as Mr. Del Frate, be for just cause. The Courts have equated this to proof to a reasonable certainty by the greater weight or clear preponderance of the evidence. *REINKE V. PERSONNEL BOARD*, 52 WIS.2D 123 (1971); *HOGOBOOM V. WIS. PERS. COMM, DANE COUNTY CIRCUIT COURT*, 81-CV-5669, 4/23/84; *JACKSON V. STATE PERSONNEL BOARD, DANE COUNTY CIRCUIT COURT*, 164-086, 2/26/79. The underlying questions are: 1) whether the greater weight of credible evidence shows the appellant committed the conduct alleged by respondent in its letter of discipline; 2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline; and, 3) whether the imposed discipline was excessive. *MITCHELL V. DNR*, 83-0228-PC, 8/30/84. In considering the severity of the discipline to be imposed, the Commission must consider, at a minimum, the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to have a tendency to impair the employer's operation, and the employee's prior work record with the respondent. *SAFRANSKY V. PERSONNEL BOARD*, 62 WIS.2D 464 (1974), *BARDEN V. UW*, 82-237-PC, 6/9/83.

. . .

The first element of the just cause analysis is whether appellant engaged in the conduct described in the letter of discipline. In that letter, DOT alleged Huntley was involved in two episodes of misconduct: 1) telling Gustafson and Obenberger that a trip to a Green Bay Packer game had been approved by the District 1 Business Services Manager when she had not approved the trip and then accepting a thing of value, a flight from a DOT vendor, ADDCO, to that football game; 2) in early 2002, approving, in error, ADDCO's hire of Gustafson's father as a delivery driver for VMSs to the District 1 warehouse from a drop-off point after reviewing an outdated version of the COE policy.

The incident involving Gustafson's father's employment.

DOT has alleged that Huntley was insubordinate under Work Rule I.1 by failing to update his COE and wrongly advising Gustafson concerning ADDCO's hire of Gustafson's father. In *GROHMAN V. OFFICE OF JUSTICE ASSISTANCE*, DEC. NO. 31021 (WERC, 3/11/05), the Commission held that in order to find an employee insubordinate, the employing agency must establish that there was

a directive or policy in effect, that he had (or should have had) knowledge of...and that he knew or should have known under an objective test that the directive prohibited the conduct in question. *LARSON V. DOC*, CASE NO. 90-0374-PC, CASE NO. 91-0063-PC-ER (PERSONNEL COMMISSION 5/14/92). See also *REIMER V. DOC*, CASE NO. 92-0781-PC (2/3/94).

Respondent argued that Huntley knew or should have known that his advice to Gustafson was in conflict with directives Huntley had received from management about maintaining an up-to-date version of the COE (Finding 7) and in conflict with management directives about responding to questions from his subordinates (Finding 12 and 13) relating to the COE.

The preponderance of the credible evidence established that Huntley did, in fact, consult an outdated version of the Department COE policy when (early in 2002) he advised his supervisee, Gustafson, that Gustafson's father was not included in the definition of immediate family contained in the COE that Huntley consulted,¹ and that therefore, ADDCO's hire of Gustafson's father would not violate the COE. It is significant that Huntley did not dispute what he told Gustafson or that his COE technically was outdated. The evidence herein showed that Huntley had received and reviewed an updated copy of the DOT Employee Handbook on March 24, 2000, which included Work Rules and the COE (Finding 7). This signature sheet also contained language indicating Huntley understood that it was his responsibility "to become acquainted with and adhere to all policies and procedures" in the handbook, "to keep abreast of any changes or modifications that are made to the handbook" and to update "a hard copy as new materials are issued." However, it is significant that DOT left it up to Huntley to decide/choose whether to stay abreast online or by hard copies issued by DOT. Huntley chose the latter approach. DOT never withdrew its authorization for employees to update their hard copies of the Handbook.

¹ The fact that the applicable COE used the term "consanguinity" in reference to immediate family (Finding 9) does not detract from the conclusion reached on this allegation. Huntley had been advised to ask for clarification if he had a question regarding the meaning/application of the COE. In any event, given the father-son relationship involved in Gustafson's situation, there is no question that the relationship involved lineal consanguinity.

The record in this case showed that DOT had revised the internet version of the COE by November 15, 2001 to reflect a change in the definition of “immediate family.” However, there is no evidence that DOT made an effort to inform its employees of the change. Nothing in the record shows that DOT had notified its employees of the revised COE by early 2002 either electronically or with a paper copy. No evidence was proffered to show that DOT employees were directed to update their paper copies of the COE to reflect changes to the internet version until July 2002, which was after Huntley advised Gustafson that his father could be employed by ADDCO.^E Furthermore, Respondent submitted no evidence to show that DOT supervisors were directed to check online for revisions to the COE at any time. Rather, the only evidence on this point was the March 24, 2000, acknowledgment of receipt (signed by Huntley) which give employees the choice, at their discretion, to review Handbook revisions online or to update a hard copy of Handbook provisions as new materials were issued. Thus, in early 2002, Huntley had no reason to believe that his hard copy of the COE was not up-to-date and Respondent failed to prove that Huntley reasonably should have known of the November 15, 2001 electronic version of the COE.²

DOT has failed to meet its burden to show that Huntley engaged in the misconduct as alleged, i.e. that he knew or should have known that his hard copy of the COE was out-of-date early in 2002 and the most current version of DOT’s online COE prohibited Gustafson’s father from employment with ADDCO.

The Packer game incident

The somewhat more difficult question concerns whether Huntley violated the Department’s COE TAM 20 in effect in early December, 2002 (quoted in Finding 11), by telling DOT employees Obenberger and Gustafson that he had received approval to fly on a

^E It was no later than February 2002 that Huntley told Gustafson that ADDCO could employ his father and not violate the COE. Larry Gustafson consequently worked for ADDCO from February until November 2002. By November, Huntley had received two separate notices, via e-mail, that the definition of “immediate family” now included grandparents: 1) an updated version of TAM 20 on July 23rd, and 2) an extensive memo from his immediate supervisor on October 2nd. However, DOT suspended Huntley because of his February decision, rather than for failing to go back to Gustafson in July or October to tell him that the new definition barred ADDCO from employing his father.

² Neither the March 24, 2000, acknowledgment nor the November 15, 2001 internet version of the COE required Huntley to seek supervisory advice/approval before he advised Gustafson regarding ADDCO’s potential hire of Gustafson’s father based upon his hard copy of the COE. Indeed, the 1997 COE Huntley consulted in early 2002, specifically stated that each employee would be accountable for “recognizing and avoiding all conflict-of-interest situations, whether actual or apparent. . .” (Finding 8).

vendor's plane to and from a Green Bay Packer game and, later, by actually making the trip.

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The letter of discipline includes the very provocative allegation that Business Services Manager Pat Jackson-Ward told Huntley that the three DOT employees would be violating the COE if they accepted a flight on the vendor's plane. According to the letter of discipline, Huntley not only ignored the advice, he incorrectly told both Gustafson and Obenberger that Jackson-Ward had approved the excursion. DOT chose not to pursue this allegation at hearing or in its post-hearing argument and made it clear during oral argument before the Commission that the allegation had been withdrawn. By removing this leg of support for the imposition of discipline, DOT has placed a far heavier burden on the remaining allegations of misconduct to establish just cause for a 10-day suspension.

Even though DOT withdrew a very important allegation relating to the flight incident, it has continued to contend that Huntley violated the COE 1) when he accepted something of value, i.e. the flight, from a vendor, 2) when he went to Ms. Jackson-Ward rather than someone in his chain-of-command for an interpretation of the COE, and 3) when he offered COE advice to Obenberger, even though he was not Obenberger's supervisor.

DOT contends that Huntley's roundtrip flight on a vendor's private plane had value and that its Code of Ethics therefore prohibited him from accepting it. The Code that was applicable in December 2002 included the following language:

Employees may not use their official positions to engage in activities which result in personal gain for themselves

The following examples of activities which may result in personal gain are prohibited.

1. You may not accept anything of value which influences or appears to influence the manner in which you perform your work, make decisions or otherwise carry out your job duties. The examples below may be interpreted as actions which could influence your behavior or judgment:

- a. Accepting lunch from a contractor. . . .
- d. Accepting food, travel or lodging at a vendor's expense

Mr. Huntley raises two primary defenses to this allegation. He contends that the value of the roundtrip flight from the vendor should be offset by the value of those things that Huntley provided to the vendor during the course of the excursion, i.e. game tickets, a meal, van rental and a round of beers at the game. Huntley also contends that he reasonably relied on the approval he had received from Ms. Jackson-Ward for the flight. The Commission declines to address Huntley's first contention because we find he was entitled to rely on

approvals he had received from DOT managers for the flight.

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Once Gustafson and Obenberger approached him with the idea of attending the Packer's game with the ADDCO representatives, Huntley promptly recognized that the matter raised an ethical question. He took the question to the individual who served as the overall supervisor for Human Resources in District 1, Patricia Jackson-Ward who filled the position of the district's Business Manager. On two separate occasions, Jackson-Ward informed Huntley that there would be no violation of the COE because the DOT employees were contributing fairly and equally to the cost of the excursion. At the time she first gave this advice to Huntley, Jackson-Ward told him that she would also consult with some of her colleagues. When she spoke with Huntley on the second occasion, Jackson-Ward told him that she and her colleagues all agreed that the trip would not violate the COE.

DOT argues that Huntley should have approached his immediate supervisor, Mr. Fernan, or someone else in Huntley's chain-of-command, for advice in applying the COE. Ms. Jackson-Ward was not one of Huntley's direct supervisors. DOT supports this argument by pointing to references in the COE and certain supporting documents that indicate an employee who has questions about how the Code should be applied is to contact "your supervisor." The Commission is unconvinced that this very narrow reading of the procedure for obtaining advice should be applied to Huntley. When Huntley first broached the ethical question with her, Ms. Jackson-Ward did not tell him to take the question to someone in his chain-of-command. Jackson-Ward later reiterated her ethical advice to Huntley after she had consulted with other managers within the department. There is no evidence that any of these individuals had ever found it appropriate to inform Huntley that he must approach a direct supervisor for assistance in applying the Code. There is no indication that the common practice within DOT is limited to seeking advice from within the chain-of-command. In addition, there is no evidence that DOT ever took any disciplinary action against Ms. Jackson-Ward for responding to Huntley's request for advice rather than referring him to one of his direct supervisors. Likewise, DOT's disciplinary action against Mr. Obendorfer was for accepting something of value rather than for seeking ethical advice from Huntley who was outside of Obendorfer's chain-of-command.^F

The Commission finds that Mr. Huntley reasonably relied on the ethical advice given to him by Ms. Jackson-Ward and, apparently, by the other business managers with whom she consulted. While the Commission is not otherwise commenting on the accuracy of the advice provided to Huntley on the two occasions, we do not believe the advice was so inherently suspect as to make reliance inappropriate.

In light of all the evidence in this matter, the Respondent has failed to satisfy its burden to establish just cause for the 10-day suspension. DOT declined to pursue one of the key

^F Even if Huntley's contacts with Obenberger and Jackson-Ward could be considered technical violations of DOT's written ethical requirements, Respondent's decisions not to discipline either Obenberger or Jackson-Ward for the same conduct means that *any* discipline imposed against Huntley for these advisory contacts would be excessive.

claims in the letter of discipline and failed to show that Mr. Huntley was provided any notice

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of a change to the Code of Ethics that was the basis for a second claim. Finally, Mr. Huntley showed that 1) he twice consulted with the individual who oversaw Human Resources staff in the district, that 2) he relied upon the advice from that person before he accepted transportation to a football game from a DOT vendor where accepting the transportation was the final source for the discipline and that 3) DOT has chosen not to impose discipline under related circumstances.

The matter is therefore remanded to DOT for action in accordance with this decision. This decision is being issued on an interim basis so that Huntley can be provided an opportunity to submit a motion for costs pursuant to Sec. 227.485, Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Commissioner Susan J.M. Bauman did not participate.

