

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CATHERINE LEAVERTON, Appellant,

vs.

**WISCONSIN DEPARTMENT OF VETERANS AFFAIRS and
DIVISION OF MERIT RECRUITMENT AND SELECTION**, Respondents.

Case 12
No. 67159
PA(adv)-124

Decision No. 32416-A

NICOLE BARTON, Appellant,

vs.

**WISCONSIN DEPARTMENT OF VETERANS AFFAIRS and
DIVISION OF MERIT RECRUITMENT AND SELECTION**, Respondents.

Case 13
No. 67171
PA(adv)-125

Decision No. 32417-A

Appearances:

Mr. Nicholas E. Fairweather, Hawks Quindel, S.C., 222 West Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin, 53701-2155, appearing on behalf of Catherine Leaverton and Nicole Barton.

Mr. James Stewart, Chief Legal Counsel, Department of Veterans Affairs, State of Wisconsin, 30 West Mifflin Street, Madison, Wisconsin, 53703, appearing on behalf of Wisconsin Department of Veterans Affairs and Division of Merit Recruitment and Selection.

DECISION AND ORDER

Catherine Leaverton and Nicole Barton filed appeals with the Wisconsin Employment Relations Commission contesting their layoffs from the Wisconsin Veterans Home-King. The Division of Merit Recruitment and Selection (DMRS) along with the Wisconsin Department of Veterans Affairs (WDVA) were served with the appeals. DMRS indicated that it would not participate in the appeal, and should be treated as a nominal party with respect to the layoff. DMRS did not participate thereafter.

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The matters were consolidated. By Order dated May 5, 2008, the Commission designated William C. Houlihan as Hearing Examiner. Examiner Houlihan conducted a pre-hearing conference on September 14, 2007 and April 9, 2008, at which time the parties stipulated that there were no jurisdictional issues, and that the issues to be decided were as follows:

Did Respondent have just cause to lay off Appellant Nicole Barton?

Did Respondent have just cause to lay off Appellant Catherine Leaveron?

The result of the pre-hearing conference, including jurisdiction and stipulated issues for decision, was confirmed to the parties by letter dated May 5, 2008.

A hearing was conducted on July 7, 2008 at the Wisconsin Veterans Home in King, Wisconsin. Respondents filed a brief, which was received on August 21, 2008. Appellants filed a response brief, received on September 23, 2008. On October 16, 2008, in lieu of a reply brief, Respondents filed a Motion to Dismiss for lack of subject matter jurisdiction. The parties completed their briefing schedule, including briefs on the Motion to Dismiss, by November 17, 2008.

The examiner issued a proposed decision on March 25, 2009, and the Appellants filed written objections. Via correspondence dated June 22, 2009, the Commission notified the parties that “the record was insufficient to reach a determination” regarding one of the Appellants’ arguments and it foresaw the need to address the following sub-issues:

Is the Bureau of Activity Services at King a “bureau” for purposes of DVA’s policy on reorganization?

If so, do Respondents have another ground for arguing that the reorganization affecting Leaveron was not subject to obtaining approval from DOA? For example, had OSER or some other entity been delegated the authority to approve the Leaveron reorganization, and, if so, was or should that have been reflected in the DVA policy on reorganization? How does Sec. 15.02, Stats., affect this issue?¹

A representative of the Commission conducted a series of telephone conferences with the parties and the Appellants were provided an opportunity to conduct discovery. The parties agreed upon a procedure for “supplementing the record/reopening the hearing,” specifically,

¹ In light of the Commission’s conclusion regarding the organizational structure of the King Home for purposes of WDVA’s policy on reorganization, we do not address this second issue.

that they would do so by way of affidavit, other written material, and argument.² The final submission was received on October 20, 2009.

After considering the supplemental materials, conferring with the examiner, and analyzing the record and arguments as a whole, the Commission modifies the proposed decision. The Commission has added Conclusion of Law 3 and Findings of Fact 7 and 16 and has modified those Findings of Fact now numbered 4, 5, 9, 10, 13, 15, 17, 18, 21, 23 and 24 to remove unnecessary material. These changes have resulted in the consolidation of what were Findings 21 and 22, as well as Findings 23 and 24 in the proposed decision. Other modifications to the Findings, Conclusions and to the Memorandum portion of the proposed decision are reflected by footnotes. In addition, the Commission has modified the basic approach taken in the Memorandum portion of the proposed decision in terms of the merits of the two layoff decisions. The proposed decision included a substantive analysis of Appellant Barton's assertion that the reorganization of the King Home relating to her position had not been approved in the manner required by the relevant statute and DVA policy. However, the proposed decision would have construed prior cases to serve as a jurisdictional bar to substantively reviewing Appellant Leaverton's assertion that another reorganization plan relating to her position was not properly approved. Rather than address the two appeals inconsistently, the Commission has adopted a single approach and has addressed the additional materials submitted by the parties after the proposed decision had been issued. As a consequence, all of the analysis now found after the heading of "Just Cause for Layoffs" replaces the corresponding sections in the proposed decision. The revised language more clearly articulates the underlying facts and the Commission's analysis.

For the reasons set forth below the Commission Denies the Motion to Dismiss, and further concludes that the Respondents have proven there was just cause for the layoff of Nicole Barton and Catherine Leaverton.

FINDINGS OF FACT

1.³ At all relevant times, the Wisconsin Department of Veterans Affairs (WDVA) included the Division of Veterans Homes,⁴ which was organized into two principal subunits

² We view the agreed-upon procedure as a waiver of further hearing and an agreement to accept the factual assertions set forth in the affidavits.

³ The Commission has modified this finding to reflect the supplemented record.

⁴ Context for understanding the relevant organizational structure is supplied by Sec. 15.02(3)(c), Stats., which provides that "all departments shall adhere to the following standard terms" for their internal structure:

1. The principal subunit of the department is the "division". Each division shall be headed by an "administrator". . . .
2. The principal subunit of the division is the "bureau". Each bureau shall be headed by a "director". . . .
3. If further subdivision is necessary, bureaus may be divided into subunits which shall be known as "sections" and which shall be headed by "chiefs" and sections may be divided into subunits which shall be known as "units" and which shall be headed by "supervisors".

called the Wisconsin Veterans Home at King (King) and the Wisconsin Veterans Home at Union Grove. WDVA employed commandants to be in charge of each facility. The King Home and the Home at Union Grove are two “bureaus” of the Division of Veterans Homes for organizational purposes.

2.⁵ Appellant Catherine Leaverton was employed by WDVA to lead one of the subunits within the King Home. She filled the position denominated as the “Director of the Bureau of Activity Services”. Ms. Leaverton’s position was classified as a Therapist Supervisor and her seniority date was May 31, 1994. Ms. Leaverton supervised several Therapists and Therapist Assistants in that subunit.

3.⁶ Appellant Nicole Barton was employed by WDVA in a second subunit of the King facility which was referred to as the “Bureau of Medical Services”. The subunit was led by a position denominated as the “director of the Bureau of Medical Services”. Appellant Barton reported to that position and she led the Physical Therapy Unit. Her position was assigned to the Therapist Supervisor classification and her seniority date was March 10, 2003. Ms. Barton supervised two Physical Therapy Assistants.

4. WDVA has and maintains a Policy and Procedure applicable to the reorganization of WDVA work units.⁷ Relevant provisions of that policy include the following:

Review and approval of proposed reorganization changes is required as follows:

A. Review and approval by the Governor

1. When functions and positions are transferred from one department or independent agency to another.
2. When a division is created, abolished or consolidated.
3. When WDVA expands or contracts the number of field operations units.

⁵ The Commission has modified this finding to reflect the supplemented record.

⁶ The Commission has modified this finding to reflect the supplemented record.

⁷ Changes to a department’s organizational structure are subject to Sec. 15.02(4), Stats., which provides, in part:

The head of each department . . . shall, subject to the approval of the governor, establish the internal organization of the department The governor may delegate the authority to approve selected organizational changes to the head of any department. . . .

B. Review and approval by the Department of Administration (DOA)

1. When bureaus or comparable subunits are created, eliminated, or consolidated.
2. When “Offices” which report directly to the Secretary’s Office or the administrator of a division are created, eliminated or consolidated.
3. When transfer of an entire bureau, section, work unit or office within the department requires transfer between appropriations (often with transfers between divisions).

...

D. Review and approval by the WDVA Secretary

1. Approval is required prior to submitting any of the above reorganization proposals to the Governor or the Department of Administration.
2. Approval is required for any abolishment, establishment or consolidation of internal work units, as well as their transfer within or between bureaus or divisions.

...

4. The internal restructuring of a WDVA Veterans Home whenever changes in staffing or programs or costs will result.

II. DEFINITIONS

Reorganization is defined as any realignment of a department subunit where functions, roles, programs or scope of activities are redefined.

Changes in an individual position or groups of positions and the associated reporting patterns, where the above is not affected, do not normally constitute a reorganization.

The statutory definition for department organizational structure includes:

- **Division** – A major subunit of a department, headed by an administrator.
- **Bureau** – Major subunits of a division, headed by a director.
- **Section** – Major subunits of a bureau, headed by a chief.

- **Unit** – Major subunits of a section, may be headed by a supervisor or lead worker.
- **Office** – Normally refers to a subunit reporting directly to the Secretary’s Office or a division administrator.

III. PROCEDURE/RESPONSIBILITY FOR REORGANIZATION

A. Requesting Division

1. Determines the need for reorganization and whether it will require review and approval at higher than the Secretary’s level of authority. Upon request, the Administrator, Division of Administration will arrange for advice and assistance in developing a reorganization proposal.
2. If no outside level of approval (Governor or DOA) is required, the Division Administrator prepares the necessary reorganization proposal, including identification of all personnel and budgetary changes.

A revised organization chart, and if appropriate, a mission statement must be filed with the WDVA Secretary’s Office along with the reorganization proposal, with copies to OPPB and the Administrator, Division of Administration, for review and approval.

3. If an outside level of approval is required, the Division Administrator notifies the WDVA Secretary’s Office, OPPB and the Administrator, Division of Administration of its intention to reorganize and briefly explains the need for formal reorganization. Subsequently, the division prepares an official “Reorganization Proposal” in the prescribed format (see Attachment) and submits it to the WDVA Secretary, with copies to OPPB and the Division of Administration.

B. Office of Policy, Planning and Budget

1. Offers consultation and technical assistance to divisions considering reorganization, as appropriate.

...

C. Division of Administration

1. Reviews the appropriateness of transfers and redeployments.

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2. Functions as the “process manager” for the formal review process of reorganization proposals requiring approval by the WDVA Secretary, DOA or the Governor. Coordinates and expedites necessary reviews and approvals. Provides liaison with the Department of Administration and the Office of State Employment Relations.
3. Prepares a written report for the WDVA Secretary which summarizes the reviews and makes a consolidated recommendation.
4. Perform follow-up reviews of implemented reorganizations. All reorganizations requiring approval by the Governor must have such follow-up reviews. The WDVA Secretary will determine the need for other reviews.

D. Bureau of Administrative Services

1. Performs preliminary and final review of proposed position descriptions to determine appropriate position classification.
2. Reviews reorganization proposal for conformance to state personnel policies.
3. Reviews effect of organization and position changes to determine appropriate personnel transactions.
4. Reviews effect of reorganization changes on collective bargaining agreements.
5. Processes necessary paperwork to effectuate personnel transactions.

E. WDVA Secretary

1. Approves or disapproves reorganization proposals based on reviews and recommendations of the above divisions.
2. Participates, as necessary, in subsequent reviews and decisions by the Department of Administration and the Governor’s Office.

Reorganization of the Bureau of Medical Services and Layoff of Nicole Barton

5. On, or about April 9, 2007 Jackie Moore, Adjutant of the King Home, wrote Amy Franke, Director of Human Resources for WDVA, the following memo in support of a proposal to reorganize the Bureau of Medical Services at the King facility:

We are proposing a reorganization of the Physical Therapy section of the Bureau of Medical Services. We propose to abolish the Physical Therapy "Therapist Supervisor" position from this section. This position has been improperly classified for many years. The classification specification defines the position as "Professional supervisory positions over therapists and responsible for a major therapy program within an institution." The Therapist Supervisor position at King does not supervise any therapists, instead they direct the work of two physical therapy assistants.

In July of 2005, the Therapist Supervisor position for the Occupational Therapy section was abolished. This position was also misclassified as the position directed the work of two occupational therapy assistants. The two occupational therapy assistants are now supervised by the Clinical Coordinator. With this reorganization, the Physical Therapy Assistants would also be supervised by the Clinical Coordinator. The Physical Therapist duties would be performed by the MJ Care staff currently contracted to provide therapy services.

MJ Care rents space in our physical therapy area and treats all members who have Medicare Part B, Medicaid, or private insurance. They provide services until the member has reached a plateau or when payment has ended. At that time, a maintenance program is provided by the King staff. There is currently some redundancy, as the King Therapist Supervisor then does another assessment and treatment plan. Since July of 2006, the MJ Care staff (consisting of one Physical Therapist and one Physical Therapy Assistant) have provided 10,317 units of care. The King staff (consisting of one Therapist Supervisor and **two** Physical Therapy Assistants) have provided just 8,148 units of care. Considering the extra documentation and paperwork that the MJ Care staff are required to complete for billing purposes, it becomes apparent that the current arrangement of the King staff is not very cost effective.

MJ Care would continue to provide their current level of service, and would then oversee the daily work assignments of the King staff to carry out the maintenance services. The King therapy assistants would also be responsible for the provision of exercise programs and classes as has been frequently requested by members. MJ Care would also provide additional services as required on a fee basis, as is the current arrangement for Speech Therapy and Occupational

Therapy. As an aside, Union Grove plans to have all of their therapy provided by MJ Care as they do not have any in-house therapy staff. The abolished

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Therapist Supervisor position would be converted to a Nurse Clinician position. This would be a much better use of our resources. We would like to move on this as quickly as possible to give us the opportunity to fill the Nurse Clinician position at the earliest opportunity.

6. Bill Crowley is the King Home Commandant, and as such oversees the King Home.⁸ The reference to Union Grove is to the second WDVA Home.

7.⁹ Even though the memo proposing the reorganization referred to the Medical Services subunit of the King Home as a “bureau”, it was a section of the agency for purposes of the WDVA reorganization policy.

8. The Physical Therapy “Therapist Supervisor” position was held by Nicole Barton. The King Home had experienced a decline in Physical therapy units (a unit is a 15 minute period of therapy) or service. In fiscal year 2003-04 there were 28,571 units; in fiscal year 2004-05 there were 25,296 units of service; in fiscal year 2005-06 there were 24,925 units of service. During the week of April 11, 2007, Ms. Barton was scheduled for 5 units of therapy in 5 days. The week of April 11 is the only Physical Therapy schedule in the record. Hands-on physical therapy is only one element of the Therapist Supervisor position.

9. Human Resources Director Franke concurred with the recommendation, and so indicated by sending the e-mail below, dated April 11, 2007, to the following WDVA employees: Seth Perelman, Administrator of the Division of Administration; Tom Rhatican, former Division Administrator of the Division of Homes; and Micabil (Mike) Diaz, who was either the current Division Administrator of the Division of Homes or the acting Administrator because at the time of the correspondence, Rhatican was deployed into active military service. Copies were also sent to Commandant Crowley and Adjutant Moore.

. . .

I agree with Jackie’s recommendation to eliminate the remaining Therapist Supervisor position.

Aside from economics of care and the benefit of using the position for a nurse clinician, there have been HR compliance issues with the therapist supervisor positions for some time. From an organizational point of view, it also

⁸ The Commission has modified this sentence in the proposed decision to correct a misleading use of the term “administrator.”

⁹ The Commission has added this finding to reflect the supplemented record. Subsequent findings have been renumbered accordingly.

eliminates a 'layer of fat' in the structure and will contribute to more efficient operation.

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Implementing this recommendation will require the lay off Ms. Barton. There is another Therapist Supervisor in the Activities Therapy section of WVH-King. Activities is separate organizationally and functionally from this unit.

Although the Activities position will need to be part of the lay-off process because the process is driven by classification and employing unit, the Activities position has seniority and will come through the process unaffected.

The lay-off plan and justification will have to go to OSER, but approval should be pro-forma. Assuming there are no objections to moving forward, implementation will take approximately 30 days (assuming no delay at OSER).

DOA notification is not necessary for this restructuring because of the low level of the organization impacted.

Note: Ms. Barton will have restoration rights to any Therapist Supervisor vacancy within DVA for which she is qualified. Additionally, she will have to be offered any vacancy in the 81-03 pay range (or counterparts) in her employing unit (WVH-King) for which she may be qualified.

Seth [Perelman]: Because a lay-off is involved, I am requesting your approval of this transaction and that of the Deputy if necessary.

Tom [Rhatican] and Mike [Diaz]: I am requesting your sign-off on the restructuring aspect of this proposal.

If you need additional information or have any concerns, please do not hesitate to let me know.

10. Perelman forwarded the request to William Kloster.

11. Mr. Kloster was the agency's acting Secretary from April – November, 2007. As such, he was the WDVA appointing authority. Kloster received the reorganization proposal and discussed the business rationale with Perelman, Diaz, Franke, and Moore. He thereafter approved of the reorganization and accompanying layoff. The reorganization relating to the physical therapy program was approved to the extent required by WDVA's policies. The reorganization did not require a transfer between appropriations.¹⁰

12. WDVA has historically experienced a shortage of Registered Nurses. It has been unsuccessful in securing requested R.N. positions from the Governor and Legislature. Jackie

¹⁰ The Commission has added the final sentence to more clearly reflect the record.

Moore had engaged in bargaining with the Union that represents the Registered Nurses and Activity Therapists. Among the concerns addressed in those negotiations were the forced

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overtime practices of the Home and the lack of staff to cover contractually authorized vacation. In response to the concerns voiced in negotiations, Moore prepared a new work schedule. The Home lacked the positions to staff the new schedule.

13. On, or about April 24, 2007 Franke submitted the following layoff plan to Respondent Division of Merit Recruitment and Selection:

We find it necessary to vacate one nonrepresented position in the Department of Veterans Affairs, Veterans Home at King. This position (Therapist Supervisor 81-03) is located in the Division of Veterans Homes - King, Bureau of Medical Services. This classification had been improperly used in the past and had created structural anomalies. An additional factor is that the majority of our physical therapy services are provided by an outside contractor.

To correct this situation and to utilize the position for patient care, the position will be fractionated into two Nursing Clinician 2 positions. Therefore, we find it necessary to eliminate the therapist supervisor position and must initiate a layoff of this position.

The following employees occupy positions in the layoff group:

Therapist Supervisor – Veterans Home at King, Employing Unit 485200					
Name	Seniority Date	Sex	Racial/Ethnic	Disability Status	%FTE
Leaverton, Catherine	05/31/94	F	5	n/a	100
Barton, Nicole N.	03/10/03	F	5	n/a	100

Nicole Barton who is the least senior in this layoff group will be laid off effective May 26, 2007.

Our agency has no limited term, original appointment probationary, or project appointment employees occupying positions in this layoff group

...

14. On April 30, Respondent Division of Merit Recruitment and Selection approved the April 24 layoff plan for the Therapist Supervisor position.

Reorganization of the Bureau of Activities and Layoff of Catherine Leaverton

15. On June 14, 2007, Adjutant Moore sent Human Resources Director Franke and Commandant Crowley the following proposal to reorganize the Bureau of Activities:

As part of the culture change movement to more person-centered care, we are proposing an integration of the Bureau of Activities staff into the Bureau of

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Nursing. The Activities Therapist and Therapy Assistants in each building will function as a section under the DON of their building. The reorganization will help to create a strong care team with a focus on the needs of the members within their building and it will break down the barriers created by having separate bureaus. This is a logical move, as the Activities staff in each building currently work independent of the activities staff in other buildings. They will have access to more resources as part of a larger organization, with nursing supervisors available at all times.

As a result of this change, there will be a greater emphasis on nursing staff helping to involve the members in various activities and provide meaningful activities beyond the hours covered by the Therapists and Therapy Assistants. The Activities staff will participate in LEAP training to build a strong foundation for the team approach. Nursing I Assistants will also receive guidance on incorporating some of the goals of the therapy into their everyday interactions with members.

With this reorganization, the therapy programming hours will expand. Initially, organized activities will be scheduled two evenings per week and on Saturdays.

The 1 therapy assistant working these shifts will be responsible for providing activities with the involvement of nursing staff as available.

The Therapist Supervisor position will be abolished and will be replaced by two 50% Therapy Assistants. The Therapy Assistant positions are greatly needed. We depend very heavily on LTEs to provide our activity programming. (We currently have just 11 permanent Therapy Assistants and 11 LTE Therapy Assistants.)

16.¹¹ Even though the memo proposing the reorganization referred to the Activities subunit of the King Home as a “bureau”, it was a section of the agency for purposes of the WDVA reorganization policy. The reorganization did not require a transfer between appropriations.

17. The Therapist Supervisor position referenced in Finding 14, was occupied by Catherine Leaverton. She supervised six Senior Therapists and eleven Therapy Assistants. The effect of the reorganization was to eliminate the Director position and assign the Therapists and Assistants to the four residential buildings, each under the immediate

¹¹ The Commission has added this finding to reflect the supplemented record. Subsequent findings have been renumbered accordingly.

18. On June 15, Franke forwarded the plan for approval to Acting Secretary Kloster and Acting Division Administrator Diaz with the following cover letter:

For purposes of time, I'm forwarding this reorganization plan to you for approval without the formal layoff plan that will result. (In preparation for OSER.) This change will benefit the members and the involved employees. Jackie, Neal and Donna have put a great deal of thought and work into establishing a structure that will work to best accomplish our care goals and improve several organizational issues.

The lay-off will be the current Director of Activities, Cathy Leaverton. My understanding is that Bill Crowley has approved this. I am in support of the reorganization and have recommended to Jackie that we hold off on Nicole Barton's lay-off (Medical Bureau, same class: Therapist Supervisor) and do them both at once . . .

19. Before submitting the reorganization proposals, Moore had consulted informally with Commandant Crowley and secured his approval. Crowley confirmed his approval of both reorganization plans by e-mail, dated June 15, 2007.

20. As before, the reorganization proposal was forwarded through the Departmental chain of command, ultimately reaching Acting Secretary Kloster. Kloster discussed the proposal with the relevant administrative personnel, and approved of the reorganization by e-mail, dated June 20, 2007. Kloster confirmed his approval in a telephone call to Commandant Crowley. The reorganization relating to the physical therapy program was approved to the extent required by WDVA's policies.¹³

21. On June 18, 2007, Human Resources Director Franke forwarded the following layoff plan for the Therapist Supervisor position to the Division of Merit Recruitment and Selection:

We find it necessary to vacate one nonrepresented position in the Department of Veterans Affairs, Veterans Home at King. This position (Therapist Supervisor 81-03) is located in the Division of Veterans Homes-King, Bureau of Activity Services. The activities therapist and therapy assistants in each building will function as a section under the Director of Nursing of their building.

The reorganization will help to create a strong care team with a focus on the needs of the members within the individual buildings. This will allow access to

¹² The Commission has modified this finding to draw a distinction between the title of Ms. Leaverton's position as found on the organization chart, and her functional role.

¹³ The Commission has added the final sentence to more clearly reflect the record.

more resources as part of a larger organization with nursing supervisors available at all times. With this reorganization, WVH-King will be able to expand the therapy programming hours.

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This change will mean that the Bureau of Activity Therapy will no longer exist as a separate entity within WVH-King. The supervisory position will be fractionated into two Therapy Assistant positions. Therefore, we find it necessary to eliminate the therapist supervisor position and must initiate a layoff of this position.

The following employee occupies the position in the layoff group:

Therapist Supervisor - Veterans Home at King, Employing Unit 485200					
Name	Seniority Date	Sex	Racial/Ethnic	Disability Status	%FTE
Leaverton, Catherine	05/31/94	F	5	n/a	100

Please note: In May, the department submitted a layoff plan for the Bureau of Medical Services - King for Nicole Barton, Therapist Supervisor. We have postponed that action but the write-up is still valid. We have decided that it is in the employees' and the work units' best interest to notify them at the same time on July 3, 2007. We are treating these as two separate reorganizations within WVH-King, and that is why the lay-off plans deal with only one position each.

...

22. The June 18 layoff plan was approved by Respondent Division of Merit Recruitment and Selection on June 25, 2007.

23. By letters dated July 3, 2007, Nicole Barton and Catherine Leaverton were notified of their layoffs, effective July 21, 2007.

24. Ms. Leaverton and Ms. Barton filed appeals with the Commission on July 26 and August 2, 2007, respectively

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

CONCLUSIONS OF LAW

1. The Commission has the authority to review a layoff decision pursuant to Sec. 230.44(1)(c) and Sec. 230.45(1)(a), Stats.

2. Since Nicole Barton and Catherine Leaverton had achieved permanent status in class, the Commission has subject matter jurisdiction over these layoffs pursuant to Sec. 230.44(1)(c), Stats.¹⁴

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3.¹⁵ The King Home is a bureau of the WDVA as the term “bureau” is described in Sec. 15.02(3)(c), Stats. The Medical Services and the Activities subunits of the King Home were sections of the agency as the term “section” is described in the same statutory paragraph.

4.¹⁶ Respondents have satisfied the burden of establishing that the layoff of Nicole Barton was for just cause.

5. Respondents have satisfied the burden of establishing that the layoff of Catherine Leaverton was for just cause.

Based upon the above and foregoing Findings of Facts and Conclusions of Law, the Commission makes and issues the following

ORDER¹⁷

1. Respondents’ layoff of Nicole Barton is affirmed and her appeal is dismissed.
2. Respondents’ layoff of Catherine Leaverton is affirmed and her appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of March, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

¹⁴ The Commission has clarified the reference to the statutory authority for asserting jurisdiction.

¹⁵ The Commission has added this Conclusion of law to reflect the supplemented record. The subsequent conclusions have been renumbered accordingly.

¹⁶ The Commission has modified Conclusions of Law 4 and 5 to refer to both Respondents.

¹⁷ Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to these matters 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.

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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Wisconsin Department of Veterans Affairs (Barton/Leaverton)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The question of subject matter jurisdiction was first raised in Respondents' October 15, 2008 Motion, submitted in lieu of a reply brief. The essence of the Motion is that the Appellants have failed to establish that either had "permanent status in class". It is Respondents' contention that the Appellants bear the burden of proof in this area, and that such status should not be inferred or implied. The Appellants oppose the Motion citing the procedural record of this proceeding, and the late and prejudicial timing of the Motion.

"An employee with permanent status in class . . . may be removed . . . or discharged . . . only for just cause." Section 230.34(1)(a), Stats. Similarly, "Employees with permanent status in class in permanent, sessional and seasonal positions in the classified service . . . may be laid off . . . but only after all original appointment probationary and limited term employees in the classes used for layoff, are terminated." Sec. 230.34(2)(a), Stats.

During the pre-hearing conference, the parties stipulated that there were no jurisdictional issues. The context for that stipulation were the claims advanced by Barton and Leaverton that their layoffs violated statutory and administrative requirements for layoff of state employees with permanent status in class. The appeals cite Sec. 230.44(1)(c), Wis. Stats., as authority for the actions.¹⁸ The letters appealing the layoffs make a clear and unambiguous jurisdictional claim. The pre-hearing stipulation that there is no jurisdictional issue is accompanied by two stipulations as to the issues to be decided. The two issues to be decided are whether or not there was just cause for the layoffs of the two Appellants. An element of the application of the just cause standard is the existence of permanent status in class. It is only those employees who have achieved permanent status in class who are subject to the just cause standard.

The effect of the stipulation as to issue(s) was to enter into a stipulation that for purpose of hearing the Appellants had permanent status in class. The purpose of pre-hearing

¹⁸ Paragraph (c) provides:

(c) Demotion, layoff, suspension or discharge. If an employee has permanent status in class, or an employee has served with the state as an assistant district attorney for a continuous period of 12 months or more, the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

stipulations is to narrow the scope of the hearing. Where matters are agreed upon before hearing and are entered into the record, they serve to shorten the hearing and conserve resources. Once a matter has been stipulated to it obviates the need to offer testimony to prove the stipulated fact. That is what occurred here. Respondents acknowledge as much. In their initial brief, Respondents argue that the just cause standard is applicable and has been satisfied.

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Respondents do not claim that, as a matter of fact, Barton and Leaverton lack permanent status in class. Rather, Respondents claim that the Appellants bear a burden of proof in this area, and that they failed to satisfy that burden. Respondents argue that there is no explicit record evidence which declares that the Appellants have achieved permanent status in class. Neither Appellant testified. However, the record does comment on their status in a number of places. The reorganization memo, dated April 9, 2007, indicates that the Physical Therapy Therapist Supervisor position has been improperly classified for many years. Barton had been in this classified position for years and would have achieved permanent status in class.

Human Resources Director Franke's April 11 response supports the recommendation and notes: "Implementing this recommendation will require the lay off of Ms. Barton." It further notes that Barton will have restoration rights, and rights to certain other vacancies. If Ms. Barton lacked permanent status in class, there would have been no layoff required. The requirement was created by Barton's permanent status in class. Similarly, Barton would have had no right to restoration absent her permanent status in class.

The April 24 layoff plan that was submitted to the Division of Merit Recruitment and Selection makes certain representations. It asserts that the WDVA ". . . must initiate a layoff." It further asserts that "Nicole Barton who is the least senior in this layoff group will be laid off. . . ." It represents that the agency "has no limited term, original appointment probationary, or project appointment employees occupying positions in this layoff group." This layoff group included Barton. Without explicitly declaring her to be an employee with permanent status in class, the memo describes her status as just that. It certainly does so in sufficient clarity, and without contradiction, to satisfy the Appellant's burden of proof in this area.

The same is true of Leaverton. The June 15 memo from Franke forwarding the reorganization plan refers to the "formal layoff plan that will result." The June 18 layoff plan submitted to the Division of Merit Recruitment and Selection relative to Leaverton's Therapist Supervisor position makes the same representations as did the Barton plan.

Both Barton and Leaverton received layoff letters that confirmed "Your position is classified...", and that "According to the administrative rules, layoff must be accomplished by classification within the employing unit by seniority. . . ." The letters go on to enumerate rights which are available to the Appellants. Such rights are a product of the Appellants' permanent status in class. These letters are admissions, and contribute further to the

evidentiary record supporting a finding that Barton and Leaverton had permanent status in class.

Both layoff letters confirm that “You are entitled to appeal this layoff action to the Wisconsin Employment Relations Commission. . . .” Only an employee with permanent status in class is entitled to appeal a layoff under Sec. 230.44(1)(c), Stats.

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It is worth noting that the authors of the documents representing that the Appellants had permanent status in class testified at the hearing. Human Resources Director Franke, Adjutant Moore, and Commandant Crowley all testified. If there was doubt that their written representations accurately conveyed the Appellants’ status, they could have been questioned in this area.

II. Just Cause for Layoffs

WEAVER V. WISCONSIN PERSONNEL BOARD, 71 WIS. 2D 46, 237 N.W. 2D 183 (1976), provides the analytical framework for decisions in this type of appeal. In WEAVER, an employee of the University of Wisconsin was laid off for economic reasons. The employee appealed his layoff, contending it was not for just cause. The Supreme Court reviewed the actions of the Personnel Board for the purpose of addressing the question of the meaning of “just cause” for a layoff. The Supreme Court held:

While the appointing authority indeed bears the burden of proof to show “just cause” for the layoff, it sustains its burden of proof when it shows that it has acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious.

. . .

Arbitrary and capricious action on the part of an administrative agency occurs when it can be said that said action is unreasonable or does not have a rational basis . . . and [is] not the result of the “sifting and winnowing” process.

The core claim advanced by the Appellants in this proceeding is that WDVA did not establish that it had ever obtained the appropriate level of approval for the two reorganizations of the King Home that precipitated their layoffs.¹⁹ It is the burden of Respondents to establish just cause for the layoffs, and the Appellants contend that Respondents failed to meet that burden. According to the Appellants, “the Respondent failed to establish that the reorganization was executed properly, in accordance with State statutes and administrative

¹⁹ When reviewing Ms. Leaverton’s appeal, the proposed decision included a lengthy analysis of whether the Commission has the authority to even examine the question of whether DVA had obtained the necessary approvals for the reorganization, and would have found a lack of subject matter jurisdiction. At the same time, the proposed decision would have ignored the jurisdictional question and addressed the substance of Ms. Barton’s claim. In our analysis, we simply assume, *arguendo*, we have subject matter jurisdiction and, because of the specific facts presented by these two cases, do not review the jurisdictional question.

rule”, and the case law surrounding the review of layoff actions establishes “that a reorganization must be approved before incumbents in eliminated positions are laid off by the appointing authority.” Appellants point to WDVA’s written policies and procedures related to reorganization, interpret the policy to require Department of Administration approval of the two reorganizations affecting Ms. Barton and Ms. Leaverton, and contend the Respondents have failed to sustain their burden of persuasion because Department of Administration approval was not obtained.

A. Construing the DVA reorganization policy for changes relating to the King Home

During the relevant time period, WDVA maintained a written policy that required review and approval of certain changes to the agency's organization structure. The policy, set forth at some length in Finding 4, requires approval by the Governor for changes at the "division" level, approval by the Department of Administration (DOA) for changes at the "bureau" level, and approval by the WDVA Secretary for organizational changes to "internal work units." In addition, the "transfer of an entire bureau, section, work unit or office" that "requires transfer between appropriations" must be approved by DOA.

The WDVA policy expressly adopts the statutory definition of organizational terms found in Sec. 15.02(3), Stats.:

(c) For their internal structure, all departments shall adhere to the following standard terms . . . :

1. The principal subunit of the department is the "division". Each division shall be headed by an "administrator". . . .
2. The principal subunit of the division is the "bureau". Each bureau shall be headed by a "director". . . .
3. If further subdivision is necessary, bureaus may be divided into subunits which shall be known as "sections" and which shall be headed by "chiefs" and sections may be divided into subunits which shall be known as "units" and which shall be headed by "supervisors".

In its organization chart, WDVA identified Appellant Barton's position as the Therapist Supervisor of the Physical Therapy section of the King Home's Bureau of Medical Services. The agency identified Appellant Leaverton's position, also bearing the classification of Therapist Supervisor, as the Director of the Bureau of Activities for King. However, the actual and functional organizational structure of WDVA shows that the nomenclature of "bureau" and "section" at the King Home is inconsistent with the way those terms are used in both the agency's reorganization policy and in Sec. 15.02(3), Stats.

The WDVA is a "department" for purposes of Sec. 15.02(3), Stats. During the relevant time period, William Kloster was the Department's Acting Secretary. WDVA includes several "divisions" including the Division of Administration, which was led by Administrator Seth Perelman, and the Division of Homes, headed by Acting Administrator Micabil ("Mike") Diaz. Pursuant to Sec. 45.50(1)(a), Stats., WDVA is required to employ a "commandant" for the Veterans Home at King as well as a commandant for the Veterans Home at Union Grove:

45.50 Veterans homes; management. (1)(a) The department shall operate the Wisconsin Veterans Home at King and employ a commandant for the home. The department shall employ a commandant for the Wisconsin Veterans Home at Union Grove and may employ a commandant for the Wisconsin Veterans Home at Chippewa Falls. The department may employ any personnel that are necessary for the proper management and operation of veterans homes. . . .

The Appellants do not disagree with any of the information found in this paragraph.

The organizational structure described in Sec. 15.02(3), Stats., does not explicitly take into account the provisions of Sec. 45.50, Stats., both in terms of the organizational units of the Veterans Home at King and the Veterans Home at Union Grove, as well as the commandants who are to manage those WDVA facilities.

Nevertheless, the record establishes that the Veterans Home at King is one of two principal subunits of the WDVA's Division of Nursing Homes. The other principal subunit of the Division is the Veterans Home at Union Grove. Both institutions are referenced in Sec. 45.50(1)(c), Stats., as are their respective managers, the commandants. Under these circumstances, we believe it is reasonable to interpret the WDVA policy on reorganization to equate the Home at King to a "bureau" in the sense the term is used in Sec. 15.02(3)(c)2., Stats., and the Home's Commandant to the bureau "director".²⁰

Once the Commandant of the King Home is treated as a "bureau director" for purposes of WDVA's organizational structure and reorganization policy, the subunits of the Home must be considered as sections, irrespective of the nomenclature actually assigned them by WDVA. The organization chart for the King Home, dated October 2006, lists 16 subunits that are to report directly to the Commandant, Deputy Commandant, or Adjutant. Ten of the 16 are identified on the organization chart as a "bureau", five as a "section", and one as a "unit". If the Commandant is considered the "bureau director" for the King Home "bureau", none of the 16 units within the Home can be considered, for the purposes of the reorganization policy and Sec. 15.02(3)(c), Stats., as anything higher in the organizational structure than a "section". In the context of the reorganization policy, the individuals who head the 16 units at the Home may be considered nothing higher in the organizational structure than a "section chief".

In terms of the 2006 organization chart, Appellant Barton led one of the units reporting to the head of the "Bureau of Medical Services". Because the Home's Commandant is a "bureau director" for purposes of the reorganization policy, the Medical Services subunit is a section led by a section chief, and Ms. Barton would be the unit supervisor for the Physical Therapy unit. In the same context, Appellant Leaverton, who led one of the 16 subunits reporting to the Commandant level, was a "section chief".

The WDVA reorganization policy requires the agency to obtain Department of Administration approval for changes at the "bureau" level. Because the two reorganizations that precipitated these appeals related to "internal work units" of the bureau-level King Home, neither the Governor nor the Department of Administration had to approve them. Permission from the WDVA Secretary was sufficient.

There is also nothing in the supplemented record that showed either reorganization required a transfer between appropriations. To the contrary, affidavits from Administrators

²⁰ The supplemented record indicates that agency management treated the King Home as a bureau for management purposes even though subunits of the Home were commonly referred to as bureaus.

Perelman and Diaz established that the reorganization of the Activities subunit did not require a transfer between appropriations. While WDVA policy provides that a reorganization requiring a transfer between appropriations must be approved by the Department of Administration, the provision has no application to the two reorganizations that are the subject of these appeals.

B. Other contentions

It is the further view of the Appellants that there is no evidence in the record establishing that Respondent WDVA complied with Wis. Stats. Sec. 16.705, or Ch. Adm. 10, Wis. Admin. Code, relative to contracting out of work. Prior to Appellant Barton's layoff, the King Home contracted with MJ Care to supply the bulk of the physical therapy needed by its members. The reorganization resulting in Ms. Barton's layoff was premised on expanding the role of MJ Care to extend to a therapy maintenance program that had previously been provided by employees of the facility.

Nothing in this record suggests that there was a change in the terms or conditions of the contract between the WDVA and MJ Care. A contract had been in place for therapy services long before the events giving rise to this dispute. There is no indication that any new contract was created or an existing contract modified as a result of this reorganization.

There is also no evidence that the reorganization relating to Appellant Leaverton's position or Appellant Barton's position led to a new contract or modified an existing contract.

C. Reorganization within the Medical Services subunit (Barton appeal)

The reorganization of the Medical Services subunit amounted to the elimination of the Therapist Supervisor position which was converted to two half-time Nursing Clinician (Registered Nurse) positions. Ms. Barton had supervised two Therapy Assistants. The WDVA's reorganization plan reflected the agency's conclusions that Ms. Barton's position was misclassified and that King's resources could be more effectively allocated. The overall amount of physical therapy provided within the facility had declined in the preceding two years. Most of the physical therapy for King's members was being provided by MJ Care on a contractual basis. The record indicates that during the period leading up to the layoff, Ms. Barton was scheduled to provide very little hands-on therapy. Her work was to be absorbed by staff Therapy Assistants or by MJ Care.

In the period immediately preceding the layoff, the Home had too few Registered Nurses for its needs. The Department had commissioned a study that reported a significant shortage of nurses. The results of the study were submitted to the Governor and Legislature to support the funding of additional nurse positions. The Home ended up with four nurse positions in the subsequent budget cycle. It was the uncontradicted testimony of Adjutant Jackie Moore that, following receipt of those positions, there were still not enough Registered

Nurses to fill the staffing schedule. Moore testified that the addition of the two half-time Nurse Clinician positions created in conjunction with Appellant Barton's layoff allowed for the schedule to be fully staffed.²¹

On its face, the reorganization appears to be the product of a decision to expand hands-on care for the members of the King Home. Nothing in the record suggests that the reorganization affecting Ms. Barton's Therapist Supervisor position was motivated by anything other than the operational considerations set forth above. The Appellant does not meaningfully attack the rationale of the reorganization.

Adjutant Moore's reorganization plan was approved by Human Resource Director Franke and King Home Commandant Crowley and forwarded to Division of Administration Administrator Perelman and to Acting Administrator Diaz of the agency's Division of Homes. They approved the plan and forwarded it to William Kloster, who was serving as the Acting Secretary of the Department and was the appointing authority. Kloster approved the reorganization plan as required by the agency's written reorganization policy. Franke also drew up a layoff plan, and submitted it to the Division of Merit Recruitment and Selection, where it was approved. Respondents obtained or provided all approvals necessary for Appellant Barton's layoff.

D. Reorganization of the Activities subunit (Leaverton appeal)

The Activities subunit of the King Home was headed by Catherine Leaverton, in a position classified as a Therapist Supervisor. Although Appellant Leaverton is listed on the organization chart as the Director of the Bureau of Activities, we have already concluded that in terms of the WDVA reorganization policy, the position was actually that of a section chief.

The Activities subunit consisted of six Therapist Senior positions and ten full or part-time Therapist Assistant positions. Ms. Leaverton reported to the Deputy Commandant. The effect of the reorganization was to eliminate the subunit, eliminate the Therapist Supervisor position, and to have the various Therapists and Assistants assigned to one of four residence halls, supervised by a building Nursing Supervisor. The building supervisors reported to the King Home's Director of Nursing. The reorganization had the effect of consolidating supervision of patient care which was consistent with the person-centered care model described in Adjutant Moore's June 14 proposal.

The reorganization plan called for eliminating the Therapist Supervisor position and converting it to two half-time Therapy Assistants. It is the Therapy Assistants who provide the bulk of hands-on service to the members. The record indicates that the King Home suffered a shortage of Activity Therapists and Assistants and that the organizational change led to the delivery of additional service for the members.

²¹ The Commission has modified this paragraph in the proposed decision to better articulate the underlying facts.

The reorganization plan and accompanying layoff plan were approved by Director of Human Resources Franke and Commandant Crowley and were forwarded to the Division of Administration. Division Administrator Perelman and Acting Administrator Diaz of the Division of Homes approved the plans and submitted them to the Office of the Secretary. Acting Secretary Kloster approved them as well. The layoff plan was then submitted to and approved by the Division of Merit Recruitment and Selection.

Appellant Leaverton disagrees with the wisdom of the reorganization but does not advance an argument that the reorganization or the layoff were motivated by improper considerations or that the WDVA acted in an arbitrary or irrational manner when it determined to reallocate scarce resources to patient care in lieu of supervision of care providers.

E. Summary

The record supports a conclusion that the layoffs of Appellant Barton and Appellant Leaverton accomplished what WDVA claimed to be seeking; increased patient care within a confined budget. For all of the above reasons, there was just cause for the layoffs of both Appellants and the Respondents' layoff actions must be affirmed.

Dated at Madison, Wisconsin this 2nd day of March, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner