

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**BRENDA L. BRISTER-COOPER**, Appellant,

vs.

**PRESIDENT, UNIVERSITY OF WISCONSIN**, Respondent.

Case 21  
No. 65176  
PA(adv)-85

**Decision No. 32290**

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**Appearances:**

**Douglas Carroll, Jr.**, Cross Law Firm S.C., 845 North 11th Street, Milwaukee, Wisconsin 53233, appearing on behalf of the Appellant.

**Joely Urdan**, Associate Director and University Legal Counsel, UW-Milwaukee Office of Legal Affairs, P.O. Box 413, Milwaukee, Wisconsin 53201-0413, appearing on behalf of the Respondent.

**FINAL DECISION AND ORDER**

Brenda L. Brister-Cooper appeals the imposition of a disciplinary discharge from employment as Police Sergeant with the University of Wisconsin-Milwaukee Police Department, effective August 26, 2005. The parties agreed to the following issue for hearing:

Did the Respondent have just cause to terminate the employment of Appellant pursuant to the Letter of Termination of August 26, 2005?

If not, what is the appropriate remedy?

The matter was heard on February 23 and March 15, 2006, before Stuart D. Levitan, a member of the Commission's staff serving as Hearing Examiner. The hearing was recorded and a copy of the recording provided to the parties. The parties filed post-hearing briefs and reply briefs, the last of which was received on August 14, 2006. At the Examiner's request, the parties engaged in settlement talks, including a mediation session on November 27, 2006. On December 6, 2006, the Respondent rejected a proposed settlement, and asked for a written decision in the matter. The examiner issued a proposed decision on December 13, 2007. The Appellant filed written objections and the Respondent's response was filed on January 31, 2008.

Dec. No. 32290

We have revised the proposed decision in an effort to clarify the conclusions reached, place the text into a different sequence, more accurately reflect the Commission's analysis of the case and to otherwise address Appellant's objections to the proposed decision. The changes are described more fully in individual footnotes or are clearly reflected in the body of the decision.

Being fully advised in the premises, the Commission hereby makes and issues the following

### **FINDINGS OF FACT**

1. Appellant, Brenda Brister-Cooper, was hired as a Security Officer for the University of Wisconsin-Milwaukee Police Department in January, 1991, and was promoted to Police Officer that September. In June, 2000, she was again promoted, to the supervisory position of Sergeant.

2. Pamela S. Hodermann is the chief of police for the University of Wisconsin-Milwaukee. On August 26, 2005, she issued the following Letter of Termination to Brister-Cooper:

Pursuant to the authority vested in me, your employment as a Police Sergeant with the University of Wisconsin-Milwaukee (UW-M) Police Department is hereby terminated effective Friday, August 26, 2005. Your statements and your actions as set forth below represent severe violations of the UW System Classified Work Rules and the University Police Department Rules and Regulations. Through extensive investigation, the following course of events was discovered:

On Saturday, June 11, 2005, a red Roadmaster bicycle was recovered by UWM Police and inventoried according to department policy. You reviewed the report on June 16 according to standard supervisory report review procedures, but did not have the officer follow up by attempting to contact the owner.

About a month later, a former UWM student, James Wright, approached Officer Craig Rafferty about borrowing one of the bicycles that he had seen in our secured outside storage cage. Officer Rafferty told him that he must speak with you to obtain permission to borrow the bike and advised him to return the next day to do so. Officer Rafferty then informed you of this conversation. He told you that Mr. Wright would be coming to see you to borrow a bike.

On Wednesday, July 13, Mr. Wright came to the station and asked for you. You did not ask him relevant and necessary questions as to his full name, personal information or his reasons for being in the station. You nevertheless proceeded to take him and his female friend out to the UWM Police Department secured storage cage to look over the bikes. The next day, still without having all the facts and necessary information, you instructed Officer Rafferty to release a bike to him.

On Monday, July 18 a Security Officer arranged for the owner of the red Roadmaster bicycle to be contacted to say that we had recovered his property. The owner came in on Thursday but the bike was nowhere to be found, and numerous employees were tied up for hours searching for it. At the 3:00 p.m. roll call an announcement was made saying the bike was missing from our inventory, and it was discovered that you had loaned the bike to James Wright.

On Friday, July 22, Sgt. Learman discussed the situation with you. You told him that Officer Rafferty released the bike, that you assigned him to do a report, and that you were not directly involved in releasing the bike. You said the bike had been given to someone that Officer Rafferty knew and that we would be able to get it back.

You then called Officer Rafferty at home and told him that he released the wrong bike and that he needed to get it back. On Saturday, July 23 Officer Rafferty picked the bike up and returned it to the rightful owner.

These acts are impermissible for a supervisor in the University Police Department. Police Sergeants are expected to set an example for the employees under their supervision. They are expected to follow procedures as to reviewing reports and protecting evidence, and giving a valuable bicycle to someone who just "asks" for it without checking to see if there is a rightful owner is nothing short of extreme negligence. To compound the situation, you failed to take any responsibility for what happened. You denied that you had authorized the release of the property and tried to place all of the responsibility on an Officer under your supervision.

Furthermore, allowing anyone to take improper possession of property in the care of the Police Department violates the public's trust. If the campus community did not feel that it can freely file reports, make statements, or turn over property to the University Police, the Department would cease to perform any useful function. The campus population must never believe that we give away or take home their property at will. The campus must be able to rely upon

our honesty, and Police personnel must understand that inventoried property in our possession is to be safeguarded until released to its rightful owner or otherwise legitimately disposed of, following procedures and with documentation.

These acts are violations of the following department policies and UWS Classified Employee Work Rules:

**UWM POLICE DEPARTMENT WORK RULES AND REGULATIONS**

**ARTICLE I PROFESSIONAL CONDUCT**

Section 2. Performance of Duty. Employees shall perform whatever duty is lawfully required of them. They shall comply with all directives published by the University Police Department and shall obey all directives and orders, written or oral, of their superior officers or persons in charge.

Section 3. Unbecoming Conduct. Because the public trust is so essential to the operation of a police force both on and off duty employees shall conduct themselves in such a manner so as to not reflect unfavorably upon nor bring discredit to the Department, nor bring disgrace or dishonor to themselves.

**ARTICLE I PROFESSIONAL ETHICS Section 21<sup>1</sup>**

...

**ARTICLE V EQUIPMENT AND SUPPLIES Section 4**

Care of Evidence. Employees shall exercise every precaution to preserve and void (sic) destroying evidence, and must properly secure evidence or property which has been confiscated or entrusted to them. Employees shall not take evidence or property or otherwise wrongfully appropriate and convert to their own use or the use of others.

**UW SYSTEM CLASSIFIED EMPLOYEES WORK RULES  
PROHIBITED CONDUCT**

**I. WORK PERFORMANCE**

E. Failure to provide accurate and complete information whenever such information is required by an authorized person.

...

G. Negligence in performance of assigned duties.

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<sup>1</sup> The text of this section is identical to the text of Article V, Section 4.

### III. USE OF PROPERTY

- B. Unauthorized possession or removal of University or another person's private property.

### IV. PERSONAL ACTIONS AND APPEARANCE

- J. Failure to exercise good judgment, . . . in dealing with fellow employees, students, or general public.

These infractions were compounded by your conduct in the course of this investigation. On July 25 and again on July 28 with your attorney present, you were interviewed regarding possible violations of work rules and policies. Throughout both interviews there were numerous inconsistencies in your answers. You virtually failed to answer anything completely.

At both interviews, you refused to answer a direct yes-or-no question about having the original conversation with Officer Rafferty where he told you that Mr. Wright wanted to borrow a bike and would be coming in. And even though you were asked numerous times, you were not able to say why Mr. Wright was in the police department on July 13 or again on July 14. When asked if he came in to receive a bike, you said that he was in to report a bike theft.

You said that you became "concerned" because Mr. Wright was inconsistent in picking out which bike was "his" and that you told him that he would need to return the next day to see Officer Rafferty. You failed to conduct a thorough investigation or to convey your concerns to Officer Rafferty. As a Police supervisor it was your responsibility to communicate your concerns to Officer Rafferty. It is your duty to direct and ensure that all police policy and procedures are followed, and to communicate with subordinate officers. You failed in this responsibility.

Furthermore, during both interviews you denied ordering or having any knowledge of the release of the bike. Investigation has revealed however that you *ordered* PO Rafferty to release the bike on July 14, 2005. You denied ordering PO Rafferty to release the bike, denied any knowledge of the release of the bike, and denied all knowledge of how the bike was returned to the rightful owner.

Your statements as made to investigators on July 25 and July 28, 2005 represent violations of University of Wisconsin Classified Work Rules as follows:

## **UW SYSTEM CLASSIFIED EMPLOYEES WORK RULES**

### **I. WORK PERFORMANCE**

- E. Failure to provide accurate and complete information whenever such information is required by an authorized person.

### **IV. PERSONAL ACTIONS AND APPEARANCE**

- J. Failure to exercise good judgment, or being discourteous, in dealing with fellow employees, students, or general public.

This is not the only recent occurrence where you have failed to follow department rules and regulations, and then compounded the damage by failing or refusing to provide accurate information when asked.

On July 4 of this year, Police Officer Brian Switala reported for duty at the Shorewood July 4<sup>th</sup> parade. You had made the assignment although you had not alerted the command staff of the Chief to the change in his schedule. When asked about it, you said that you had not officially assigned or scheduled him for this detail. You actually asserted in an email that the Chief had assigned Officer Switala to the detail. You had in fact, assigned him yourself, and denied having done so.

On July 28, you were interviewed regarding possible violations of UW System work rules and UWM Police Department policies and procedures. Throughout your interview there were numerous inconsistencies in your answers and you failed to answer questions with complete answers.

You failed to properly communicate your 4<sup>th</sup> of July special detail assignment to the officers involved or to the command staff. As a Police supervisor you must communicate regularly with all subordinates, in order to develop trust and to encourage a positive attitude and positive response to duty assignments. You failed in this responsibility.

More than that, you actually denied having made the assignment and tried to “blame” someone else for having made it. It may or may not have been appropriate for you to assign Officer Switala to the detail, but it would *never* be appropriate or acceptable for you to try to deny having done it. Actions of this type completely undermine a supervisor’s effectiveness. How can the Officers under your supervision ever trust that your work assignments or orders are legitimate, if it is known that when questioned, you will try to deny everything?

Worse than that, for any Police Department, is what happens when a Police Officer develops a reputation for untruthfulness. That Officer will never again be fit for police work because he or she cannot take the stand in court and testify without being easily impeached. An untruthful Officer is worse than no Officer because the taint of reputed untruthfulness reflects on everyone in the department. This is doubly so when the untruthful Officer is supposed to be part of the management team.

Your actions in making the July 4<sup>th</sup> assignment and then denying it represent violations of the following policies and work rules:

## **UWM POLICE DEPARTMENT WORK RULES AND REGULATIONS**

### **ARTICLE I PROFESSIONAL CONDUCT**

**SECTION 3. Unbecoming Conduct.** Because the public trust is so essential to the operation of a police force both on and off duty employees shall conduct themselves in such a manner so as to not reflect unfavorably upon nor bring discredit to the Department, nor bring disgrace or dishonor to themselves.

## **UW SYSTEM CLASSIFIED EMPLOYEES WORK RULES**

### **[I]. WORK PERFORMANCE**

- E. Failure to provide accurate and complete information whenever such information is required by an authorized person.

### **IV. PERSONAL ACTIONS AND APPEARANCE**

- J. Failure to exercise good judgment, or being discourteous, in dealing with fellow employees, students, or general public.

You were aware of these work rules and policies as you were given a copy of them and they were discussed with you. Furthermore, as a Police Sergeant and a supervisor in the University Police Department, you have been made aware of the work rules as they would pertain to your employees.

This is not the first time you have been disciplined for the exercise of poor judgment, negligence, and failing to provide accurate and complete information in an investigation. On May 23, 2003, you received a five day suspension. In that situation you told a Police Officer to make a vehicle stop but failed to monitor the chase that ensued; you then arrived at the crime scene but did not stay, and finally failed or refused to answer truthfully the questions asked in the employer's investigation of the accident.

As already discussed, the University Police cannot afford to employ a Sergeant who is negligent in the conduct of her official duties, and then lies, avoids questions and conveniently “can’t remember” what happened when questioned about the circumstances. A Sergeant who has a reputation for untruthfulness is of no value as a supervisor, or as an officer of the court. The Department has no alternative but to discharge you from your position.

...

3. On August 25, 2005, Chief Hodermann issued the following Letter of Suspension to UW-Milwaukee Police Officer Craig L. Rafferty:

Pursuant to the authority vested in me, you are hereby suspended for ten (10) working days without pay. This suspension will be served September 11, 2005 through September 24, 2005. The reason for this suspension is your severe violation of work rules and departmental policies as follows:

On Saturday, June 11, 2005 a red Roadmaster bicycle was recovered by UWM Police personnel and inventoried according to department policy. On June 16, Sgt. Brenda Brister-Cooper reviewed the report but did not have any officer follow up with attempting to contact the owner.

A day or two before July 14, 2005, a former UWM student, James Wright, approached you while you were on patrol duty outside of the police station, and asked about borrowing one of the bicycles that he had seen in our secured outside storage cage. You told him that he would have to speak to your supervisor, Sgt. Brister-Cooper to obtain permission to borrow a bike and you told him to return the next day to speak with her. You then informed the Sergeant of this conversation, and told her Mr. Wright would be coming in to see her about borrowing a bike.

On Thursday July 14, Sgt. Brister-Cooper instructed you to release a bike to Mr. Wright from the secured storage cage. You allowed him access to our secured storage cage without verifying with the Sergeant that a bike would in fact be loaned to Mr. Wright. Furthermore you failed to get specific information regarding which bike was to be released.

In the course of investigation, you said that Mr. Wright pointed to two or three bikes before picking out the red Roadmaster bicycle. Previous interviews with Mr. Wright revealed that at some time in the past he may have lost or had stolen a black and silver or grey Mongoose bicycle, but not a red Roadmaster bicycle. Your failure to conduct a thorough investigation of Mr. Wright and what was being released to him resulted in giving him a bike that belonged to someone else. You also failed to enter any pertinent information about this transaction into your memo book or into an ARMS supplement report.



On Monday, July 18 a Security Officer arranged for the owner of the red Roadmaster bicycle to be contacted to say that his property had been recovered. The owner came in on Thursday but the bike was nowhere to be found, and numerous employees were tied up for hours searching for it. At the 3:00 p.m. roll call an announcement was made saying the bike was missing from our inventory, and it was discovered that Sgt. Brister-Cooper had loaned out the bike to James Wright.

On Friday, July 22 Sgt. Learman discussed the situation with Sgt. Brister-Cooper. She told him that you had released the bike, and had been assigned to write a report on it. She said that she had not seen the report but assumed that you had completed it. She said that the bike had been given to someone you knew and that we would be able to get it back because it was only loaned out.

She then called you at home and told you that you had released the wrong bike and that you needed to get it back. On Saturday you picked the bike up and returned it to the rightful owner. You completed a supplement report regarding the bike's release to the rightful owner and had the owner sign our property report.

Your actions were impermissible for a Police Officer in the University Police Department. Your failure to ask the questions necessary for a complete report, or in fact to make any report of this exchange at all, is negligence at best. Police officers are expected to follow procedures as to making reports and protecting evidence, and giving a valuable bicycle to someone who just "asks" for it without authorization should never happen. The only factor that redeemed this situation from being much worse was your ability to retrieve the bike from Mr. Wright.

Among others, your actions represent violations of the UWM Police Department Policies and Procedures on maintaining accurate offense reports, and on the care and handling of property under our control.

...

You also failed to keep a record of this transaction in your memo book. On more than one occasion UWM Police Officers have been directed to maintain memo books into which they must enter the names of persons taken into custody and such particulars as may be important in a trial, or to generate official police reports.

Furthermore, your actions represent violations of the UWM Police Department Rules and Regulations on professional conduct and ethics and the UWM System Classified Employees work Rules, as follows:

...

The incident described above is not the only recent incidence of negligence, lack of good judgment and adequate record keeping on your part that has resulted in the improper possession of property.

On October 21, 2004 you were dispatched to Engelmann Field regarding a charcoal grill that had been left near the soccer field. You created an ARMS report for this dispatch and the grill was placed into inventory according to procedures. In June 2005 you took possession of it and transported it in a co-worker's private vehicle to a friend's residence in the City of Milwaukee.

You failed to follow proper department procedures regarding property by taking an inventoried item and converting it to your personal use. Not only did you take property that was not yours from inventory, but you failed to document the release on any official department reports.

...

You have violated the public's trust in the University Police Department. During the course of the employer's investigation into these events, you asserted that you did not think you had done "anything wrong" in releasing the bike to someone other than its rightful owner, nor did you think you had done "anything wrong" in taking a charcoal grill just because it had been in the inventory room more than 90 days. This creates the concern that you do not understand the nature or the gravity of the infractions. If the UWM campus community does not feel that it can file reports, make statements, or turn over property to the University Police, the Department would cease to perform any useful function. The campus population must never come to believe that we give away or take home their property at will. The campus must be able to rely upon the honesty of our Officers, and our Officers must understand that inventoried property in our possession is to be safe guarded until released to its rightful owner or otherwise properly disposed of following legitimate procedures with documented records.

You should also understand that this discipline would have been more severe but for your bring truthful and forthcoming in cooperating with the employer's investigation. If you had not been honest and truthful in revealing what you knew about the bicycle and the charcoal grill, you would not merely have received a suspension for these infractions.

...

You are also advised that any further violations of the work rules could result in additional disciplinary action, up to and including discharge. If you wish to appeal this action, please contact your WLEA representatives for information.

Notwithstanding the commentary in the penultimate quoted paragraph, Chief Hodermann believed that Rafferty lied during the investigation into the grill incident, but that she could not prove it.

4. On or about July 12, 2005, James Wright, a member of the UW-M men's basketball team ("the Panthers"), approached Rafferty, whom he knew from various contacts around campus, and engaged him in conversation about the bicycles that Wright knew the police had in their property cage. Wright related to Rafferty that he had had a black and silver or gray Mongoose brand bicycle apparently stolen a few years prior, and asked if he could borrow one of the department's inventory to train with over the summer. Rafferty, who had followed Wright's career since high school, told him that might be possible, but he would have to come to the stationhouse and talk with Sgt. Brister-Cooper because he, Rafferty, did not have authority to release a bicycle under those circumstances.

5. Rafferty subsequently told Brister-Cooper that Wright would be coming to see her, that he previously may have lost a bicycle or had it stolen, and that he would like to borrow an impounded bike for training purposes.

6. On July 13, 2005, Wright, accompanied by an unidentified woman, came to the front desk at the UW-M police station and asked for Sgt. Brister-Cooper, whom dispatcher Mary Jackson called. Jackson recognized Wright and knew who he was, and chatted with him while they were waiting. Brister-Cooper came down from her office to the reception desk, where she talked with Wright for about ten seconds before inviting him in to see what bikes the department had. At no time prior to allowing Wright and the never-identified woman into the secure area did Brister-Cooper obtain identification, review any computerized database, ask for a report number, or take a report.

7. The three walked through a parking area to the property cage, where Wright looked around the cage to see what bikes were there. After a few moments, the three left the area; before Wright and the woman left the station house, Brister-Cooper told him to come back the following night.

8. Wright returned the following night, alone, again asking for Brister-Cooper. The two spoke briefly before Brister-Cooper directed Rafferty, who was assisting Ofc. Switala book four juveniles arrested on drug charges, to attend to him. Brister-Cooper did not direct Jackson to assign Rafferty a number for filing a report, as would normally be the case when a new report was to be filed.

9. Brister-Cooper watched Rafferty open the reception area door to Wright and walk with him towards the secure area. Rafferty, who by now had obtained a property cage key, let Wright pick out a bike to borrow. Wright chose a red Trek Roadmaster which UW-M Police personnel had recovered in mid-June, but whose owner the department had not yet contacted. Rafferty had Wright sign a property release form, which he did not file. Wright then rode away.

10. A little while later, Jackson mentioned to Rafferty and Brister-Cooper that maybe Wright would get the department some Panther tee-shirts, for community policing efforts, in thanks for the loan of the bike. Brister-Cooper heard and understood the remark, and did not ask any questions or raise any concerns.

11. On July 18, the department finally contacted the owner of the bicycle, and told him it had his Roadmaster. On July 21, the bike's owner came to the station, where the bike was no longer kept.

12. On Friday, July 22, Sgt. Learman announced at roll call that a bicycle was discovered to be missing, and the department was trying to find out what had happened. As of that date, no report regarding the bicycle's release had been filed. A short while later, Jackson told Learman she believed that Sgt. Brister-Cooper and Ofc. Rafferty had released a bike. Learman related this information to Lt. Linda Swenson, who told him to interview Brister-Cooper, which he did. Brister-Cooper acknowledged a bicycle's release, which she attributed to Rafferty, who she said had all the details. Learman did not take any contemporaneous notes of their conversation.

13. Later that day, Brister-Cooper called Rafferty, who was on his day off; he wasn't at home, but she reached him on his cell phone. The next morning, Rafferty met Wright and retrieved the bicycle, which he then took to its owner. Wright did not get a replacement loaner bike.

14. The department thereupon began an investigation into the improper release of the bicycle, ultimately devoting about 200 command and supervisory staff-hours.

15. On Sunday, July 24, 2005, Rafferty sent the following e-mail at 6:49 pm:

Sgt Learman, this property was mistakenly issued to UWM Mens Basketball player James Wright on 07/14/05. The property report he signed is in your mailbox. We thought that Wright had identified a bike in the bike cage as his property but after speaking with him he just wanted to use one of the bikes for training. Wright said the bike I issued to him was similar to a bike he had stolen on campus about two years ago. I left a message with Wright to return the bike to us ASAP so that it can be released to its proper owner. Wright returned the bike to me.<sup>2</sup> I advised Wright that the bike actually belonged to [REDACTED]. Sorry for the mix up. The property was released to [REDACTED] by me on 07/23/05. The property report was signed by [REDACTED] and submitted with report #051974.

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<sup>2</sup> Actually, Rafferty retrieved the bike from Wright.

At 10:34 that evening, Rafferty wrote the following e-mail:

Chief Hodermann this is to inform you of the events of 07/14/05, a couple of days prior, UWM Mens Basketball player James Wright approached me regarding the bikes inside the bike cage. He stated that his bike was stolen a while back and was wondering if we could lend him one of the bikes inside the cage. I informed Wright that some of the bikes in the cage were never claimed and that it may be possible for him to use one but he would have to talk with Sgt Cooper first. On 07/14/05 Wright came to retrieve one of the bikes in the cage and said he spoke to unit 14. That day while booking 4 juvenile suspects I was directed by Sgt Cooper to escort Wright to the cage and release a bike to him, however it was mis[-]communicated as to which bike. I was under the impression that he wanted to use one of the bikes that wasn't claimed by someone. Wright explained that he wanted to use the bike for training with the basketball team and in return he would help us to obtain some community policing materials (ie t-shirts or UWM Panthers stuff) for our upcoming policing event. I believe Sgt Cooper may have thought that Wright had previously saw his bike in our bike rack and wanted to claim his property which was not the case. Upon escorting Wright to the bike cage I asked him which bike did Sgt Cooper say he could have. Wright pointed out a red TREK 4500 which we brought in the station. I then proceeded to released this property to Wright by having him sign the property form. See Sgt Cooper/Learman for signed form. On 07/22/05 I received a call at home from Sgt Cooper who said that I had released the wrong bike to Wright. She continue to explain that Wright was to receive another bike that was not in inventory and that I needed to contact him to get the bike back. On 07/23/05 I made contact with Wright and explained to him that I made a mistake and gave him the wrong bike. I told him that he would need to speak with Sgt Cooper again regarding which bike she wanted him to use. I was able to retrieve the bike and return it to its owner on 07/23/05. Per PO Hanson the owner had come in to claim his property and was not there. There was no ill will to take a bike from the bike cage but my intentions were to have Mr. Wright give us something in return for our services to him. Below is the email I sent to Sgt Cooper and Sgt Learman explaining the mix up.

16. At 12:58 on the afternoon of July 25, 2005, Sgt. James Learman wrote an e-mail to Lieutenant Linda Swanson as follows:

On Thursday, July 21, 2005 it was brought to my attention, that the department was unable to locate a bicycle that we had taken into custody for safe keeping (051974). The owner had arrived to claim the bike and we could not find it. Ofc Hanson, Det.s. [Dets.] Cavan and Sorrell and PCO Kuchta were involved in trying to locate the bike. Ofc Hanson said that there were several bikes in the cage without inventory numbers. SO Rewolinski volunteered to track down and label each bike with an inventory number. I told him to proceed with this.

At roll call for the 3-11 shift, I mentioned that we had been unable to locate a bike. Later, PCO Jackson came to me and informed me that she was aware that Sgt Brister had loaned a bicycle from inventory to a student. Jackson did not know the name of the student.<sup>3</sup>

On Friday, July 22, 2005 I informed Lt Swenson of the possible loss of a bike from inventory. She assigned me to interview Sgt. Brister. I printed the report, the Property Report and a search of Property Type – BIKE. That evening, around 4:30-5pm, I spoke with Sgt. Brister.

I told her that we were missing a bike from inventory and asked her if she had any information about it. Sgt. Brister told me that Officer Rafferty released a bike from inventory and that she assigned him to do a report. She had not yet seen Officer Rafferty's report and assumed that he had completed it. She told me that she was not directly involved in releasing the bike and only assigned the report to Officer Rafferty. I asked her if we had the name of the person and if we could get the bike back. She said it was someone that Officer Rafferty knew and that we would be able to get the bike back because it was only loaned out. She said that she did not know the name of the person and that I should talk to Officer Rafferty. When I asked about what she meant by "loaned out" she told me to talk to Officer Rafferty. When I asked about why this particular bike was chosen or how it was identified before releasing – she said to talk to Rafferty.

Officer Rafferty was not working on Friday but was scheduled to work on Saturday. On Saturday evening, around 8:30pm-9:00pm, I received a call on my cell phone but was unable to answer in time. The display showed "ID Restricted," which I commonly assume to be the department calling. I called in and asked the dispatcher if anyone had called me. Sgt. Brister came on the line.

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<sup>3</sup> In Mary Jackson's investigatory interview on July 25, 2005, the following colloquy transpired between Jackson and Lt. Ernest Meress:

MJ: Well, I know he came in one, the day before. Uh, looking for the sergeant for whatever reason she told him, she must have told him to come back because he came back the next day.  
EM: Okay, when you say he, do you know who this individual is?  
MJ: Yes.  
EM: And who is it?  
MJ: James Wright.  
EM: And how do you know James Wright?  
MJ: Because James Wright used to live in the dorms when I lived in the dorms. And I know him as a basketball player.

Jackson's easy and knowing identification of Wright is contrary to Learman's statement in his e-mail that "Jackson did not know the name of the student." Whether Jackson misinformed Learman or Learman misunderstood Jackson is unclear from the record. Jackson also identifies Wright, by name and occupation, in her e-mail of that same date, cited in Finding of Fact 18.

She told me that Officer Rafferty would complete his report and recover the bike.

On Monday, July 25, 2005, upon my return to work Chief Hodermann informed me that Officer Rafferty had sent e-mails concerning this incident and that she assigned det. [Det.] Koch to investigate this.

At 4:07 that afternoon, Learman sent an amended version of this e-mail, adding Chief Hodermann and Lt. Meress as recipients, with the following explanation:

I have made changes to my original e-mail, specifically I changed the date of St. [Sgt.] Brister's call from Saturday, to Friday, 7/22/05, and that Ofc Rafferty "would complete" the reports. I added Ofc Hanson's name as the original source of this information.

17. At 4:12 pm on July 25, 2005, Sgt. Learman sent the following e-mail:

As directed by Lt. Meress, I re-interviewed PCO Jackson on Monday, 07/25/05 at about 3:30pm to determine how she became aware of the information she provided to me on 07/22/05.

PCO Jackson stated that she overheard, while working as a dispatcher, that Ofc. Rafferty was directed by Sgt. Brister to release a bike to Wright, but does not know what date this was. Jackson believed that Wright and Rafferty meet [met] on an earlier unknown date, discussed how he might obtain a bike, and was probably refereed [referred] to Sgt. Brister by Ofc Rafferty. She believes this because Wright came into the station and asked for Sgt. Brister. This was on an unknown date, but before July 14, 2005. Wright and Sgt Brister talked at the dispatch console area. Wright left. Wright came back the next day and asked to see Ofc Rafferty. That was when Ofc Rafferty released the bike.

Contrary to the penultimate sentence in this e-mail, when Wright returned to the department, he again asked to see Sgt. Brister-Cooper, not Rafferty. Again, it is unknown whether Jackson made an incorrect statement in her interview, or Learman recounted her correct statement erroneously.

18. Jackson addressed this point, and others, in an e-mail she sent Lts. Meress and Swenson that evening, July 25, 2005, at 8:52:57 pm:

. . .

I told Sgt. Learman that I believe I knew what happened to the bike. I further told the Sgt. that I believe Officer Rafferty loaned James Wright, the basketball player at the approval of Sgt. Brister-Cooper, a bike for Wright to get in shape with. Sgt. Learman asked me why did I think it was loaned? I said I believe

Rafferty told me that Wright saw the bike in the cage and that while Rafferty was out around campus Wright asked him if he could use the bike to get in shape with but Rafferty told Wright to come in to the PD and ask for Sgt. Brister-Cooper because he doesn't have the authority to release the bike. I also believe that Wright mentioned it while he was in the reception area on the 13<sup>th</sup> when I asked him what brings him to the PD. I also told Sgt Learman that I waited to tell him in his office with out a lot of people around because I did not want to be known as a snitch or be on Sgt. Brister-Cooper's bad side.

...

On Thursday, July 14, 2005, James Wright returned to the PD looking for Sgt. Cooper. She came to the reception area to speak with him. I returned to the dispatch area because officer Rafferty was booking while officer Switala were busy dealing with 4 juveniles in custody. Sgt. Brister-Cooper had officer Rafferty stop booking the juvys and turn the bike over to Wright. I do remember Wright coming through the dispatch area with officer Rafferty who looking for a peg to get into the cage, so he could release the bike to Wright. After the bike was released, I joked with the Sgt. in the presence of officer Rafferty, why didn't she get some shirts or something, because she is always talking about trying to get free stuff from other departments within the university.

\*NOTE\* I am not positive which day the female came with right to the PD, I believe it was on the 13<sup>th</sup>. The more I try to recall which day, I begin to think it was the 14<sup>th</sup>.<sup>4</sup>

On Friday, July 15, 2005<sup>5</sup>, earlier in the shift, Sgt. Brister-Cooper was at dispatch and she made reference to officer Rafferty releasing the wrong bike to Wright. She also stated she needed to get a hold of officer Rafferty to get the bike back from Wright and turn it over to the correct owner. Sgt. Brister-Cooper was dispatching from about 6p-7:30pm while I was down at GLWI .... When I returned I believe Sgt. Brister-Cooper was on the phone with Rafferty on line 3 telling him to return the bike. It also could've been her husband because he also calls in on line 3. I think that Sgt. Brister-Cooper called Rafferty at home from a recorded line while dispatching.<sup>6</sup>

...

---

<sup>4</sup> Jackson was wrong; it was the 13<sup>th</sup>.

<sup>5</sup> This date cannot be correct, in that it was not until July 18 that the owner of the red TREK came into the station. As Rafferty and Brister-Cooper both related, Brister-Cooper called Rafferty on Friday, July 22.

<sup>6</sup> No such recording was ever offered in evidence or mentioned in testimony.



19. From 6:04 to 6:45 pm on July 25, 2005, Lt. Ernest Meress, accompanied by Lt. Swenson, interviewed Sgt. Brister-Cooper, as follows:

...

Q: Did you ever direct Officer Rafferty to escort anyone to the UWM evidence cage and to release a bicycle there to that person?

A: NOPE, I told him to take a report, when the guy came back.

...

Q: So the next night he (James Wright) comes back

A: uh-huh

Q: Are you involved in anything that night?

A: Um, Mary calls me in and says that he's here ok, I looked in the um lounge. I didn't recognize the guy, so I asked Mary who is that and she tells me and I said are you sure he doesn't look like the same guy that was here last night she said yeah that's that's him. I said ok fine um have Rafferty take a report.

...

Q: So he you never to the to the to the you're telling me that you never called Rafferty at home and said Raff Craig we released or you released the wrong bike whatever you said (inaudible)?

A: I called I called him where is the fucking report on this bike? What happened?

Q: But there was never anything about the wrong bike?

A: No no now he called back later um and I don't know if he said something about it or if I did something about so the guy has the wrong bike I don't even know I don't know you know who the bike belonged to I don't know how he got that information so...

Q: So the release of the bike, somebody going opening up the cage and taking a bike out and giving it to this person if they even did it

A: uh-huh

Q: You have no knowledge

A: No.

...

Q: So you're saying you never instructed Rafferty to call this person who came in to get the bike back?

A: No.

Q: So the only thing you ever the only interaction on this whole case up until this point that you had with anybody was Rafferty get the fucking report done?

A: Get the yes.

...

Q: And then somewhere you now you don't remember you remember calling Rafferty and saying where's the report but you never asked said anything about where's the bike, we got to get the bike back anything like that?

A: No.

...

Q: The second night.

A: And uh says that I have a visitor I think something like that. So I come in through the front and I look in. I don't recognize who that person was so I kept going and so I asked Mary who is it? And she tells me that it's whatever um James Jim Wright whatever his name is and I ask are you sure? It doesn't look like the guy I talked to last night. And she said yeah. So ok. Tell Rafferty to take a report.

Q: And you never called him at home and said you need to get we gotta get that bike from this individual because it's the wrong bike and we need to give him one that's not on inventory.

A: No no. I called him and asked for the report.

...

Q: And you have no knowledge of how, you don't know who called this person and said we need to get the bike back you don't know

A: Don't know how it got back

...

Q: OK. Do you Do you have any knowledge of who gave offer Officer Rafferty or whoever did give the bike supervisory permission to do that?

A: No, it wasn't me. I told Rafferty to do a report.

Q: And you are saying you never called Rafferty at home and said we gave the person or the person has the wrong bike. You never did that? And you never told Rafferty that he needs to get a hold of the person cause they had to bring that bike back?

A: No.

Q: And do you know who subsequently got a hold of this person because obviously they brought the bike back. Do you know who called James Wright and told him to bring the bike back?

A: Nope.

...

20. From 5:58 to 7:14 pm on July 28, Lt. Meress, accompanied by Lt. Swenson, again interviewed Sgt. Brister-Cooper, who was accompanied by attorney Nola Cross, as follows:

Q: Okay, we'll go on to the next question. Did you ever authorize anyone to loan one of our bikes on inventory to James Wright?

A: No.

Q: On Friday, July 22, 2005, did you ever call Craig Rafferty anywhere and tell him that he had released the wrong bike to James Wright?

A: I call him and asked for a report.

Q: Okay, did you ever talk to him on that conversation about releasing the wrong bike to James Wright?

A: I asked him about the report. If I have the report, I look at the report and determine what he did. If I have that report.

Q: Okay. So, then in answer to this question, if I ask you, did you ever call Craig Rafferty anywhere and tell him that he released the wrong bike to James Wright, your answer would be no. Because that's what you're, you're not answering.

A: I'm telling you. I called him and I asked for the report.

Q: Ok, I'm not asking you about the report. I'm asking if you ever called him and told him he released the wrong bike? That's what I'm asking you.

A: Then, I can't answer that.

Q: You don't know if you said that?

- A: I'm telling you what I know. I'm telling you what I can provide to you. When I called him and told him I asked him, where is the fucking report?
- Q: Okay. Did you ever talk to him about releasing the wrong bike?
- A: I asked him for the report. If I have the report,
- Q: Brenda
- A: I can look at it and determine that, if I have the report.
- Q: I understand you asked him about the report. I'm not asking that. I'm asking you if you ever talked to him about releasing the wrong bike?
- A: I then, I can't answer that. I don't know.
- Q: So, you are saying, you don't know. You don't remember. You didn't. you did. Or, you're just refusing to answer.
- A: I am not refusing to answer. I am just saying. I've just told you what we talked about.
- Q: But, you're not, you're not you are here under an investigatory
- A: And, I'm answering you the best I can.
- Q: I am asking you direct questions and I'm asking you if anywhere you ever called Craig Rafferty and talk about your bike. And, you are saying. What's your answer?
- A: I am saying, I called him and I asked for the report.
- Q: I'm telling you, I'm not asking you about the report. I'm asking you if you ever talked to him about releasing the wrong bike.
- A: I can tell you, I told him about the report.
- Q: And, I can tell you right now, you're not answering the question.
- A: I don't know how you want me to answer it.
- Q: Well, I want you to answer it truthfully, but you're not you're not.
- A: I am telling you what I
- Q: Brenda, you are not answering the question. It's a simple question. Did you ever call Craig Rafferty anywhere and tell him that he released the wrong bike? Now that is not a complicated hard question.

A: I called Craig Rafferty and asked him for the

Q: Report

A: fucking report.

...

Q: Did you ever direct Police Officer Rafferty Rafferty to escort James Wright to the bike cage for purposes of Mr. Wright getting an inventory bike?

A: No.

Q: Did you ever make arrangements for anyone to recover the bike given to James Wright?

A: No.

...

Q: On July 14, 2005, did you pull Police Officer Rafferty from assisting with Police Officer Switala's arrest and tell him to help the guy out front?

A: I guess I did.

...

Q: To go to the bike cage with James Wright?

A: No, I told him to take the report.

...

Q: You never had any conversation about, you gave the bike to the wrong person or anything like that?

A: No, I didn't do stuff (words unclear).

...

Q: Did you tell Police Officer Rafferty in any way that he needed to get the bike back from James Wright?

A: No.

...

21. By her actions authorizing the release of a bicycle to James Wright, and then failing to provide full and accurate information during the subsequent investigation, the Appellant violated Article V, Section 4 (care of property) of the UW-M Police Department "Rules and Regulations". The same conduct violated the following University of Wisconsin

System work rules: I. E. (provide accurate and complete information when required); I. G. (negligence); III. B. (unauthorized removal of private property); and IV. J. (not exercising good judgment or being discourteous).<sup>7</sup>

22. On June 15, Brister-Cooper had called the Shorewood Police Department to discuss participating in the SPD parade on the Fourth of July. She had the following exchange with Officer Walton:

Brister-Cooper: We'd like to participate since, you know, we're so close.

Walton: Well, I'm sure ... what do you guys want to do, march in it?

Brister-Cooper: March, we're gonna have we're gonna have I'm gonna put Switala Switala I gotta' put Switala on a bike.

Walton: He's going to ride circles around everybody?

Brister-Cooper: Yeah, We're going to try to get that done.

Walton: ??? You're going to punish him and send him over to our national [Night Out] aren't you?

Brister-Cooper: Yes, we are

Walton: Oh man

Brister-Cooper: But don't tell him all that now. It's a secret till it happens or he'll call in sick on me.

Walton: OK, I'll leave a message for him ... to get in touch with you regarding that you guys might be participating and poor Brian ....

Brister-Cooper: Laughter. Thank you.<sup>8</sup>

23. Brister-Cooper changed Officer Switala's assignment by assigning him to Shorewood's 4<sup>th</sup> of July parade, and did so without informing command staff and without placing him on the master schedule. Brister-Cooper subsequently sent an e-mail in which she stated that Switala had informed her that the Chief of UW-M's Police Department had told Switala to be available for the parade.<sup>9</sup>

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<sup>7</sup> The Commission has rewritten and modified the corresponding finding in the proposed decision to more clearly describe the written rules that Appellant violated and to reflect our conclusions.

<sup>8</sup> The first exchange was not included in the transcript placed into evidence, but was taken from the recording itself.

<sup>9</sup> The Commission has added this finding to more clearly set forth our conclusions.

24. During her July 28 investigative interview with Lts. Meress and Swenson, Brister-Cooper was asked numerous questions about the parade assignment. She answered inconsistently and she failed to completely answer some of the questions:<sup>10</sup>

Q: On June 15, 2005, did you call Office Walton of the Shorewood Police Department?

...

A: I don't know if I called him or he called me, but I talked to him.

...

Q: Did you make that call at dispatch?

A: I made a call at or I don't know if he called me or if I called him.

...

Q: Within that conversation, did you tell Officer Walton that Officer Switala would, Switala would be participating in the parade?

A: He asked me if they would be getting Switala twice. Ah, were we gonna be sending him for punishment and hey, fine, you know.

Q: I don't understand.

A: And then, we just started laughing. That was that.

Q: I don't understand your answer. You were going to get him twice. What does that mean?

A: He said that, are we going to get Switala cause he was supposed to be doing something else. It's on the tape. You'll have to listen to it. I'm not exactly sure what it was, but he would say something about, so are you going to punish him? Are you going to let Switala come out so he can, you know, and ride the bike so he can be punished? He was joking to me. So, I think, ah, Mary Jackson and I think Switala came around the corner and I think I told him, you know, Shorewood wants you to come up so they can punish you there on the parade route.

Q: okay. The question was, did you ever tell Officer Walton that Switala would be assigned to the parade?

A: I don't, you'd have to listen to the tape. I don't remember exactly what the wording was.

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<sup>10</sup> The lengthy portion of the hearing transcript had been found in finding 21 of the proposed decision. The Commission has renumbered the finding so that it appears in a more logical sequence and has expressly set forth our conclusions as to the nature of Appellant's responses.



- Q: So you don't. So your answer is that you don't know?
- A: I'm not saying I don't know. I don't remember. That's June 15<sup>th</sup>. We talked about Switala and he said something about, he, I think he requested him. I don't know if I did. I know it was like, you know, send him for punishment or something like that.
- Q: Okay. But, in answer to this question, in that conversation you had, either you called him or he called you, did you ever tell Officer Walton that Switala would be participating, participating in the parade?
- A: I may have said something like it sounds like a good idea for, you know, because he said something about punishing either punishing him and send him up. I can't ....
- Q: Well, in your mind was Switala going to be participating in the parade?
- A: In my mind was he going, have to be, we would we would have to decide if he was going to be participating in the parade.
- Q: But, you are talking to Officer Walton at Shorewood.
- A: Um mmmm.
- Q: So, I am assuming that Officer Walton needs to know who's coming to the parade. So, did you convey to him Switala was coming to the parade or not. In a work ...
- A: We talked about Switala and I don't see how he would, maybe he got that. Maybe that's what was his understanding of it. But, that was when, June 15<sup>th</sup>. I emailed somebody back, ah, letting the, know we were going to send one bike and one officer.
- Q: Okay. So, your answer to this question is, you don't know if you told Walton that. Because my question is specifically, did you tell Walton, now this, you know, we deal with other agencies all the time.
- A: Yes.
- Q: And if they are asking us a question, we got to give them an answer.

A: Um hmmm.

Q: Did you tell Walton, Switala's coming to this, going to participate in the parade or not? Yes or no.

A: I can't remember 100% what was said.

Q: Okay.

A: I know we talked about Switala. Then just because people overhear things that doesn't mean they are going to be assigned to stuff.

Q: Was Switala present at dispatch during part of this conversation?

A: I don't know where Switala was at all. But, I'm sure he was e[a]vesdropping somewhere.

Q: Okay. Did you ever tell Officer Switala that he was not assigned to the parade?

A: I told him that he had a legal holiday. I told him, ahm, that Griffin was assigned. He told me that the Chief told him to make himself available for this parade.

Q: Okay. My questions is, did you ever convey to him that he was not assigned to the parade?

A: I can only tell you what I just told you.

Q: Which didn't answer the question.

A: (words unclear) [Sigh]

Q: And I am asking you, did you ever tell him he was not assigned to the parade?

A: I told him that he was off on a legal holiday.

Q: I don't care about the legal holiday.

A: Well, then I can't, then I can't.

Q: Brenda, you're not answering the question. I'm asking you the question, so your answer is, you don't remember?

A: That's all I remember. I told him that he had a legal holiday.

- Q: You remember he had a legal holiday, but you don't remember if you told him if he was assigned to a parade or not, that you're having a conversation with an officer in Shorewood about.
- A: I told him. That was June 15<sup>th</sup>. I have to pull up my email. That was way back in June. The final decision wasn't made until, I don't know who Lieutenant.
- Q: Did you ever tell him he was or was not assigned in writing? By email?
- A: No.
- Q: So you never either assigned him or didn't assign him by email?
- A: I assigned Officer Griffin by email.
- Q: You remember that.
- A: Switala didn't get that email.
- Q: But, you remember that, right?
- A: Yes, I did. You received a copy.
- Q: Okay. You remember that you sent an email about Officer Griffin being assigned, but you're telling me you don't remember if you sent an email or verbally told Officer Switala he either was assigned or was not assigned.
- A: Well, he's on a legal.
- Q: Is that what you're telling me? Yes or no?
- A: I can only tell you what I know. I can only tell you what I know.
- Q: But, you are not answering the question.
- A: But, I am answering your question.
- Q: No, you're not. You're telling me that you're telling me that you sent an email to Officer Griffin and you remember that?
- A: Yes.
- Q: I am asking you about a conversation you had with Officer Walton of Shorewood.
- A: uh huh

- Q: I am asking you if you ever told
- Atty. Nola Cross: Lieutenant, would you please stop shouting.
- Q: No, I am not shouting.
- Cross: Sure you are
- Q: I am not shouting at all.
- Cross: Sure.
- Q: I am asking you if you were having a conversation with Officer Walton about Switala either being assigned or not being assigned.
- A: We had ....
- Q: And you're not answering the question. And I'm directing you to answer the question.
- A: And I'm trying to answer your question.
- Q: And you're not. This is ....
- A: Well, I
- Q: I am asking you in a yes or no question.
- A: When, i
- Q: Did Officer, did you assign, did you ever tell Office Switala that he was not assigned to the parade?
- A: I told Switala he had a legal holiday. He told me the Chief told him to make himself available for this.
- Q: Okay. That's fine, but beyond that, did you ever tell him that he was not assigned to the parade?
- A: He didn't get the email. Why, why would he go?
- Q: So your answer is, you didn't send him an email?
- A: I didn't get, I didn't send him an email telling him he was going.
- Q: So, your answer is, you never assigned him to the parade?
- A: I didn't send him an email saying that he was going. I sent an email to command and to the officer that was assigned, Lamar Griffin.



- Q: Okay. We got that straight. We know what you did with Lamar. I am asking you what you did with Switala. Did you ever send him an email or did you ever verbally tell him he was or was not assigned to this parade? Yes or no?
- A: I did not send him an email.
- Q: Okay. Did you ever verbally tell him? Yes or no?
- A: That he was assigned to the parade?
- Q: Or not assigned. Whichever one you want to talk about. Let's talk about assigned. You've never sent him an email saying he was assigned.
- A: No.
- Q: Did you ever verbally tell him he was assigned?
- A: He
- Q: Yes or no.
- A: He asked. I'm gonna say no. He asked.
- Q: So, you're saying no, you never told him he was assigned? Did you ever tell him he was not assigned?
- A: I told him he had a legal holiday.
- Q: Ok, we already got that far. Did you ever tell him he was not assigned, verbally or written?
- A: Right.
- Q: Yes or no?
- A: I can't say I did.
- Q: You can't what?
- A: I can't say I did.
- Q: Ok, did you provide Officer Switala with the lineup location and time for the Shorewood parade?
- A: No.
- Q: Did you assign Officer Griffin and Officer Switala to the Shorewood parade?
- A: I assigned Officer Griffin to the parade and sent him an email that I copied command on as to the time and the location.

Q: So you you don't, we'll go back again. You don't remember or you're saying no, you didn't assign Switala because that's what your answer was.

A: I didn't send him an email.

Q: Right. And, when I asked you verbally, you said no. Is that what I'm saying? Is that a correct answer?

A: That's

Q: Isn't that what you said?

A: No.

Q: You didn't say no.

A: Yes. No.

Q: Okay, I'll ask it again. We'll go back to, I know you didn't send him an email. Did you ever tell him he was assigned to the parade? You said, no. I believe we can all answer ... no is what you answer was. Is that right?

A: Sure.

Q: Did you ever tell him he wasn't going to the parade?

A: I can say that I 100% directed to him, no you are not going. I can't say that. I could tell him that he had a legal holiday.

Q: Okay, we're on the second tape. Do you know if, if you didn't assign him to the parade, do you know of anybody who may have, if you didn't?

A: He told me the Chief told him to make himself available for the parade.

Q: How were Officer Griffin how was he notified of, and Officer Switala, how was he notified of their assignments that you know?

A: I copied Officer Griffin the same email that command received about the location and the time.

Q: On July 3<sup>rd</sup>, did you give Office Switala the box of parade handouts?

A: I left the parade handouts outside my door because I wouldn't be here when Griffin arrived to pick it up.

Q: Okay. And, just to reiterate one more time. I think it's the last question. You do not I'm still confused on your answer. You said, no, you didn't tell him that he was part of the parade, but you don't, you're not 100% sure if you told him he was not part of the parade, you said you can't %100 be sure. Is that correct?

A: No. Yes, I can.

Q: Do you have any other questions?

Lt. Swenson: What was your conversation with Office Switala on the night of July 3 in regards to the parade?

A: He had a legal holiday.

Swenson: You had to say more than that.

A: He was on a legal holiday. He told me again that the Chief told him to make himself available.

Swenson: What time was this conversation?

A: I have no idea.

Swenson: Early in the shift? Late in the shift?

A: I have noooo idea.

Swenson: Is there a reason why you did not call the Chief and confirm what he was saying?

A: I didn't call the Chief.

Q: So, you don't have a reason why you didn't confirm what Office Switala was saying?

A: No, no. Because I know he had talked to her about this before.



Swenson: Did you call Officer Griffin and tell him where the parade location was at and where he was to meet and line up?

A: I sent him an email. I mean

Swenson: Did you call him? Did you direct Officer Switala to call him?

A: No, I did not.

Swenson: Do you know who completed the event tracker for that event?

A: You know what, I think Switala did.

Swenson: That's all I go.

Meress: Okay. It's 7:14 and we're going to end this interview. Do you have any questions?

A: Uhmhhh, no. I think I'm good.

25. By her actions involving the assignment of Officer Switala to the Fourth of July parade, Appellant violated University of Wisconsin System work rules I. E. (not providing accurate and complete information) and IV. J. (exercising bad judgment or being discourteous).<sup>11</sup>

26. On May 29, 2003, then Police Chief Phillip Clark issued a Letter of Suspension to Sgt. Brister-Cooper for her failure to properly monitor, take control and preserve the scene of a police pursuit that resulted in Switala fatally shooting a suspect, and for failing to provide full and complete information during the subsequent internal investigation. Because he determined that the department could not afford to be without a sergeant for that length of time, Clark did not require Brister-Cooper to serve the suspension, but it went into her personnel record as a five-day suspension. Brister-Cooper was informed that further violations of work rules could result in additional disciplinary action, up to and including discharge. Clark wrote, in part, as follows:

On March 14, 2003, you met with Lt. Pamela Hodermann and Lt. Ernest Meress for an investigatory meeting. Lt. Hodermann asked if you had heard PO Griffin request to stop the car and you answered you had not. She also asked you directly if you had given PO Griffin permission to stop the car, to which you answered that you had not. She asked you directly if you had had a discussion with Dispatcher Mary Jackson about the vehicle or the stop and you answered that you had never had such a discussion. You said that you were outside salting the sidewalks, heard sirens, came into the station, and that at that time Jackson advised you about the chase.

---

<sup>11</sup> The Commission has renumbered and modified the corresponding paragraph in the proposed decision to reflect our conclusions and to more completely describe the content of the rules.

On April 11, 2003, you met again with Lt. Hodermann and Lt. Meress for further investigation. This meeting was in the UWM Police Department conference room. Present with you was attorney Richard Saks. Lt. Hodermann told you that we needed to clarify what you heard of PO Griffin's transmission on February 3, 2003, and who gave PO Griffin permission to stop the vehicle that was involved in the "aggressive panhandling." She told you that in the dispatch tape of the events, someone is heard in the background saying, "Who?" Lt. Hodermann asked you to listen to the tape to see if it refreshed your memory on what happened the night of February 3, 2003. You listened to the tape and stated, "I don't recall that. It would seem to indicate I was there. It probably was my voice." You reiterated that it "sounds like me." You then went on to state that the only thing you remembered was PO Switala leaving the dispatch area. Lt. Hodermann asked you where you were in the dispatch area, and you said, "the north end of dispatch."

You went on to answer direct questions from Lt. Hodermann about the events of PO Griffin's stop saying you didn't recall, or didn't remember.

Lt. Meress asked if you recalled PO Griffin asking permission to stop the car, and you said you didn't recall. He asked if you had a conversation with Dispatcher Jackson regarding the permission to stop the car and you said you didn't recall. Finally, he asked if you heard the transmission regarding the chase, and again you didn't recall.

As a Police Sergeant you have delegated authority over your shift and with this authority, responsibility for making operational decisions on a day-to-day basis. This position provides supervision, direction and control of employee activities to ensure that all the goals and objectives of the University of Wisconsin-Milwaukee are met. The position also needs to ensure that all policies and procedures are complied with. Your behavior in not telling the truth in this investigation destroys the trust the department delegates to you in performing your sworn duties. Integrity and accuracy are qualities that must be exhibited in a Police Sergeant working for this University.

Because you failed to show initiative and effective judgment in coping with a complex situation and the fact you were untruthful in the following internal investigation, a five (5) day disciplinary suspension is imposed.

...

You are also advised that any further violations of work rules could result in additional disciplinary action, up to and including discharge.

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

**CONCLUSIONS OF LAW**

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

2. The Respondent has the burden of proof to show that the discharge of Appellant was for just cause.

3. Respondent has sustained its burden in terms of establishing just cause for discharging Appellant for the misconduct described in the discharge letter dated August 26, 2005.

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

**ORDER**<sup>12</sup>

Appellant's appeal is denied and dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 25<sup>th</sup> day of March, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>12</sup> 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.

**UNIVERSITY OF WISCONSIN (Brister-Cooper)**

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

This matter is before the Commission as an appeal of a decision to discharge Brenda Brister-Cooper from her position as a Sergeant with the University of Wisconsin-Milwaukee Police Department, for the reasons set forth in Chief Hodermann's letter dated August 26, 2005 – that she authorized the improper release of a bicycle and thereafter failed to provide full and accurate information about the incident, and that she failed to provide full and accurate information during the investigation of her assignment of Officer Switala to a Fourth of July parade.

**More detailed summary of allegations<sup>13</sup>**

In order to provide some additional structure to our analysis and given the way that Respondent chose to write the discharge letter, we are providing the following summary of the Employer's contentions.

Respondent contends Brister-Cooper's misconduct that resulted in the release of the bicycle consisted of the following:

- After receiving, on June 16, a report of a bike recovery 5 days earlier, Brister-Cooper failed to direct an officer to contact the owner of the bike.
- On July 13, Brister-Cooper took Wright and his companion into the secured storage area without asking the appropriate preliminary questions relating to full name, personal information and reasons for being in the station.
- Even though she was "concerned" about Wright on July 13, Brister-Cooper failed to follow-up on that concern by either conducting a thorough investigation or by conveying her concerns to Officer Rafferty.
- On July 14, Brister-Cooper told Rafferty to release a bike to Wright despite the absence of any determination that Wright was the rightful owner.

Subsequent to the release of the bicycle, according to the letter of discipline, Brister-Cooper took various steps to cover up her role in the release:

- She denied she had authorized the release of the bike and tried to place all responsibility on a subordinate officer (Rafferty).
- During interviews on July 25 and 28, she:
  - Made statements that contained numerous inconsistencies and gave incomplete answers
  - Refused to answer direct "yes or no" questions about the original conversation with Rafferty
  - Was unable to say why Wright was in the Department on July 13 and on July 14
  - Said Wright was in the Department to report a bike theft

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<sup>13</sup> The Commission has added this section to the proposed decision for the reasons indicated.

- Denied ordering or having any knowledge of the release of the bike despite having ordered Rafferty to release the bike on July 14
- Denied all knowledge of how the bike was returned to its rightful owner

Respondent also contends that Brister-Cooper assigned Officer Switala to duty at the Shorewood July 4<sup>th</sup> parade, but did not alert requisite persons (the officers involved and the command staff) of the change in Switala's schedule; denied officially assigning/scheduling him; asserted (incorrectly) that the Chief had made the assignment; and, during her July 28 interview on this topic, provided inconsistent and incomplete answers.

### **The just cause standard**

In an appeal of a disciplinary matter, the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. The courts have equated this to proof to a reasonable certainty by the greater weight or clear preponderance of the credible evidence. *REINKE V. PERSONNEL BOARD*, 52 WIS.2D 123 (1971); *HOGOBOOM V. WIS. PERS. COM.*, DANE COUNTY CIRCUIT COURT, 81-CV 5669, 4/23/84; *JACKSON V. STATE PERSONNEL BOARD*, DANE COUNTY CIRCUIT COURT, NO. 164-086, 2/26/79. The underlying questions are: 1) whether the greater weight of credible evidence shows the employee committed the conduct alleged by the employer 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. *DEL FRATE V. DEPARTMENT OF CORRECTIONS*, DEC. NO. 30795, (WERC 2/04); *MITCHELL V. DNR*, CASE NO. 83-0228-PC (PERS. COMM. 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); *DEL FRATE, ID.*; *BARDEN V. UW*, CASE NO. 82-237-PC (PERS. COMM. 6/9/83). In evaluating the extent to which conduct may be found to impair the performance of a specific governmental position, it is necessary "to determine the specific requirements of the individual governmental position." *SAFRANSKY*, at 475.

### **Preliminary matters<sup>14</sup>**

#### Systemic Bias

Brister-Cooper asserts that the rest of the Police Department's command structure – especially Chief Hodermann and Lieutenants Meress and Swenson – were biased against her, and allowed their bias to corrupt the investigation.

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<sup>14</sup> The Commission has substantially modified that portion of the proposed decision found after the recitation of the just cause standard and before the "Analysis of the charges" heading. The changes more accurately reflect our analysis of the case and the arguments articulated in Appellant's objections to the proposed decision, eliminate non-substantive language, and reorganize topics to conform with the method of analysis just summarized.

At the outset, we note that the central legal question before us is whether or not there is sufficient credible evidence to support the Respondent's discharge of the Appellant. The proceeding before the Commission is a *de novo* hearing and the case rises or falls on the evidence that the parties bring to bear at this hearing rather than during the agency's investigation. Whether or not an investigator was biased is a secondary attack that is often undertaken solely for diversionary purposes.

Brister-Cooper alleges that Hodermann was biased because, (a) Brister-Cooper is an African-American and Hodermann is Caucasian, and (b) Brister-Cooper had purportedly organized a group protesting Hodermann's appointment as chief. We reject this allegation. We note first that Brister-Cooper's earlier suspension was issued by Hodermann's African-American predecessor, Chief Phillip Clark. Further, Ofc. Rafferty testified he did not consider Brister-Cooper a leader of the group that protested Hoderman's appointment. Finally, Hodermann testified credibly in denying any personal or racial animus towards Brister-Cooper.

Brister-Cooper claims that Meress "demonstrated his dislike for Sgt. Brister-Cooper by reviewing and criticizing the reports of her subordinates," and that Meress "stopped reviewing reports altogether the day that Sgt. Brister-Cooper was terminated." In fact, the evidence shows that Meress sent a greater number of corrective memoranda to sergeants other than Brister-Cooper, and only stopped reviewing reports when Hodermann changed his duties. Moreover, a review of the e-mails which Meress sent to other sergeants shows him to be critical, even caustic, towards almost everyone, not just Brister-Cooper.<sup>15</sup>

Lt. Meress used leading questions during his investigatory interviews of dispatcher Mary Jackson. While open-ended questions might have been more likely to lead management to an accurate understanding of the relevant facts, Jackson testified under oath at the hearing in this matter. As already noted, we have based our findings on the evidence that was presented at the *de novo* hearing before the Commission.

Brister-Cooper also claims that Lt. Swenson's "longstanding grudge" against Brister-Cooper gave her "motivation to be partial in this investigation." Relying on the same witness who provided the unsupported testimony about Meress, Brister-Cooper claims that six months prior to her discharge, Swenson declared that the entire command staff had opposed Brister-Cooper's promotion, and that the former chief, Clark, made that promotion only to "show everyone who is boss." Even if that assertion is accurate, we feel it falls far short of being the "venomous statement" that Brister-Cooper describes it as. Moreover, even if she had a low opinion of Brister-Cooper's ability to serve as a supervisor, Swenson was neither the primary investigator of the bicycle incident nor the final decision-maker determining Brister-Cooper's

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<sup>15</sup>E.g., on August 8, 2003, Meress wrote Craig Martinez: "What am I chopped liver? Unless I was dreaming I do believe I was there also?????" On January 6, 2003, Meress wrote Paul Starch: "This must be a joke???????? . . . I ALSO DON'T SEE ANY ADDITIONAL REPORT INDICATING WHAT HIS VERY VERY VERY DETAILED INTERVIEW SAID. . . . The complainant was NOT to do any reports. How many chances can I give to him???" And on May 2, 2003, also to Starch: "the supp filed by [redacted] is in your mailbox. Pleeese have him fix it." As these few examples indicate, any criticism Meress conveyed to Brister-Cooper about her reports was certainly nothing out of the ordinary.

discipline. Nothing in the interview transcripts or hearing testimony shows Swenson to have conducted the investigation in a biased manner. Moreover, as the primary investigator of the

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July 4 incident, Swenson did not recommend any discipline for Brister-Cooper, even though she did conclude – correctly – that Brister-Cooper failed to properly communicate her assignment, and should henceforth make her special detail assignments by e-mail with a copy to command.

The record therefore does not support a finding of any personal bias on the part of Hodermann, Swenson or Meress in the investigation and discipline of Brister-Cooper.

#### Contents of Rafferty's suspension letter

The proposed decision suggested that there was an “incontrovertible discrepancy” between the language in Appellant’s discharge letter and the language in Rafferty’s suspension letter. The discharge letter contended that Brister-Cooper had “instructed Officer Rafferty to release a bike” to James Wright while the letter suspending Rafferty provided, in part:

You allowed [Wright] access to our secured storage cage without verifying with the Sergeant that a bike would in fact be loaned to Mr. Wright. . . .

[G]iving a valuable bicycle to someone who just “asks” for it without authorization should never happen.

We do not agree with the view expressed in the proposed decision that Rafferty’s discipline was premised on the factual conclusion that he had given the bicycle to Wright without obtaining Brister-Cooper’s approval and, consequently, that “the two disciplinary letters are unambiguously in conflict with each other.” This view advanced in the proposed decision ignores the following sentence in the Rafferty suspension letter: “On Thursday July 14, Sgt. Brister-Cooper instructed you to release a bike to Mr. Wright from the secured storage cage.” While there may be some internal ambiguity expressed by the letter suspending Rafferty, this does not create an “unambiguous” conflict between the suspension and discharge letters.

#### Motive

The proposed decision in this matter also reached the conclusion that there was no apparent motive for Brister-Cooper to want to perform a favor for Wright by releasing a bike to him. This conclusion does not square with the Appellant’s own version of the bicycle incident. According to her post-hearing reply brief:

Sergeant Brister-Cooper has always been consistent in relation to her recollection of the conversation with Officer Rafferty, consistently testifying that Officer Rafferty mentioned that someone was coming to see her about a bike, *that he mentioned the name of the individual and that the individual was a basketball player*, that she understood that this individual was coming to see her

to either recover or report [a] lost or stolen bike and that Officer Rafferty was attempting to pawn his work off on her. [Emphasis added.]

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If Brister-Cooper knew that the person asking for a bike was a basketball player, she could have been motivated by the same thought that occurred to Police Dispatcher Jackson, i.e., that a basketball player might have access to t-shirts or other University athletic equipment that could be used in the Police Department's community outreach efforts.

#### Rafferty's credibility

The Appellant has advanced several arguments in an effort to impugn Officer Rafferty's credibility. The proposed decision addresses the topic at some length, but we believe that it is more appropriate to simply state that we do not rest Brister-Cooper's termination solely on the testimony of Rafferty, a subordinate officer. The only part of Rafferty's testimony upon which we find it necessary to rely is that which is supported either by another witness or external events.

Witness credibility is also discussed below.

#### Due process

In her objections to the proposed decision, Brister-Cooper also argues that Article I of the Police Department regulations is "too abstract" to be "logically analyzed." She contends, consequently, that the regulations "violate[] the requirement of due process in either their substance or their application." Nevertheless, she has failed to supply any specific case precedent to support her contention and merely relies on her assertion that "Article I can be used to fit any situation and it is impossible for a person accused of having violated it to defend against the accusation." The Commission's review is limited to the question of whether the regulations are unconstitutional in their application to Brister-Cooper. *MCSWEENEY V. DOJ & DMRS, CASE NO. 84-0243-PC (PERS. COMM. 3/13/1985)*. Respondent's discharge letter relies on three provisions within Article I of UW-M's regulations: Sections 2, 3 and 21. For the reasons explained below, our findings in this matter do not rely on the provisions of Article I of the UW-M Police Department regulations for finding that there was just cause for Appellant's discharge.

### **Did Brister-Cooper engage in the alleged misconduct?**

#### I. The Bicycle

The Employer disciplined Brister-Cooper for two categories of conduct regarding the bicycle incident: her conduct relating to the release of the bicycle, and her conduct during the ensuing investigation.

#### A. Alleged role in the release of the bicycle

Regarding the first phase, Brister-Cooper challenges only the underlined passages from the August 26, 2005 termination letter:

On Saturday, June 11, 2005, a red Roadmaster bicycle was recovered by UWM Police and inventoried according to department policy. You reviewed the report



on June 16 according to standard supervisory report review procedures, but did not have the officer follow up by attempting to contact the owner.

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About a month later, a former UWM student, James Wright, approached Officer Craig Rafferty about borrowing one of the bicycles that he had seen in our secured outside storage cage. Officer Rafferty told him that he must speak with you to obtain permission to borrow the bike and advised him to return the next day to do so. Officer Rafferty then informed you of this conversation. He told you that Mr. Wright would be coming to see you to borrow a bike.

On Wednesday, July 13, Mr. Wright came to the station and asked for you. You did not ask him relevant and necessary questions as to his full name, personal information or his reasons for being in the station. You nevertheless proceeded to take him and his female friend out to the UWM Police Department secured storage cage to look over the bikes. The next day, still without having all the facts and necessary information, you instructed Officer Rafferty to release a bike to him.

On Monday, July 18 a Security Officer arranged for the owner of the red Roadmaster bicycle to be contacted to say that we had recovered his property. The owner came in on Thursday but the bike was nowhere to be found, and numerous employees were tied up for hours searching for it. At the 3:00 p.m. roll call an announcement was made saying the bike was missing from our inventory, and it was discovered that you had loaned the bike to James Wright.

On Friday, July 22, Sgt. Learman discussed the situation with you. You told him that Officer Rafferty released the bike, that you assigned him to do a report, and that you were not directly involved in releasing the bike. You said the bike had been given to someone that Officer Rafferty knew and that we would be able to get it back.<sup>16</sup>

You then called Officer Rafferty at home and told him that he released the wrong bike and that he needed to get it back. On Saturday, July 23 Officer Rafferty picked the bike up and returned it to the rightful owner....

One phrase in the letter is somewhat misleading, but the overall context makes the meaning clear:

*it was discovered that you had loaned the bike to James Wright.*

The record is unambiguous that it was Rafferty, not Brister-Cooper, who physically released the bike to Wright. Even though the letter used the word “loaned”, Hodermann’s obvious meaning was that Brister-Cooper had *effectively* loaned the bike to Wright by authorizing its

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<sup>16</sup> The proposed decision addressed this paragraph as part of Brister-Cooper’s conduct that occurred through the time of the release of the bicycle. It is more appropriately considered part of Appellant’s alleged effort to cover-up her responsibility for the release. It is only being addressed in this section because it bears on the question of Appellant’s credibility.

release by Rafferty. This contention is addressed later in the decision.<sup>17</sup>

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Almost every other point in this part of the termination letter is established beyond any reasonable doubt, sometimes by Brister-Cooper's own statements. The only points remaining in dispute are what Rafferty told Brister-Cooper about Wright's purpose in coming to the station and Brister-Cooper's instruction to Rafferty the night the bicycle was released. Other areas of dispute involve events subsequent to the bike's release but have a clear bearing on Brister-Cooper's credibility: what Brister-Cooper told Learman about the bicycle's release, and what Brister-Cooper told Rafferty after the bicycle's improper release was discovered.

There is no independent corroboration on any one of these points. Instead, the truth about each individual event can only be understood as part of the fuller narrative. But even without these disputed points, that narrative shows that Brister-Cooper repeatedly violated applicable and legitimate departmental rules.

Brister-Cooper's violations that led to the release of the bike began a month before Wright and the woman appeared at the station-house on July 13, when she failed to assign an officer to contact the owner of the red Trek Roadmaster which had been recovered on June 11. According to the University's narrative – which Brister-Cooper has not challenged – because Brister-Cooper failed to assign this necessary follow-up, *five weeks* passed before the department finally contacted the owner. Her conduct constituted a violation of work rule Article I G (negligence) and Article IV J (failure to exercise good judgment).<sup>18</sup>

About a month after the red Trek was recovered, Rafferty mentioned to Brister-Cooper that UW-M basketball player James Wright would be coming to see her. Brister-Cooper has maintained throughout that she did not know who Wright was prior to this episode, a position which Jackson corroborated.

Wright and an unidentified woman appeared at the station house on July 13, setting the stage for Brister-Cooper's next violation. By her own testimony, Brister-Cooper then took these two civilians – people Brister-Cooper said she didn't personally know – out to the secure storage cage to let them look over bikes without ever verifying the civilians' identity and

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<sup>17</sup> The Commission has modified the corresponding paragraph to more accurately reflect our analysis.

<sup>18</sup> The Commission has modified this paragraph in the proposed decision which concluded that Brister-Cooper's failure to initiate any contact with the owner in the weeks after the bicycle was recovered violated Article I, Section 21 (ethics provision relating to the care of property) and Article V, Section 4 (care of property) of the Department's Regulations. The text of the latter two provisions reads as follows:

Employees shall exercise every precaution to preserve and [a]void destroying evidence, and must properly secure evidence or property which has been confiscated or entrusted to them. Employees shall not take evidence or property or otherwise wrongfully appropriate and convert to their own use or the use of others.

Our interpretation of this language is that the ethics provision focuses on the last sentence and that neither sentence addresses a failure to pursue contacting the property owner after the bicycle was found on June 11. Instead, the five-week delay reflects both negligence and a failure to exercise good judgment on the part of Brister-Cooper.

status, checking for any records, or even taking a statement. As she stated in her first investigatory interview:

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What my understanding was, he's missing a bike. OK. What kind, I asked him, he wasn't sure. Ah, I asked him a bunch of other questions. I don't know what they were. Um, so I said, ok, come on let's see what we have. And he goes well that looks like it.

That is, a stranger presents himself, says he's missing a bike he can't describe due to circumstances he doesn't specify – and Brister-Cooper takes him and his (still) unidentified companion to the secure storage area so they can “see what we have” in the way of bicycles. Such conduct by any officer – let alone a supervisor – is a serious and obvious violation of professional standards and conduct.

There is video of that first encounter, and it reinforces how accommodating Brister-Cooper was to the young man she said was unknown to her. It shows Brister-Cooper opening the door from the secure reception area into the public lobby to start talking to Wright. Just twelve seconds later, she is holding the door open for Wright and the woman to enter and proceed to the secure storage area. Letting unidentified civilians into a secure area inside a police station to inspect the property in the secure storage on the basis of a twelve second exchange is a serious violation of a law enforcement supervisor's professional responsibility. When Brister-Cooper did this, she failed to “properly secure ... property which has been . . . entrusted to” her, as charged. While we view this as a violation of Article V Section 4 of the UW-M Police Department regulations, we do not consider it to be an ethics violation of Article I Section 21. We understand the focus of the ethics regulation to be on the sentence of the regulation that reads: “Employees shall not take evidence or property or otherwise wrongfully appropriate and convert to their own use or the use of others.” The failure to properly qualify visitors to the department's secured property area does not encompass wrongful appropriation or conversion. However it does constitute a violation of Article I G (negligence) and Article IV J (failure to exercise good judgment) of the UW System Work Rules.<sup>19</sup>

The video also shows how misleading Brister-Cooper was when she stated she “asked him a bunch of questions” and *then* she said “ok, come on let's see what we have.” Clearly, in the twelve seconds of casual conversation, Brister-Cooper did *not* ask Wright “a bunch of questions,” if she asked him any questions at all.

Brister-Cooper insists that after taking Wright and the woman out to the cage, she quickly began to believe something wasn't right, that Wright was acting in a suspicious manner; she thought he might even be “shopping” around for the best bike. So, she says, she cut off the meeting and took the couple out, telling him to come back the next night and talk to Rafferty.

But Brister-Cooper's subsequent actions do not support her testimony.

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<sup>19</sup> The Commission has added the final four sentences to this paragraph to reflect our conclusion.

If indeed Brister-Cooper thought Wright was acting in a suspicious manner, she should have been very concerned. While she disputes the details over what Rafferty told her about Wright's full purpose, Brister-Cooper has never denied that Wright arrived at the station with

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an explicit introduction from Rafferty. Indeed, since Brister-Cooper claims she had no personal awareness of Wright, her accommodating behavior could only be explained by such an understanding. If Wright was indeed acting in a suspicious manner, Brister-Cooper should have realized that one of her own officers had vouched for a man she now believed was up to no good. As the supervisor, Brister-Cooper should have pursued this matter, starting with a prompt discussion with Rafferty, at the very least.

Yet Brister-Cooper did nothing more than end Wright's access to the secure area, and tell him to come back the next day – never, she says, passing her concerns on to Rafferty, even though the next night she brought the two together, with the direction to Rafferty to attend to the visitor, still without conveying her concerns to Rafferty or taking any steps on her own to investigate.

Again, because we find such conduct inexplicable, we find Brister-Cooper's testimony explaining that conduct not credible.

Brister-Cooper explained that she didn't convey her concerns because she had gotten in trouble in the past for somehow interfering with an officer's investigation by expressing a similar impression, and that if Rafferty also felt something was wrong he could certainly come talk to her about it. That is such an inversion of the law enforcement supervisor's responsibility that it really makes no sense, and certainly would represent another violation against the professional requirement that she "properly secure ... property" entrusted to the department. Once again, her conduct would violate Article V Section 4 of the UW-M regulations but would not be a violation of the related ethics provision found in Article I Section 21. By failing to follow-up on her acknowledged concern about Wright's interest in a bicycle, Brister-Cooper also violated work rule I G (negligence) and IV J (failure to exercise good judgment".<sup>20</sup>

Brister-Cooper's behavior would make sense, however, if Rafferty's version of key events<sup>21</sup> was true. Indeed, several of Brister-Cooper's seemingly incomprehensible actions would be far more sensible if she in fact understood who Wright was and that he was coming to see her about borrowing a bike. Although Brister-Cooper insists that she had no idea who Wright was, it does appear that from their first contact, Brister-Cooper was treating Wright in a manner normally associated with favored athletes, not rank strangers.

We agree with Brister-Cooper that Rafferty had a greater incentive to release a bicycle to Wright than did she; it was Rafferty who was a fan and acquaintance of the ballplayer, not Brister-Cooper, so it is reasonable to conclude that Rafferty would interpret Brister-Cooper's

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<sup>20</sup> The Commission has added the final two sentences in this paragraph to reflect our conclusions.

<sup>21</sup> While Rafferty's description is described elsewhere in the proposed decision, he stated he told Brister-Cooper, in the context of obtaining approval from her, that Wright, a basketball player, wanted to borrow a bike and would be speaking to her about it.

But the credible evidence was that Rafferty was not enthusiastic on July 14 about releasing a bike to Wright, and was openly displeased that he had to interrupt his booking detail with Switala.

The video evidence of that next encounter is also extremely damning -- Brister-Cooper at the counter as Rafferty gestures to Wright and opens the door to let him in, watching as they walk towards the secure storage area. Then we see the two men walking away from the cage, Wright now rolling a red bike. After another shot of the front area, we see Wright riding away.

The visual evidence unmistakably shows Brister-Cooper aware of and accommodating to Wright's entry into the secure area – without, she testified, ever addressing her earlier concerns that he was acting sneaky around the bikes.<sup>23</sup>

As asserted in the termination letter, *allowing anyone to take improper possession of property in the care of the Police Department violates the public's trust*. The department has an established protocol for handling evidence and property, which was clearly contravened by the release of the red TREK bicycle to James Wright.<sup>24</sup>

In addition to being present when the bicycle was released, Brister-Cooper acknowledges she was present when Jackson made a comment that the department might be able to get some Panther athletic gear from Wright in exchange for the loan of the bicycle. This conversation took place shortly after the bicycle's release, and came at a time Rafferty was specifically working on community policing activity. Brister-Cooper attempts to downplay the import of this discussion, claiming, in the alternative, that (a) she challenged the underlying premise, asking Jackson "what is this crap?" and (b) simply thought Jackson was joking, much the way department personnel frequently joke about taking personal possession of alcohol seized from underage or intoxicated persons.

Neither of these explanations makes much sense. First, there is no other evidence in the record to support Brister-Cooper's self-serving claim that she challenged Jackson's comment; certainly, Brister-Cooper cannot cite any signs that she followed up. If Brister-Cooper had truly been unaware that Rafferty had released another person's bicycle to Wright – a claim we would question, given her awareness of Wright's visits and his interests – this comment should have occasioned an immediate and unambiguous reaction.<sup>25</sup> Brister-Cooper should have

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<sup>22</sup> The Commission has modified this sentence to more accurately reflect our conclusions.

<sup>23</sup> The Commission has modified the proposed decision by deleting a sentence that suggested this conduct represented an additional violation of the work rules.

<sup>24</sup> The Commission has modified the proposed decision by deleting a sentence that suggested this conduct represented an additional violation of the work rules.

<sup>25</sup> Brister-Cooper is also correct that, as Hodermann acknowledged, there were other bicycles which were

demanded that Jackson explain her comment, that Rafferty explain his conduct, and that the bicycle be recovered immediately. Yet Brister-Cooper did nothing of the sort. To the contrary, Jackson testified credibly that Brister-Cooper nodded affirmatively after her comment.

Moreover, Brister-Cooper testified that when she spoke to Rafferty on the evening of Friday, July 22, all she did was ask about “the fucking report.” At that time, Brister-Cooper was aware that Rafferty had wrongfully released impounded property to someone other than its owner. If she *really* didn’t already know the circumstances of his misconduct, she certainly should have demanded an immediate and comprehensive explanation; that, by her own testimony, she failed to do.<sup>26</sup>

Accordingly, on the basis of her own testimony, as well as the overwhelming weight of the credible evidence, we have found that Brister-Cooper authorized the improper release of a bicycle to James Wright, a serious violation of Article V, Section 4 (care of property) of the UW-M Police Department regulations, and UW-System work rules III.B. (unauthorized removal of private property) and IV.J. (not exercising good judgment or being discourteous). Authorizing the release of the bicycle to Wright without determining that he was the rightful owner was also negligence in violation of work rule I G.<sup>27</sup>

The first material fact in her termination letter that Brister-Cooper directly challenges is the assertion that Rafferty “told you that Mr. Wright would be coming to see you to borrow a bike.”

Brister-Cooper acknowledges that Rafferty told her that a basketball player named James Wright would be coming to see her, with the subject ... something to do with his missing bicycle, she wasn’t sure exactly what. She insists Rafferty did not say anything about Wright borrowing a bicycle, only that he was coming to see her “about a bicycle,” which she interpreted to mean about filing a report with her about a stolen or lost bicycle. But Brister-Cooper testified she might not have fully understood what Rafferty was telling her, because she was busy working on unspecified paperwork, and didn’t really pay that much attention to what he was saying. Rafferty told investigators, and testified, that he indeed told Brister-Cooper that Wright’s ultimate purpose was to borrow (or in Rafferty’s vernacular, loan) a bicycle for his pre-season workout.

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sufficiently outside the property inventory system that Brister-Cooper could have released directly to Wright without anybody ever knowing. That there may have been a more clever way for Brister-Cooper to commit an infraction of the rules relating to property is not, however, dispositive evidence that she didn’t commit the infraction at all.

<sup>26</sup> The Commission has modified the corresponding sentence in the proposed decision because it suggested it was an additional violation of the work rules.

<sup>27</sup> The Commission has added the final sentence and modified the previous sentence in order to accurately reflect our conclusions. Contrary to the conclusion reached in the proposed decision, we do not consider this conduct by Brister-Cooper to be a violation of Article I Section 2 of the UW-M regulations (requiring compliance with all directives published by the Department and all directives and orders of the employee’s superiors). Respondent has not identified a distinct directive or order, other than the work rules and regulations that are the basis for separate violations, that Appellant failed to follow. We also decline to make a finding relating to Article I Section 3 of the UW-M regulations (conduct that reflects unfavorably on the Department or dishonors the employee) because it is obvious that Brister-Cooper’s actions violate other, more specific, provisions.

Brister-Cooper admits it doesn't seem to make sense that a subordinate would essentially assign his superior officer to take a report, but she testified she considered this just another attempt by Rafferty to get her to do his work. Rafferty declared during the

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investigation and at hearing that he had told Brister-Cooper that Wright was coming to see about borrowing a bicycle, but at hearing he also testified that he wasn't sure she understood that, because he may have mentioned something about Wright having lost a bike at some time in the past, and that she may well have thought he was there to retrieve his own bicycle. Rafferty referred in his e-mail of July 25 to a "mix-up," which he explained at hearing as follows:

What I meant by mix up is was on my behalf I was under the understanding that Mr. Wright was there to loan [borrow] a bike. *However in my conversation with Sgt. Cooper I may have mentioned about him losing a bike previously and that he was attempting to recover a bike.* That's when I think the mix-up had come in. She was perceiving one thing and I was perceiving something else. (Emphasis added).

Asked<sup>28</sup> directly if he thought it was possible that Brister-Cooper believed that Wright had come in to report and recover his own lost property, Rafferty replied, "yes."

That is, the employer's sole direct witness as to Brister-Cooper's state of mind concerning the release of the bicycle states (a) that he gave Brister-Cooper reason to believe Wright was there to recover, rather than borrow, a bike, and (b) that very well may have been what Brister-Cooper understood.

However, Rafferty's testimony is often marked by imprecision and inconsistency. And, notwithstanding his statements, his actions – namely, the fact of the conversation itself – supports the employer's charge. After all, there is no question that Rafferty had told Wright he needed Brister-Cooper's OK to get the bike; Rafferty's ultimate purpose in this exchange was to prepare Brister-Cooper for that request. He *had* to tell her about Wright wanting to borrow a bike – that was the whole point. He likely added the bit about Wright losing a bike, or having it stolen, to make him more sympathetic and deserving of the favor, but we conclude the greater weight of credible evidence is that Rafferty told Brister-Cooper that Wright was coming in hopes of borrowing a bike.

Brister-Cooper next challenges the letter's assertion that she ". . . instructed Officer Rafferty to release a bike to him." Brister-Cooper strongly denies this, asserting that she "assigned him to do a report," and was "not directly involved in releasing the bike."

Again, neither common practice, Brister-Cooper's subsequent conduct, or direct visual evidence support her statements and testimony. There is significant evidence Brister-Cooper was involved in releasing the bike; there is essentially no evidence that she directed Rafferty to take a report from Wright on July 14.

There is no dispute that Rafferty was helping Switala book the four Downers Grove

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<sup>28</sup> The Commission has removed the preceding paragraph because it was unnecessary in light of our conclusions.

juveniles on drug charges when Brister-Cooper pulled him off that detail and ordered him to attend to Wright instead. Whether that attention involved releasing a bike (Rafferty's testimony) or merely taking Wright's report (Brister-Cooper's testimony), the situation clearly involved a non-exigent property matter.

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Ordering an officer to take an unspecified report about a bicycle rather than continue with the criminal booking of multiple suspects seems an inappropriate assignment, contrary to all supervisory standards. So if all Brister-Cooper was doing was telling Rafferty to take a report – again, without ever verifying any of Wright's story, or even understanding what that story was, and without sharing her concerns about Wright with Rafferty - she must have thought it was a very important report to leave Switala to book the four juveniles, and notify their families, by himself. In his investigatory statement, Switala noted that the four subjects were brought back to the police department "(d)ue to the severity of the detention..."

Yet Brister-Cooper was content to let more than a week go by without ever reading the report, which Rafferty had still not filed when Brister-Cooper called him on July 22. Indeed, it was not until the scheme to release the bike to Wright became known that Brister-Cooper even bothered to inquire into the whereabouts of the report that was so important on July 14 that it took precedence over having Rafferty assist Switala book four criminal suspects.

The fact that Brister-Cooper failed to take any steps whatsoever to ensure that Rafferty took and filed a report on Wright and his bicycle is evidence that Brister-Cooper did something other than direct Rafferty to take and file a report. And, again, external reality reinforces that conclusion, for Rafferty indeed did not file a report.

Brister-Cooper seeks to cite Switala's statement that he heard Brister-Cooper tell Rafferty to "help" Wright out as evidence she told Rafferty to take a report rather than release a bicycle. While we cannot say conclusively that "help" was the equivalent of "release a bike," we are confident that in this context "help" was certainly as likely to mean "release a bike" as "take a report."<sup>29</sup>

We note that dispatcher Jackson provided testimony both helpful and harmful to Brister-Cooper. Jackson thought that Brister-Cooper *did* tell Rafferty to do a report, but also believed she did *not* tell Jackson to give Rafferty a report number, as would normally be the case, and that she *did* instruct him to release a bicycle. Jackson also stated that Rafferty looked unhappy and being pulled off the booking detail with Switala, and muttered something about "why couldn't she [Brister-Cooper] do it herself," corroborating Rafferty's testimony.

We conclude that the greater weight of credible evidence is that Brister-Cooper did not direct Rafferty to "take a report" from Wright on July 14.<sup>30</sup>

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<sup>29</sup> We also note that Brister-Cooper is here relying on the testimony of a witness, Switala, whom she seeks to discredit as biased and unreliable in relation to the Fourth of July incident.

<sup>30</sup> The Commission has removed that portion of this sentence in the proposed decision expressing the conclusion that Brister-Cooper's statements during Respondent's investigation (that she directed Rafferty to "take a report") were material misstatements in violation of Respondent's work rules. The nature of Appellant's conduct during the investigation is addressed in a later section of this memorandum.



Brister-Cooper has also maintained she had no involvement in the bicycle's release. But it was Brister-Cooper who told Wright to come back the next night, Brister-Cooper who told Rafferty to attend to Wright, Brister-Cooper who watched as Rafferty opened the reception area door for Wright and escort him to the garage. While we believe it would be more

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accurate to say Brister-Cooper "authorized" Rafferty to release a bike to Wright than that she "instructed" him, certainly Brister-Cooper was far more intimately and knowingly involved in the bike's release than simply assigning Rafferty to do a report.<sup>31</sup>

An analysis of subsequent events relating to the bicycle further undermines Brister-Cooper's denials that she authorized Rafferty to release the bike to Wright.

Brister-Cooper disagrees with the discharge letter's statement that, "*You said the bike had been given to someone that Officer Rafferty knew and that we would be able to get it back.*"

Brister-Cooper denies making this statement to Learman. If substantiated, it would establish that on July 22 Brister-Cooper knew enough about the bicycle's release as to give her responsibility for the action. That is why she has to deny making this statement.

Even Brister-Cooper acknowledges, though, the underlying accuracy of the information she is reported to have relayed – the bicycle *was* given to someone who Officer Rafferty knew, and the department *was* able to get it back. Only someone who knew the truth about the bicycle's release would have known this information at this time.

The primary source for this portion of the discharge letter<sup>32</sup> is a line in Sgt. Learman's July 25 e-mail recounting his conversation with Brister-Cooper on July 22, in which he wrote that "Sgt. Brister told me that Officer Rafferty released a bike from inventory and that she assigned him to do a report." According to Learman's e-mail, Brister-Cooper "said it was someone that Officer Rafferty knew and that we would be able to get the bike back because it was only loaned out." Brister-Cooper admits the first sentence is accurate, but denies making the other statement attributed to her.

Thus, we must consider Learman's credibility and competence. And although his weaknesses as a witness are not as serious as Rafferty's, there are concerns about Learman's testimony as well. First, his encounter with Brister-Cooper was not a formal interview, but merely a brief conversation. Second, and contrary to obvious best practices, Learman took no notes during the conversation. Third, Learman did not even write his e-mail until three days after his conversation with Brister-Cooper. Fourth, as noted above, Learman's original e-mail contained an erroneous timeline, as well as at least one clear factual error (Learman wrongly

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<sup>31</sup> The Commission has deleted the final sentence from this paragraph of the proposed decision because it addressed conclusions found earlier in the Memorandum. We have also deleted a phrase that prematurely addressed the appropriate degree of discipline.

<sup>32</sup> The Commission has modified the proposed decision here and in a subsequent paragraph to remove the word "charge" which incorrectly suggested this subject represented a separate charge of misconduct.

related that dispatcher Mary Jackson did not know the name of the student who received the bicycle). In a second e-mail of July 25, recounting his second interview with Jackson, Learman also wrongly related that “Jackson stated that she overheard ... that Ofc. Rafferty was directed by Sgt. Brister to release a bike to Wright,” and that “Wright came back the next day and

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asked to see Ofc. Rafferty.” In fact, whatever her understanding, Jackson did not gain it through “overhearing,” and when Wright came back he asked for Brister-Cooper, not Rafferty. Learman thus conveyed three material misstatements of facts in as many e-mails.

Confronted with these matters at hearing, Learman admitted his limitations: “I make lots of mistakes,” he testified. Such candor may be good for the soul, but it does not enhance a witness’s credibility. Finally, we note that at the time he wrote his e-mails, Learman had already spoken to dispatcher Jackson, who herself had described the bicycle as having been “loaned out.” Without any notes to confirm his recollection, Learman could have easily attributed Jackson’s comments to Brister-Cooper. And we imply no bias in noting that Learman would be more likely to conflate statements made by Brister-Cooper and Jackson than by Brister-Cooper and Switala.

Despite our doubts about Learman’s accuracy, however, corroborating testimony and common sense again support the employer’s version of events.

First, there is Jackson’s contemporaneous statement also attributing this comment to Brister-Cooper.

And there is also this inexorable logic: Brister-Cooper knew Wright was only at the station due to his personal connection with Rafferty, Brister-Cooper knew that Rafferty released a bike to Wright – ergo, Brister-Cooper knew that Rafferty released a bike to someone he knew.

The greater weight of the credible evidence, therefore, is that Brister-Cooper did tell Learman in their initial conversation about the matter that the bicycle had been loaned out to someone Rafferty knew, and could therefore be recovered.

The discharge letter goes on to state that Brister-Cooper:

*. . . then called Officer Rafferty at home and told him that he released the wrong bike and that he needed to get it back.*

Brister-Cooper does not dispute that she called Rafferty at home on his day off to talk about the bicycle incident, but insists that, after reaching him on his cell phone, she merely (albeit profanely) inquired about the report she purportedly told him to prepare, and did not instruct him to retrieve the bike and deliver it to its owner. Rafferty, however, told investigators, and testified at hearing, that she *also* told him he had released the wrong bike and directed him to retrieve it.

This dispute is important because it, too, relates to Brister-Cooper’s awareness of and responsibility for the bike’s release. If Brister-Cooper told Rafferty that he had released the wrong bike, and needed to retrieve it, that means – again – that she had greater knowledge of the situation than she has acknowledged.

This allegation also supports Learman's report and testimony that Brister-Cooper knew that Rafferty could retrieve the bike, an important internal consistency helping validate the employer's narrative.

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The allegation also has the force of reasonableness behind it – telling Rafferty he had released the wrong bike and that he needed to get it back is *exactly* what Brister-Cooper should have told Rafferty (along, of course, with demanding prompt submission of his report). Indeed, Brister-Cooper's self-confessed failure to tell Rafferty to retrieve and return the bicycle would itself be an act of such supervisory incompetence and malfeasance that Brister-Cooper's testimony on this point is not inherently credible.

Notwithstanding her otherwise consistent testimony, at one point during her July 25 interview, Brister-Cooper said she *did* tell Rafferty that he had released the wrong bike and needed to retrieve it – but attributed the message to Learman:

I, I told him what Learman said, that *we're missing a bike, we need to get that bike back*. What bike? He showed me a report and it was a red something I, you know, all, but all I did, to Rafferty, where's, where's your report? (Emphasis added).

Yet literally within a minute or two, Brister-Cooper was denying what she just said

Q: So you're saying you never instructed Rafferty to call this person who came in to get the bike back?

A: No.<sup>33</sup>

And on no fewer than seven more instances in that interview, Brister-Cooper kept explicitly denying she ever instructed Rafferty to retrieve the bicycle and return it to its owner.

Rafferty, of course, insists Brister-Cooper did give that instruction. And the next day, Rafferty did indeed retrieve and return the bicycle, enhancing his credibility on this point.

Again, dispatcher Jackson provides very helpful testimony for the Employer, stating in her contemporaneous e-mail:

...Sgt. Brister-Cooper was at dispatch and she made reference to officer Rafferty releasing the wrong bike to Wright. She also stated she needed to get a hold of officer Rafferty to get the bike back from Wright and turn it over to the correct owner.... When I returned I believe Sgt. Brister-Cooper was on the phone with Rafferty on line 3 telling him to return the bike. It also could've been her husband because he also calls in on line 3. I think that Sgt. Brister-Cooper called Rafferty at home from a recorded line while dispatching.

Although this statement generally corroborates Rafferty's account, it is not completely dispositive. First, Jackson raises the possibility that Brister-Cooper was talking to her husband,

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<sup>33</sup> The use of a negative in this context is equivalent to saying, "correct."

not Rafferty. Second, although Jackson indicates she thought the call was recorded, no such recording was ever offered or even mentioned at hearing. Finally, notwithstanding the critical importance of this question and Jackson's possible ability to answer it conclusively, no one asked her about this point at hearing.

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At the time of her conversation with Rafferty, Brister-Cooper knows the situation involves an ongoing investigation of an officer under her command for the improper release of impounded property. She has called the officer on his cell phone on his *day off* – and she insists that all she did was ask about the status of a report. The report, that is, that was so important she pulled Rafferty off the booking detail to complete -- but then wasn't important enough for her to ever check for its submission.

Even crediting her testimony that she applied a profane preface to describe the report, it is unlikely to the point of absurdity that she would only ask about the report, rather than demanding answers on the spot. For Brister-Cooper to ask for the report instead of demanding immediate answers must mean she already knew what those answers were – there is no other explanation for her conduct.

Brister-Cooper's testimony setting forth her version of events, i.e. that when she called Rafferty on Friday, July 22 she limited her comments to inquiring as to the status of his report, is not credible. Rafferty's account – that in addition to inquiring about the report, she directed him to retrieve the bicycle and return it to its owner – is both reasonable and supported by external events.

The Respondent summarized phase one of the bicycle incident as follows:

*These acts are impermissible for a supervisor in the University Police Department. Police Sergeants are expected to set an example for the employees under their supervision. They are expected to follow procedures as to reviewing reports and protecting evidence, and giving a valuable bicycle to someone who just "asks" for it without checking to see if there is a rightful owner is nothing short of extreme negligence.*

We agree.

**B. Alleged misconduct during the investigation relating to the bicycle**

The second phase of the "bicycle incident" primarily involved Brister-Cooper's conduct during the investigation, when the Respondent alleges she further violated the following UW System Classified Employees Work Rules:

**I. WORK PERFORMANCE**

- E. Failure to provide accurate and complete information whenever such information is required by an authorized person.

#### IV. PERSONAL ACTIONS AND APPEARANCE

- J. Failure to exercise good judgment, or being discourteous, in dealing with fellow employees, students, or general public.

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The underlined passages from the August 26, 2005 termination letter are supported by the greater weight of credible evidence:

These infractions were compounded by your conduct in the course of this investigation. On July 25 and again on July 28 with your attorney present, you were interviewed regarding possible violations of work rules and policies. Throughout both interviews there were numerous inconsistencies in your answers. You virtually failed to answer anything completely.

At both interviews, you refused to answer a direct yes-or-no question about having the original conversation with Officer Rafferty where he told you that Mr. Wright wanted to *borrow* a bike and would be coming in. And even though you were asked numerous times, you were not able to say why Mr. Wright was in the police department on July 13 or again on July 14. When asked if he came in to receive a bike, you said that he was in to report a bike theft.

Furthermore, during both interviews you denied ordering or having any knowledge of the release of the bike. Investigation has revealed however that you *ordered* PO Rafferty to release the bike on July 14, 2005. You denied ordering PO Rafferty to release the bike, denied any knowledge of the release of the bike, and denied all knowledge of how the bike was returned to the rightful owner.

Other than the two italicized verbs, all the assertions in these paragraphs are easily and well-supported by the greater weight of credible evidence in the record.<sup>34</sup>

As noted above, the visual evidence shows Brister-Cooper watching as Rafferty allowed Wright into the secure area and escorted him to the storage cage; while further evidence shows Brister-Cooper to have been aware a bicycle was released, there is no credible evidence that Brister-Cooper directed Rafferty to take Wright's report. Whether or not Brister-Cooper *ordered* Rafferty to release a bike to Wright, she certainly authorized his doing so, and thus had a degree of personal knowledge which she later improperly denied.

As alleged, Brister-Cooper also denied knowing how the bike was returned to its rightful owner. Brister-Cooper maintains she merely called Rafferty on July 22 to demand submission of his report; Rafferty says she told him he released the wrong bicycle, which she directed him to recover.

While there is dispute over what Brister-Cooper told Learman on the 21<sup>st</sup>, there is no dispute that the conversation took place, and that it made Brister-Cooper aware that the

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<sup>34</sup> The Commission has deleted a phrase from the proposed decision that prematurely addressed the appropriate degree of discipline, and has deleted one paragraph from the quoted portion of the discharge letter because it relates to an aspect of the case that has already been addressed.

department's command structure was very concerned over the situation.

According to Learman's e-mail, Brister-Cooper phoned him about four hours later to inform him that Rafferty would complete his report and recover the bike. During two

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subsequent formal interviews, Brister-Cooper resolutely maintained her only communication with Rafferty was to inquire as to the whereabouts of "the fucking report" she had assigned him to complete. On several occasions, she clearly and explicitly denied telling Rafferty he had released the wrong bicycle, or directing him to retrieve it. Obviously, telling him that he had released the wrong bike and directing him to retrieve it would have meant she knew more about the bicycle's release than she was acknowledging. As noted above, Brister-Cooper did not direct Jackson to issue Rafferty a number as generally would be the case for the filing of a report, and Rafferty did not file any report prior to the discovery of the bicycle's release.

After the phone call from Brister-Cooper, Rafferty contacted Wright to retrieve the bike. There are only two explanations for this. Either, as Rafferty said during the investigation and later testified, Brister-Cooper told him that he had released the wrong bike and needed to get it back. Or else Rafferty realized from Brister-Cooper's call asking for "the fucking report" that the bicycle's release had become known and that he needed to retrieve it.

We recognize our continuing concerns over Rafferty's credibility and Learman's e-mail report. However, the greater weight of the credible evidence – especially Jackson's independent corroboration of Rafferty's account, Rafferty's prompt retrieval of the bicycle following the call from Brister-Cooper, and the inexplicable account Brister-Cooper gave of that phone call – supports a finding that Brister-Cooper indeed told Rafferty that he had released the wrong bike, which he needed to get back. When Brister-Cooper denied that she had done so, she committed further violations of UW System Work Rule 1.E. (provide accurate and complete information when required).

The employer has charged Brister-Cooper with a "failure to provide accurate and complete information whenever such information is required by an authorized person" in part based on her evasive responses to Lt. Meress' questions concerning her phone call to Rafferty. We agree with Chief Hodermann's observation that Brister-Cooper's behavior during these interviews seemed more like a perpetrator attempting to conceal than an officer assisting in an investigation.

The July 28 colloquy with Lt. Meress, quoted at length at pages 18-20, shows Brister-Cooper attempting to evade, and ultimately refusing to answer, a direct question – did she ever call Rafferty and tell him that he had released the wrong bike to Wright? On no fewer than eight occasions, Meress asked Brister-Cooper that question; she never really answered, responding instead with references to the report she purportedly had assigned and was now awaiting. She never said she *did* tell Rafferty to retrieve the bike, and she never said she *didn't*. At least twice, she simply said, "I can't answer that," which is not an acceptable response for a police officer – let alone a police supervisor -- in an investigatory interview.

Brister-Cooper had the following exchange with Meress during the July 28 interview:

Q: And do you know who subsequently got a hold of this person because obviously they brought the bike back. Do you know who

called James Wright and told him to bring the bike back?

A:

Nope.

...

We find that the greater weight of credible evidence supports a finding that Brister-Cooper indeed told Rafferty to retrieve the bicycle and return it to its rightful owner. Each time during her investigative interviews and testimony that she denied having done so, Brister-Cooper violated departmental and system work rules, as charged.

By her misleading, incomplete and evasive responses in her investigatory interviews regarding the Wright incident on July 25 and 28, the Appellant violated the legitimate and well-established UW System work rule requiring “accurate and complete information whenever such information is required by an authorized person” that is identified as work rule I E. Brister-Cooper’s actions also violate work rule IV J relating to a “[f]ailure to exercise good judgment, or being discourteous, in dealing with fellow employees.”<sup>35</sup> These work rules go to the heart of the law enforcement supervisor’s responsibility to act with the utmost integrity and honor.

#### Summary of substantiated allegations regarding the bicycle incident

By her failure to establish the identity and status of civilians she brought to the property cage; her failure to convey her concerns about James Wright to Rafferty; her knowing authorization to Rafferty to release a bicycle to Wright; and her failure to ensure timely reports regarding the disposition of property, Brister-Cooper failed to “properly secure ... property which has been ... entrusted to” her.<sup>36</sup> In so doing, she violated department regulations found in Article V, Section 4 (care of property). Her conduct also violated UW System classified employees work rules I.G., prohibiting “negligence in performance of assigned duties,” III. B. (unauthorized removal of another person’s private property) and IV. J. (failure to exercise good judgment).<sup>37</sup>

We conclude further that Brister-Cooper’s statements and testimony denying any awareness or responsibility for the bicycle’s release were contrary to the facts, and known to her to be so, and that she did indeed testify untruthfully during the investigation into this incident and subsequent proceedings. In so doing, she violated department work rules 1.E. (not providing accurate and complete information when required) and IV.J. (not exercising good judgment in dealing with fellow employees).<sup>38</sup>

## II. The Fourth of July Parade

The department has also charged Brister-Cooper with violating several department rules and regulations in conjunction with Switala and the 4<sup>th</sup> of July parade in Shorewood. Again, the allegations concern both an initial action by Brister-Cooper and her subsequent attempts at concealment.

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<sup>35</sup> The Commission has added this sentence to reflect our conclusions.

<sup>36</sup> The Commission has deleted a phrase from this sentence in the proposed decision because it referred to conduct that was not identified in the discharge letter as a basis for the discipline.

<sup>37</sup> The Commission has modified this paragraph to reflect our earlier conclusions as well as to make the proposed decision internally consistent.

<sup>38</sup> The Commission has revised the work rule citations listed in the proposed decision in order to correspond to the allegations in the letter of discipline.



Both parties clearly consider this episode as far less significant than the bicycle incident, giving it only very cursory attention in their briefs.

There are only two factual allegations in any serious doubt: whether Brister-Cooper assigned Switala to the parade, and what she asserted in a subsequent e-mail. All other statements in the termination letter are well-established by the credible evidence, and show Brister-Cooper to have committed several violations of departmental work rules and regulations, as follows:

*Throughout your interview there were numerous inconsistencies in your answers and you failed to answer questions with complete answers.*

The transcript of her July 28 interview with Lts. Meress and Swenson clearly contains numerous inconsistencies and many instances in which Brister-Cooper failed to provide complete answers. From her first attempt to obfuscate that she had made the call to Shorewood that started the matter, through the investigative interview (Finding of Fact 24), Brister-Cooper aggressively failed to provide accurate and complete information during the investigation into the Fourth of July incident.

Brister-Cooper mainly tended to fend off questions by rotely repeating that Switala was on a legal holiday. But at times her obfuscation is more pronounced:

Q: okay. The question was, did you ever tell Officer Walton that Switala would be assigned to the parade?

A: I don't, you'd have to listen to the tape. I don't remember exactly what the wording was.

Q: So you don't. So your answer is that you don't know?

A: I'm not saying I don't know. I don't remember. ...

Q: Okay. But, in answer to this question, in that conversation you had, either you called him or he called you, did you ever tell Officer Walton that Switala would be participating, participating in the parade?

A: I may have said something like it sounds like a good idea for, you know, because he said something about punishing either punishing him and send him up. I can't . . .

Q: Well, in your mind was Switala going to be participating in the parade?

A: In my mind was he going, have to be, we would we would have to decide if he was going to be participating in the parade.

. . .

Q: Did you tell Walton, Switala's coming to this, going to participate in the parade or not? Yes or no.

A: I can't remember 100% what was said.

Q: Okay.

A: I know we talked about Switala. Then just because people overhear things that doesn't mean they are going to be assigned to stuff.

Q: Was Switala present at dispatch during part of this conversation?

A: I don't know where Switala was at all. But, I'm sure he was eavesdropping somewhere.

This continuing pattern of evasion and avoidance gives the appearance that Brister-Cooper is answering questions in the manner of someone with something to hide – again, as Hoderman commented, more like an offender than an officer.

Even worse than Brister-Cooper's evasion and obfuscation, we believe she knowingly made misrepresentations, such as the following exchange:

Meress: OK, did you provide Officer Switala with the line-up location and the time for the Shorewood parade?

Brister-Cooper: No.

Notwithstanding Brister-Cooper's denial, Switala testified credibly that she did provide that information in a face-to-face conversation on July 3. And Switala did of course report at the right time and place for the parade, with the appropriate hand-outs. There is no support for Brister-Cooper's version of events other than her own statement, and no other explanation of how Switala obtained that information.

Accordingly, the greater weight of the credible evidence is that Brister-Cooper violated Article I., Section E (not providing accurate and complete information) of the UW System work rules.<sup>39</sup>

Whether or not Brister-Cooper did improperly assign Switala to the parade, we find there is also enough credible evidence in the record to establish the further charge that:

*You failed to properly communicate your 4<sup>th</sup> of July special detail assignment to the officers involved or to the command staff.*

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<sup>39</sup> The Commission has modified this sentence in the proposed decision to reflect our conclusion that it is unnecessary to address the question of whether Appellant's conduct violated the more general language of Article I Section 3 (unbecoming conduct) of the UW-M Police Department regulations because her conduct very clearly violated a provision of the UW System work rules.

Brister-Cooper told Shorewood's Officer Walton she *would* be sending Switala, Jackson believed she *had* assigned Switala, and Switala *acted* as he would had he been assigned. If, as she insists, Brister-Cooper *didn't* assign Switala, then she is certainly responsible for improperly communicating what assignment *was* made. This failure to exercise good judgment in dealing with a fellow employee constitutes a violation of Article IV, Section J.

The university is correct that:

*As a Police supervisor you must communicate regularly with all subordinates, in order to develop trust and to encourage a positive attitude and positive response to duty assignments. You failed in this responsibility.*<sup>40</sup>

One allegation is easily dismissed:

*You actually asserted in an email that the Chief had assigned Officer Switala to the detail.*

This allegation is not substantiated by the record evidence. As recounted in Lt. Swenson's investigatory report of August 5, Brister-Cooper on the evening of July 4 sent the following e-mail:

This is my last e-mail about the parade.  
PO Switala told me that the Chief, told him to make himself available for this.

Obviously, there is a substantial difference between Brister-Cooper attributing the statement to Switala and Brister-Cooper asserting it on her own. Moreover, as Lt. Swenson's investigative report relates, Switala told Lieutenants Swenson and Meress that "Chief said to make himself available for events as they come up." Given the imprecision which seems to characterize internal communications at the department, the difference between "told him to make himself available for this" and "said to make himself available for events as they come up" does not strike us as significant enough to justify discipline.

The only difficult allegation to evaluate is this assertion:

*You had made the assignment although you had not alerted the command staff or the Chief to the change in his schedule.*

Also expressed as: *You had in fact, assigned him yourself, and denied having done so.*

And: *More than that, you actually denied having made the assignment and tried to "blame" someone else for having made it.*

Also expressed as: *You had in fact, assigned him yourself, and denied having done so.*

And: *More than that, you actually denied having made the assignment and tried to "blame" someone else for having made it.*

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<sup>40</sup> The Commission has deleted the subsequent paragraph found in the proposed decision because it concluded that Brister-Cooper had spoken disparagingly about Officer Switala in her recorded conversation with an officer from Shorewood. The deleted paragraph went on to conclude that this conduct violated the work rule prohibiting discourteous conduct. Brister-Cooper's discharge letter did not cite her for her comments during the recorded conversation.

Parts of these allegations, of course, are not in dispute. Brister-Cooper clearly did not alert the command staff or Chief about Switala being assigned to the parade, and Brister-Cooper has consistently denied having assigned him herself.

The only evidence supporting Brister-Cooper's claim that she didn't assign Switala, other than Brister-Cooper's evasive denials, is the lack of a confirming e-mail, as she provided to Officer Griffin and command for Griffin's assignment.

However, given Brister-Cooper's demonstrated failures regarding reports (particularly their preparation and review), her failure to send a confirming e-mail is not in itself proof that she didn't. Moreover, sending an e-mail to command staff would have exposed her plan to assign Switala, since this was to be a one-officer assignment.

And, as noted above, Brister-Cooper did tell Shorewood she would be assigning Switala, Jackson believed Brister-Cooper assigned Switala, and Switala did report for the parade.

Under other circumstances, the fact that there was an e-mail assigning Griffin and not Switala for a one-officer detail would likely have led to Switala being sent home. But as it happened, the officer-in-charge when Switala reported was his father-in-law, Lt. Meress, under direct orders to avoid *all* supervisory actions regarding Switala.

Brister-Cooper implies that this was part of the plan all along – that Switala, perhaps with Hodermann's active assistance, connived to get himself "assigned" to lucrative holiday pay on a shift where he knew the officer-in-charge couldn't review the scheduling. Her narrative is unconvincing, especially given that it was Brister-Cooper who introduced Switala's name into the matter of the Fourth of July scheduling.

We concur in the letter's contention that Brister-Cooper assigned Switala to the parade and the letter's conclusion<sup>41</sup> that:

*It may or may not have been appropriate for you to assign Officer Switala to the detail, but it would never be appropriate or acceptable for you to try to deny having done it. Actions of this type completely undermine a supervisor's effectiveness. How can the Officers under your supervision ever trust that your work assignments or orders are legitimate, if it is known that when questioned, you will try to deny everything?*

*Worse than that, for any Police Department, is what happens when a Police Officer develops a reputation for untruthfulness. That Officer will never again be fit for police work because he or she cannot take the stand in court and testify without being easily impeached. An untruthful Officer is worse than no Officer because the taint of reputed untruthfulness reflects on everyone in the department. This is doubly so when the untruthful Officer is supposed to be part of the management team*

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<sup>41</sup> The Commission has modified this sentence in order to more clearly set forth our factual conclusion.

### **Summary of substantiated allegations regarding the Fourth of July incident**

There is a clear preponderance of credible evidence in the record to substantiate the employer's allegations that Brister-Cooper failed to properly communicate the Fourth of July special detail assignment to the officers involved and to command staff, that she assigned Switala to the detail and thereafter failed to provide accurate and complete information as required by an authorized person, that she failed to exercise good judgment, and that she showed unbecoming conduct, thus violating Article I Section E (not providing accurate and complete information) and Article IV, Section J (discourtesy or bad judgment) of the UW System work rules.<sup>42</sup>

### **Consideration of the Appropriate Level of Discipline**

The specific requirements of the position of police officer are unique in public employment, and carry the greatest demand for absolute honesty and integrity. There are no civilian occupations in which individuals wield greater day-to-day power over others than law enforcement. The power to arrest, and the right to use deadly force are awesome responsibilities, and those who exercise them are held to the highest standards of ethics and honor. Moreover, the sworn statements of police officers form the basis of search and arrest warrants and criminal complaints, and their sworn testimony is crucial in the criminal justice system. An officer or a supervisor, known to have lied in the exercise of official duties is significantly, and likely irreparably, damaged. No public employee has a higher standard of job-related conduct than a law enforcement supervisor. It does not take prolonged analysis to conclude that a law enforcement supervisor who lies in the line of duty is properly subject to discipline up to and including discharge.

Moreover, Brister-Cooper herself was previously disciplined for failing to provide full and complete information during the internal investigation into a fatal shooting by Officer Switala in 2003. We understand that Brister-Cooper continues to challenge the Respondent's understanding of that tragic incident, but her denial of culpability does not negate the fact that she was explicitly put on notice that untruthfulness during an internal investigation would subject her to further discipline, up to and including discharge.<sup>43</sup>

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<sup>42</sup> The Commission has modified this sentence to reflect our conclusions. The proposed decision found that Appellant's conduct also violated Article I Section 3 of UW-M Police Department regulations. We decline to reach a conclusion regarding this particular allegation because the conduct clearly violates other relevant provisions.

<sup>43</sup> Although it was not mentioned in the proposed decision, the Appellant had been disciplined on another occasion. She received a letter of reprimand in October of 2002 for submitting "a voided [parking] ticket that you knew or should have known was legally issued to a police officer, and not eligible to be voided." The reprimand relied upon work regulation Article IV Section J (discourtesy or bad judgment) as well as a parking provision. In addition, relatively recent performance evaluations indicated that Brister-Cooper needed to improve her performance in some relevant areas. For example, her 2003-04 evaluation indicated she needed "to make concerted efforts to regain her confidence and the confidence of her subordinates," and her 2004-05 evaluation provided that she needed "to review, maintain, and update personnel schedules daily as there have been numerous errors." The reprimand and the performance evaluations are elements of Brister-Cooper's work record, which is one of the factors to be considered when assessing whether the Respondent has justified the degree of discipline that was imposed. Appellant's work record, which obviously also includes the 2003 suspension, supports the imposition of very substantial discipline.



The matter before us goes beyond the release of the bicycle and assignment of Officer Switala. More important is whether Sgt. Brister-Cooper acted properly during the internal investigations into the matters. We have no hesitancy in declaring that because Sgt. Brister-Cooper lied during the investigations, the employer was within its rights to terminate her employment. The record showed that the UW-M Police Department had also terminated the employment of a security officer because that officer had lied. There is no evidence that the Respondent had treated another employee less harshly than Brister-Cooper for having lied. The Appellant argues that her discharge was inconsistent with the Respondent's decision not to discipline an officer who had shot and killed a man during a vehicle stop in 2003. That officer made a decision to use deadly force, an action that is quite distinct from Brister-Cooper's misconduct. In addition, we are not in a position to render judgment as to whether the circumstances justified the use of deadly force.<sup>44</sup>

In her written objections to the proposed decision, Brister-Cooper also contends that the evidence in this matter is insufficient to satisfy a test established in *STATE EX REL. GUDLIN V. CIVIL SERVICE COMMISSION*, 27 WIS. 2D 77, 87, 133 N. W. 2D 799 (1965) and cited in *SAFRANSKY V. STATE PERSONNEL BOARD*, 62 WIS. 2D 464, 474, 215 N.W.2D 379 (1974) that the misconduct "be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service." Appellant's contention fails to recognize that the above standard is only one means of satisfying the just cause standard:

Where a municipal employee has been discharged under a statute or ordinance which endows him with tenure, one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. The record here provides no basis for finding that the irregularities in appellant's conduct have any such tendency. It must, however, also be true that conduct of a municipal employee, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service. In such case the conduct can reasonably be deemed cause for suspension or discharge even though it has no direct bearing upon his performance of his duties. 27 WIS. 2D 77, 87.

Brister-Cooper's misconduct is of a nature that satisfies both standards. Her record of lying would substantially damage any testimony she might provide in a criminal proceeding, thereby undermining the performance of UW-M's Police Department. Public confidence in the Department would also be undermined by Appellant's shoddy efforts to protect private property under the Department's control, her willingness to release that property to someone who had no right to it, and her repeated history of lying during the course of her employment.

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<sup>44</sup> The Commission has revised the last two paragraphs of the proposed decision in this section in order to accurately reflect the Commission's conclusion regarding the relative significance of the various charges that were brought against Brister-Cooper.

**Conclusion**

Due to several factors – concerns about credibility, questions of motive, varying degrees of verbal skills – it has been difficult to determine exactly what happened with the release of the bike to James Wright and the assignment for the Fourth of July parade.

However, we are mindful that the legal standard is not that of a criminal prosecution (beyond a reasonable doubt), but rather “clear preponderance of the credible evidence.” We have found that there is indeed a clear preponderance of credible evidence to support the charges in Respondent’s letter of August 26, 2005, and that the discharge of Appellant was justified given the specific requirements of her position as a law enforcement supervisor.

Accordingly, we have denied and dismissed the Appeal.

Dated at Madison, Wisconsin, this 25<sup>th</sup> day of March, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner