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MEMORANDUM

To: Members, JCRAR
From: Senator Judith Robson, Co-Chair
Representative Glenn Grothman, Co-Chair
Date: August 10, 1999
Re: Service of Lawsuit

Pursuant to s. 227.40(5), Stats, the Joint Committee for Review of Administrative Rules has been served with notice in the matter of *Thomas Bush v. Wisconsin Department of Health and Family Services*. The case was filed in Dane County Circuit Court on July 1, 1999, and the case number is 99-CV-1531. A copy of the Petition is attached.

Subchapter III of Chapter 227, Stats, establishes an action for declaratory judgment in the circuit court for Dane County to be the primary means for judicial review in a dispute concerning the validity of an administrative rule. Subject to the approval of the Joint Committee on Legislative Organization, the Joint Committee for Review of Administrative Rules may choose to be made a party to the suit, and thereby be entitled to be heard.

If you are interested in a further pursuit of the rights of the JCRAR under this suit, please forward your request in writing to the offices of the co-chairs of the committee.

STYLER, KOSTICH, LeBELL, DOBROSKI & McGUIRE

ATTORNEYS AT LAW

DONALD P. STYLER
NIKOLA P. KOSTICH
ROBERT G. LeBELL
JOHN D. DOBROSKI
RICHARD P. McGUIRE, JR.
COURT COMMISSIONER

100 EAST WISCONSIN AVENUE
SUITE 1700
MILWAUKEE, WISCONSIN 53202-4113
TELEPHONE: (414) 276-1233
FAX: (414) 276-5874

August 10, 1999

Cory Mason, Clerk to
Senator Judy Robson
Co-Chairman JCRAR
Wisconsin State Capitol
Room 15 South

Maggie Grimm, Clerk to
Representative Glenn Grothman
Co-Chairman JCRAR
Wisconsin State Capitol
Room 15 North

Dear Senator Robson and Representative Grothman:

Enclosed for each of you are authenticated copies, plus 5 photocopies of the Summons and Action for Declaratory Judgment regarding Thomas Bush v. Wisconsin Department of Heath and Family Services, Case No. 99CV1531, and the Petition for Review of Administrative Decision/Order in Thomas Bush v. Wisconsin Department of Health and Family Services, Case No. 99CV562.

These documents are being personally served pursuant to §227.45, Wis. Stats. It is my understanding that you have 45 days to review same and respond if necessary.

Thank you for your courtesies in this matter.

Sincerely,

Robert G. LeBell
Attorney for Petitioner

RGL/cef

Enclosures

C. WILLIAM FOUST
CIRCUIT COURT BR 14

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

THOMAS BUSH,
Plaintiff,
vs.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Defendant.

Case No.: 99CV1531
Case Classification 30607

THIS IS AN AUTHENTICATED COPY OF THE ORIGINAL DOCUMENT FILED WITH THE DANE COUNTY CLERK OF CIRCUIT COURT
JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

SUMMONS

THE STATE OF WISCONSIN, TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY NOTIFIED that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within ~~twenty (20)~~ 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Court, Dane County Courthouse, 210 Martin Luther King Jr. Boulevard, Madison, Wisconsin 53709-0001** and to plaintiff's attorney, **Robert G. LeBell, whose address is 100 East Wisconsin Avenue, Suite 1700, Milwaukee, Wisconsin 53202.** You may have an attorney help or

represent you.

If you do not provide a proper answer within ~~twenty (20)~~ 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated at Milwaukee, Wisconsin, this 1st day of July, 1999.

Robert G. LeBell, 01015710
Attorney for Plaintiff
100 E. Wisconsin Avenue, #1700
Milwaukee, WI 53202
(414) 276-1233

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

THOMAS BUSH,
Plaintiff,

vs.

Case No.: 99CV1531
Case Classification 30607

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Defendant.

ACTION FOR DECLARATORY JUDGMENT

NOW COMES the plaintiff, Thomas Bush, through his attorney, Robert G. LeBell, and respectfully represents that:

1. Plaintiff is an adult resident of Winnebago County. The plaintiff is a resident of the Wisconsin Resource Center as a result of a commitment order entered on the 21st day of August, 1997. Said commitment order issued by the Eau Claire County Circuit Court declared that the plaintiff was a sexually violent person as defined by Wis. Stats. §980.

2. Defendant, Department of Health and Family Services (DHFS), is an agency of the State of Wisconsin, which is statutorily responsible for the custody of the plaintiff.

3. Plaintiff has resided at the Wisconsin Resource Center pursuant to such commitment order continuously as of the date of commitment.

4. Defendant DHFS is authorized, under certain circumstances, pursuant to §980.12 Wis. Stats., Department Duties; Costs; 20.435(2)(a)(bm) Health and Family Services, Department of; and 46.10 Cost of Care and Maintenance, Liability; Collection and Deportation of Counsel; Collections; Court Actions; Recovery, to recoup the cost of care and treatment provided to certain committed individuals.

5. Defendant DHFS posted notice for all Wisconsin Resource Center patients that effective July 1, 1999, each patient shall be responsible for the costs of the care and treatment provided by Wisconsin Resource Center. A copy of said notice is attached to this complaint as Exhibit "A".

6. On December 22, 1998, the Court of Appeals, District III, reversed and remanded for cause the trial court's judgment that plaintiff be committed as a sexually violent person under §980.05, Stats. A copy of said decision is attached to this complaint as Exhibit "B".

7. As of this date, plaintiff's commitment as a sexually violent person remains reversed although it is the subject of a pending petition for review before the Wisconsin Supreme Court, filed by the State of Wisconsin.

8. Consequently, plaintiff is illegally committed and no valid commitment order exists. Therefore, even if the defendant had the theoretical authority to recoup costs, it would be prevented from doing so in the plaintiff's case.

9. The defendant is further precluded from recouping costs because the plaintiff's commitment is illegal and unconstitutional.

10. The defendant is precluded from recouping monies for costs of care and treatment because the plaintiff's commitment is a collateral ramification of a criminal proceeding. (His) §980 commitment was ordered as a direct result of a prior conviction for a sexually violent offense.

11. The statute under which the plaintiff is committed is unconstitutional both on its face and as applied to the plaintiff. More specifically, the statute and its implementation have denied the plaintiff due process of law, and equal protection as guaranteed by the Wisconsin and United States Constitutions. Furthermore, the statute on its face and as applied constitutes an *ex post facto* law and is violative of the plaintiff's right to be

free from being twice placed in jeopardy, as protected by the United States and Wisconsin Constitution.

12. The statute on its face and as applied constitutes punishment which is cruel, unusual, and excessive as proscribed by the United States and Wisconsin Constitutions. The purported objective of treatment has not been fulfilled nor has it been properly pursued by the defendant. The means by which the plaintiff's commitment has been instituted constitutes punishment as well as a deprivation of liberty which is penal in nature. The plaintiff's care and custody provided by the defendant has, since the inception of such commitment, constituted incarceration without meaningful treatment. Furthermore, the plaintiff has been treated as if he were a prisoner subject to the control of the Division of Corrections. The defendant has denied the plaintiff certain statutory, constitutional, and administrative rights which would be enjoyed either as a state prisoner or as a committed patient.

13. The rule by which the defendant has implemented its claimed statutory authority and the statutory authority upon which the defendant relies are unconstitutional on its face and as applied to the plaintiff. The Department

therefore is precluded from implementing and applying a rule which results in an unconstitutional deprivation of liberty and/or taking of the plaintiff's property.

14. The rule under which the defendant claims it has authority to act in the instant matter was not adopted in compliance with the statutory rule making authority.

15. Any attempted recoupment by the defendant would exceed its statutory, lawful, and/or constitutional authority.

16. Pursuant to Chapter 227 of Wis. Stats., plaintiff seeks a declaratory judgment that the defendant DHFS is not authorized to recoup monies from the plaintiff for the costs of care and treatment.

17. Such declaratory judgment should provide that:

a. DHFS has no authority pursuant to Wis. Stats. §46.10, §980, HFS 20.435(2)(a)(bm), to recoup monies for costs of care and treatment because plaintiff is illegally committed and no valid commitment order exists. Jankowski v. Milwaukee County, 312 N.W.2d 45, 104 Wis.2d 431 (1981) (holding that individuals illegally and involuntarily committed may not be held responsible for costs of care pursuant to §46.10).

b. Even assuming a valid commitment order exists and the commitment is not illegal, DHFS's use of §46.10, §980 and HFS 20.435(2)(a)(bm), to recoup monies for costs of care and treatment violates the plaintiff's rights as guaranteed by the *ex post facto*, double jeopardy, due process, equal protection, and excessive fines and punishment provisions of the United States and Wisconsin Constitutions.

c. Recoupment is further prohibited because the commitment of the plaintiff is a collateral ramification of the criminal proceeding.

d. Recoupment constitutes an unlawful taking by virtue of the involuntary nature of the plaintiff's commitment.

e. Recoupment is prohibited because the commitment of the plaintiff constitutes penal confinement, is punitive in nature and has not afforded the plaintiff proper care and treatment.

WHEREFORE, plaintiff asks that this court:

1. Enter a declaratory judgment that DHFS cannot recoup costs from plaintiff pursuant to Wis. Stats. §46.10, §980.12, HFS 20.435(2)(a)(bm), and/or by any other means

or rule until plaintiff's commitment status has been lawfully determined.

2. Enter a declaratory judgment that application of Wis. Stats. §46.10, §980.12, HFS 20.435(2)(a)(bm), and/or by any other means or rule to the plaintiff is unconstitutional both on its face and as applied.

3. Enter an order that the defendant exceeded its statutory authority in the passage of the rule and its implementation as applied.

4. Enter an order declaring that the rule upon which the defendant relies was adopted without compliance with the statutory rule making authority.

5. Grant the plaintiff leave to present additional materials and evidence in support of the instant complaint.

6. Grant the plaintiff authority to conduct discovery as permitted in Wis. Stats. §804.

Dated this 1st day of July, 1999.

Respectfully submitted,

Robert G. LeBell, 01015710
Attorney for Plaintiff
100 E. Wisconsin Avenue, #1700
Milwaukee, WI 53202
(414) 276-1233

Unit 6

Tommy G. Thompson
Governor

Joe Leean
Secretary

State of Wisconsin

Department of Health and Family Services

PLEASE POST

DIVISION OF CARE AND TREATMENT FACILITIES

WISCONSIN RESOURCE CENTER
BOX 15
WINNEBAGO WI 54985-0015

(414) 426-4310

EXHIBIT
A

NOTICE TO ALL WRC PATIENTS

June 1, 1999

COST OF CARE AND TREATMENT

Effective July 1, 1999, and every month thereafter, each patient will be responsible for the costs of the care and treatment provided to him. This is in accordance with State Statutes: 980.12 Department Duties; Costs; 20.435(2)(a)(bm) Health and Family Services, Department of; and 46.10 Cost of Care and Maintenance, Liability; Collection and Deportation Counsel; Collections; Court Actions; Recovery. These statutes provide that certain family members of patients may also be liable for the cost of care and treatment provided.

WRC will notify each patient of the amount of the cost of care and treatment provided to him in the form of a patient billing each month.

The bill you will receive in August will cover the previous month's costs incurred (i.e. July 1999) and will not be itemized.

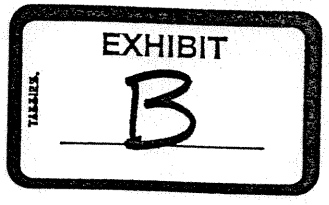
You will be billed at the rate of $242.00 per day for Fiscal Year 2000 (July 1, 1999 to July 1, 2000).

Sincerely,

Phillip G. Magnit
Director
WISCONSIN RESOURCE CENTER

PGM:nab

Cc: Executive Management Staff
Patient Accounts
CRS
Registrar
Administrative Assistant
File



COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-3454

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE COMMITMENT OF:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

THOMAS H. BUSH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Thomas Bush appeals a judgment determining that he is a sexually violent person under § 980.05, STATS., and committing him to the custody of the Wisconsin Department of Health and Family Services for control,

care and treatment. Bush raises seven issues: (1) the trial court erroneously instructed the jury; (2) the trial court made erroneous evidentiary rulings; (3) newly discovered evidence requires a new trial; (4) the prosecutor made improper argument; (5) Bush should not have been committed but granted supervised release; (6) he was denied due process by operation of § 980.04(2), STATS., and ch. 980 is unconstitutional; and (7) his request for a closed hearing was improperly denied. Because the trial court erroneously instructed the jury and the error was not harmless, we reverse the judgment and remand for a new trial.

Bush argues that the trial court erroneously instructed the jury. The standard jury instruction requires proof that the person "is dangerous to others because the mental disorder creates a substantial probability that he will engage in acts of sexual violence." *See* WIS J I—CRIMINAL 2502. Bush requested that the term, "substantial probability" be defined as a probability more than a possibility. He suggested that in order to be substantially probable, a result must be "highly likely" to happen. The trial court rejected this request, stating:

> The committee notes of the legislative history of this statute show that likely was the original word used in the draft. The term substantial probability was substituted to use a term that is more commonly used in the Wisconsin Statutes and was intended to be the equivalent of the word likely.

The court ultimately instructed that: "In order to be substantially probable, a result must be likely to happen."

Subsequent to trial, we published *State v. Kienitz*, 221 Wis.2d 275, 585 N.W.2d 609 (Ct. App. 1998), in which we concluded that "'substantially probable" means "considerably more likely to occur than not to occur." Because the trial court's instruction was incomplete in light of *Kienitz*, it was erroneous.

When the circuit court has given an erroneous instruction, a new trial is not warranted unless the error is prejudicial. *Nowatske v. Osterloh*, 198 Wis.2d 419, 429, 543 N.W.2d 265, 268 (1996). "[A]n error relating to the giving or refusing to give an instruction is not prejudicial if it appears that the result would not be different had the error not occurred." Here, there was evidence in the form of expert opinion testimony that the risk of Bush reoffending was moderate. As a result, we are unable to conclude beyond a reasonable doubt that the instructional error is harmless. *See State v. Nye*, 100 Wis.2d 398, 403-05, 302 N.W.2d 83, 86-87 Ct. App. 1981).

Because the instruction is dispositive, we need not address others on appeal. *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938). We nonetheless briefly consider those issues that may arise at Bush's new trial. We found no merit to any of Bush's other contentions. Bush asserts that the trial court committed error in other instructions to the jury. We reject Bush's contention that the trial court erroneously omitted the word, "mental," before the term "condition" in the following instruction: "Mental disorder means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." We agree with the State that the omitted term is redundant, and the context of the instructions conform to the law. *See* § 980.01(2), STATS.

We also find no merit to Bush's claim that the trial court erroneously used the term "prone" instead of "predisposes." The trial court instructed the jury: "Rather, the focus here is on whether Thomas Bush has a current diagnosis of a present disorder that makes him prone to commit sexually violent acts in the future." Bush claims the term "prone" is unconstitutionally vague. In *State v. Post*, 197 Wis.2d 279, 307, 541 N.W.2d 115, 124 (1995), however, our supreme court stated that "the focal point of commitment is not on past acts but on current

diagnosis of a present disorder suffered by an individual that specifically causes that person to be *prone* to commit sexually violent acts in the future." (Emphasis added.) Prone is defined to mean: "having a tendency, propensity, or inclination : DISPOSED, PREDISPOSED ...." WEBSTER'S THIRD NEW INT'L DICTIONARY 1816 (unabr. 1993). Because prone is synonymous with predispose within the context used here, we reject his argument.

Bush further argues that the trial court erroneously deleted a portion of the pattern jury instruction that the court found "nearly incomprehensible." The court rejected the following portion of WIS J I—CRIMINAL 2502:

> The condition must be a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and must be associated with a current state of distress or impaired functioning, or with a significant risk of pain, death or loss of freedom. Disorders do not include merely deviant behaviors that conflict with prevailing societal mores.

This language was derived from *Post*, 197 Wis.2d at 306, 541 N.W.2d at 123-24, and quotes the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV at xxi-xxii.

Each instruction must be viewed in the context of the overall charge to the jury. *Buel v. La Crosse Transit Co.*, 77 Wis.2d 480, 493, 253 N.W.2d 232, 238 (1977). If the instructions adequately cover the law applicable to the facts, we will not find error in refusal of specific instructions even though the refused instruction itself would not be erroneous. *Nashban Barrel & Container v. G.G. Parsons Trucking*, 49 Wis.2d 591, 606, 182 N.W.2d 448, 456 (1971). We conclude that the omission of this language does not constitute reversible error. As the trial court pointed out, this language is not found in the statute and is an

elaboration of the meaning of "mental disorder." The court's instructions adequately defined this term. The record reflects a reasonable exercise of discretion, and we thus reject Bush's claim of error.

Next, Bush contends that the trial court erroneously exercised its discretion when it committed him instead of granting supervised release. He claims that the trial court applied an incorrect legal standard under § 980.06(2)(b), STATS., because it failed to consider the least restrictive alternative before institutionalization. We disagree.

Bush relies on § 980.06(2)(b), STATS.:[1]

> An order for commitment under this section shall specify either institutional care in a secure mental health unit or facility, as provided under s. 980.065, or other facility or supervised release. In determining whether commitment shall be for institutional care in a secure mental health unit or facility or other facility or for supervised release, the court may consider, without limitation because of enumeration, the nature and circumstances of the behavior that was the basis of the allegation in the petition under s. 980.02 (2) (a), the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment. *The department shall arrange for control, care and treatment of the person in the least restrictive manner* consistent with the requirements of the person and in accordance with the court's commitment order. (Emphasis added.)

This statutory language requires the court, in its order for commitment, to "specify either institutional care in a secure mental health unit or facility, as provided under s. 980.065, or other facility or supervised release." *Id.*

[1] Bush relies on the quoted language found in § 980.06(2)(b), STATS., but mistakenly cites the section as § 980.06(1)(b), STATS.

It is not the court's statutory duty to arrange for treatment in the least restrictive manner; rather, "it is the *department's* statutory duty to 'arrange for control, care and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the court's commitment order.'" *State v. Keding*, 214 Wis.2d 362, 369-70, 571 N.W.2d 450, 453 (1997) (quoting § 980.06(2)(b), STATS.) (emphasis in the original).

The record discloses that the trial court correctly discharged its statutory duties. The trial court stated that in reaching its decision, it considered not only the testimony presented at the dispositional hearing, but also the testimony at trial. The trial court considered Bush's history of sexual offenses, his previous mental history, his past treatment, his present mental condition, and the risk of re-offending. The court also considered protection of public safety. In light of these factors, it concluded that at this time placement on supervised release was inappropriate. The court reasonably exercised its discretionary function of considering interrelated statutory factors and provided a rational basis for its decision. *See id.* at 366, 571 N.W.2d at 452. As a result, we do not disturb it on appeal.[2]

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[2] In a one-sentence argument, Bush challenges the constitutionality of § 980.06(2)(b), STATS. His entire argument is as follows:

> If, in fact, it is the interpretation of this court that the least restrictive alternative analysis is not proper for rendering a commitment decision, the respondent maintains that the failure to so require denies him equal protection and due process of law when §980 is compared to Chap. 51 and 55 of the Wisconsin statutes.

He cites the "Fifth, Fourteenth, Sixth Amendments to the United States Constitution and Article 1, section 8 of the Wisconsin Constitution." Bush's argument is more of a heading to an argument rather than a reasoned analysis. Because it is not sufficiently developed, this court declines to address it. *State v. Pettit*, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).

Next, Bush argues that § 980.04(2), STATS., is an unconstitutional deprivation of due process because it required the court to hold a probable cause hearing within seventy-two hours. Ironically, the statutory time limit is for the benefit of an accused held in custody.[3] Nonetheless, Bush claims he needed a longer time frame to obtain defense expert testimony. We reject his due process claim for two independently dispositive reasons. Bush fails to demonstrate that he preserved any claim of error by requesting waiver of the seventy-two-hour time limit. Moreover, we perceive the probable cause hearing under § 980.04(2), STATS., to be a summary proceeding[4] in the nature of a preliminary examination under § 970.03, STATS. Thus, if there is evidence at the hearing that plausibly demonstrates the respondent is probably a sexually violent person, the ch. 980 matter must proceed, even in the face of equally plausible evidence to the contrary. *Cf. State v. Dunn*, 121 Wis.2d 389, 398, 359 N.W.2d 151, 155 (1984) (probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the alleged charge).

Bush further argues that ch. 980, STATS., is unconstitutional because it (1) is an ex post facto law; (2) denies due process because it permits mental commitment without a showing that the individual is mentally ill or amenable to

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[3] Section 980.04(2), STATS., provides:

> Whenever a petition is filed under s. 980.02, the court shall hold a hearing to determine whether there is probable cause to believe that the person named in the petition is a sexually violent person. If the person named in the petition is in custody, the court shall hold the probable cause hearing within 72 hours after the petition is filed, excluding Saturdays, Sundays and legal holidays. If the person named in the petition is not in custody, the court shall hold the probable cause hearing within a reasonable time after the filing of the petition.

[4] *See State v. Richer*, 174 Wis.2d 231, 243, 496 N.W.2d 66, 70 (1993).

treatment; (3) permits publication of his past medical records; (3) is arbitrary and capricious; (4) is void for vagueness; (5) violates double jeopardy protections; (5) violates equal protection rights; and (6) it is a prohibited bill of attainder.

Bush concedes that "[i]n large measure these arguments have been previously addressed and rejected in State v. Carpenter, 197 W2d 252 (1995) and State v. Post, 197 W2d 279 (1995)," but nevertheless raises the issues to preserve for further appeal. In lieu of his concession and because he fails to distinguish his arguments from the holdings in *Carpenter* and *Post*, we decline to address them. We are bound by supreme court precedent. *McCaffrey v. Shanks*, 124 Wis.2d 216, 221, 369 N.W.2d 743, 747 (Ct. App. 1985).

Next, Bush argues that the trial court improperly denied his request for a closed hearing in violation of his equal protection, due process and privacy rights as guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution and art. I, §§ 1 and 8 of the Wisconsin Constitution. Bush concedes that ch. 980, STATS., is silent with respect to a request for a closed hearing. Nonetheless, he contends that the trial court erroneously exercised its discretion to close the hearing under its inherent powers. He argues that the trial court was required to hold a fact-finding hearing on the issue of closure.

Prior to trial, Bush requested that the hearing be closed by analogizing to a civil commitment hearing under § 51.20(5), STATS. The trial court explained that because there is no statutory right under ch 980, STATS., to close the hearing, the requester must show some reason beyond that it is a mental commitment that may contain embarrassing information.

The trial court was correct. *State ex rel. Wisconsin State Journal v. Circuit Court*, 131 Wis.2d 515, 522, 389 N.W.2d 73, 76 (1986), discussed the

presumption that proceedings be open and observed that the circumstances justifying closure must be "unusually compelling. A courtroom should be closed only when not to do so would defeat the very purpose of the proceedings or would subvert the 'overwhelming public values connected with the administration of justice.'" Bush offered no special compelling reason to warrant closure. We therefore reject his argument.

Finally, we do not believe it would be of assistance to the trial court for us to address Bush's challenges to evidentiary rulings because these issues are generally addressed to the trial court's discretion, and the scope of our review is limited to the context in which the evidence is offered and objection raised. *See State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983); *see also* § 901.03(1), STATS.

By the Court.—Judgment reversed and cause remanded for a new trial.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

STATE OF WISCONSIN CIRCUIT COURT WINNEBAGO COUNTY

THOMAS BUSH,

Petitioner,

vs.

Case No.: 99CV562 BR5
Case Classification 30607

WISCONSIN DEPARTMENT OF
HEALTH AND FAMILY SERVICES,

Respondent.

PETITION FOR REVIEW OF ADMINISTRATIVE DECISION/ORDER

NOW COMES the petitioner, Thomas Bush, through his attorney, Robert G. LeBell, and respectfully represents that:

1. Petitioner is an adult resident of Winnebago County. The petitioner is a resident of the Wisconsin Resource Center as a result of a commitment order entered on the 21st day of August, 1997. Said commitment order issued by the Eau Claire County Circuit Court declared that the petitioner was a sexually violent person as defined by Wis. Stats. §980.

2. Respondent, Department of Health and Family Services (DHFS), is an agency of the State of Wisconsin, which is

statutorily responsible for the custody of the petitioner.

3. Petitioner has resided at the Wisconsin Resource Center pursuant to such commitment order continuously as of the date of commitment.

4. Respondent DHFS is authorized, under certain circumstances, pursuant to §980.12 Wis. Stats., Department Duties; Costs; 20.435(2)(a)(bm) Health and Family Services, Department of; and 46.10 Cost of Care and Maintenance, Liability; Collection and Deportation of Counsel; Collections; Court Actions; Recovery, to recoup the cost of care and treatment provided to certain committed individuals.

5. Respondent DHFS posted notice for all Wisconsin Resource Center patients that effective July 1, 1999, each patient shall be responsible for the costs of the care and treatment provided by Wisconsin Resource Center. A copy of said notice is attached to this complaint as Exhibit "A".

6. On December 22, 1998, the Court of Appeals, District III, reversed and remanded for cause the trial court's judgment that petitioner be committed as a sexually

violent person under §980.05, Stats. A copy of said decision is attached to this complaint as Exhibit "B".

7. As of this date, petitioner's commitment as a sexually violent person remains reversed although it is the subject of a pending petition for review before the Wisconsin Supreme Court, filed by the State of Wisconsin.

8. Consequently, petitioner is illegally committed and no valid commitment order exists. Therefore, even if the respondent had the theoretical authority to recoup costs, it would be prevented from doing so in the petitioner's case.

9. The respondent is further precluded from recouping costs because the petitioner's commitment is illegal and unconstitutional.

10. The defendant is precluded from recouping monies for costs of care and treatment because the plaintiff's commitment is a collateral ramification of a criminal proceeding. (His) §980 commitment was ordered as a direct result of a prior conviction for a sexually violent offense.

11. The statute under which the petitioner is committed is unconstitutional both on its face and as applied to the petitioner. More specifically, the statute and its

implementation have denied the petitioner due process of law, and equal protection as guaranteed by the Wisconsin and United States Constitutions. Furthermore, the statute on its face and as applied constitutes an *ex post facto* law and is violative of the petitioner's right to be free from being twice placed in jeopardy, as protected by the United States and Wisconsin Constitution.

12. The statute on its face and as applied constitutes punishment which is cruel, unusual, and excessive as proscribed by the United States and Wisconsin Constitutions. The purported objective of treatment has not been fulfilled nor has it been properly pursued by the respondent. The means by which the petitioner's commitment has been instituted constitutes punishment as well as a deprivation of liberty which is penal in nature. The petitioner's care and custody provided by the respondent has, since the inception of such commitment, constituted incarceration without meaningful treatment. Furthermore, the petitioner has been treated as if he were a prisoner subject to the control of the Division of Corrections. The respondent has denied the petitioner certain statutory, constitutional, and

administrative rights which would be enjoyed either as a state prisoner or as a committed patient.

13. The rule by which the respondent has implemented its claimed statutory authority and the statutory authority upon which the respondent relies are unconstitutional on its face and as applied to the petitioner. The Department therefore is precluded from implementing and applying a rule which results in an unconstitutional deprivation of liberty and/or taking of the petitioner's property.

14. The rule under which the respondent claims it has authority to act in the instant matter was not adopted in compliance with the statutory rule making authority.

15. Any attempted recoupment by the respondent would exceed its statutory, lawful, and/or constitutional authority.

16. Pursuant to Chapter 227 of Wis. Stats., the petitioner seeks a review by the circuit court of the decision and order mandating recoupment for the costs of care and treatment in accordance with Wis. Stats. §980.12, §46.10 and HFS 20.435(2)(a)(bm).

WHEREFORE, petitioner requests that this court:

1. Review the decision and order subject of this petition and conduct a hearing according to statute. After such

review it is requested that the court set aside and declare such provision unenforceable as they relate to the petitioner.

2. Enter an order that the application of Wis. Stats. §46.10, §980.12, HFS 20.435(2)(a)(bm), to the petitioner is unconstitutional both on its face and as applied.

3. Enter an order that the respondent exceeded its statutory authority in the passage of the rule and its implementation to the petitioner.

4. Enter an order determining that the rule upon which the respondent relies was adopted without compliance with the statutory rule making authority.

5. Enter an order that the respondent has erroneously interpreted Wis. Stats. §46.10, §980.12, and HFS 20.435(2)(a)(bm).

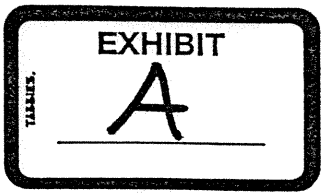
6. Grant the petitioner leave to present additional materials and evidence in support of the instant complaint.

7. Grant the petitioner authority to conduct discovery as permitted in Wis. Stats. §804.

Dated this 1st day of July, 1999.

Respectfully submitted,

Robert G. LeBell, 01015710
Attorney for Petitioner
100 E. Wisconsin Avenue, #1700
Milwaukee, WI 53202
(414) 276-1233



COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-3454

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE COMMITMENT OF:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

THOMAS H. BUSH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Thomas Bush appeals a judgment determining that he is a sexually violent person under § 980.05, STATS., and committing him to the custody of the Wisconsin Department of Health and Family Services for control,

care and treatment. Bush raises seven issues: (1) the trial court erroneously instructed the jury; (2) the trial court made erroneous evidentiary rulings; (3) newly discovered evidence requires a new trial; (4) the prosecutor made improper argument; (5) Bush should not have been committed but granted supervised release; (6) he was denied due process by operation of § 980.04(2), STATS., and ch. 980 is unconstitutional; and (7) his request for a closed hearing was improperly denied. Because the trial court erroneously instructed the jury and the error was not harmless, we reverse the judgment and remand for a new trial.

Bush argues that the trial court erroneously instructed the jury. The standard jury instruction requires proof that the person "is dangerous to others because the mental disorder creates a substantial probability that he will engage in acts of sexual violence." *See* WIS J I—CRIMINAL 2502. Bush requested that the term, "substantial probability" be defined as a probability more than a possibility. He suggested that in order to be substantially probable, a result must be "highly likely" to happen. The trial court rejected this request, stating:

> The committee notes of the legislative history of this statute show that likely was the original word used in the draft. The term substantial probability was substituted to use a term that is more commonly used in the Wisconsin Statutes and was intended to be the equivalent of the word likely.

The court ultimately instructed that: "In order to be substantially probable, a result must be likely to happen."

Subsequent to trial, we published *State v. Kienitz*, 221 Wis.2d 275, 585 N.W.2d 609 (Ct. App. 1998), in which we concluded that "'substantially probable" means "considerably more likely to occur than not to occur." Because the trial court's instruction was incomplete in light of *Kienitz*, it was erroneous.

When the circuit court has given an erroneous instruction, a new trial is not warranted unless the error is prejudicial. *Nowatske v. Osterloh*, 198 Wis.2d 419, 429, 543 N.W.2d 265, 268 (1996). "[A]n error relating to the giving or refusing to give an instruction is not prejudicial if it appears that the result would not be different had the error not occurred." Here, there was evidence in the form of expert opinion testimony that the risk of Bush reoffending was moderate. As a result, we are unable to conclude beyond a reasonable doubt that the instructional error is harmless. *See State v. Nye*, 100 Wis.2d 398, 403-05, 302 N.W.2d 83, 86-87 Ct. App. 1981).

Because the instruction is dispositive, we need not address others on appeal. *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938). We nonetheless briefly consider those issues that may arise at Bush's new trial. We found no merit to any of Bush's other contentions. Bush asserts that the trial court committed error in other instructions to the jury. We reject Bush's contention that the trial court erroneously omitted the word, "mental," before the term "condition" in the following instruction: "Mental disorder means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." We agree with the State that the omitted term is redundant, and the context of the instructions conform to the law. *See* § 980.01(2), STATS.

We also find no merit to Bush's claim that the trial court erroneously used the term "prone" instead of "predisposes." The trial court instructed the jury: "Rather, the focus here is on whether Thomas Bush has a current diagnosis of a present disorder that makes him prone to commit sexually violent acts in the future." Bush claims the term "prone" is unconstitutionally vague. In *State v. Post*, 197 Wis.2d 279, 307, 541 N.W.2d 115, 124 (1995), however, our supreme court stated that "the focal point of commitment is not on past acts but on current

diagnosis of a present disorder suffered by an individual that specifically causes that person to be *prone* to commit sexually violent acts in the future." (Emphasis added.) Prone is defined to mean: "having a tendency, propensity, or inclination : DISPOSED, PREDISPOSED ...." WEBSTER'S THIRD NEW INT'L DICTIONARY 1816 (unabr. 1993). Because prone is synonymous with predispose within the context used here, we reject his argument.

Bush further argues that the trial court erroneously deleted a portion of the pattern jury instruction that the court found "nearly incomprehensible." The court rejected the following portion of WIS J I—CRIMINAL 2502:

> The condition must be a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and must be associated with a current state of distress or impaired functioning, or with a significant risk of pain, death or loss of freedom. Disorders do not include merely deviant behaviors that conflict with prevailing societal mores.

This language was derived from *Post*, 197 Wis.2d at 306, 541 N.W.2d at 123-24, and quotes the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV at xxi-xxii.

Each instruction must be viewed in the context of the overall charge to the jury. *Buel v. La Crosse Transit Co.*, 77 Wis.2d 480, 493, 253 N.W.2d 232, 238 (1977). If the instructions adequately cover the law applicable to the facts, we will not find error in refusal of specific instructions even though the refused instruction itself would not be erroneous. *Nashban Barrel & Container v. G.G. Parsons Trucking*, 49 Wis.2d 591, 606, 182 N.W.2d 448, 456 (1971). We conclude that the omission of this language does not constitute reversible error. As the trial court pointed out, this language is not found in the statute and is an

elaboration of the meaning of "mental disorder." The court's instructions adequately defined this term. The record reflects a reasonable exercise of discretion, and we thus reject Bush's claim of error.

Next, Bush contends that the trial court erroneously exercised its discretion when it committed him instead of granting supervised release. He claims that the trial court applied an incorrect legal standard under § 980.06(2)(b), STATS., because it failed to consider the least restrictive alternative before institutionalization. We disagree.

Bush relies on § 980.06(2)(b), STATS.:[1]

> An order for commitment under this section shall specify either institutional care in a secure mental health unit or facility, as provided under s. 980.065, or other facility or supervised release. In determining whether commitment shall be for institutional care in a secure mental health unit or facility or other facility or for supervised release, the court may consider, without limitation because of enumeration, the nature and circumstances of the behavior that was the basis of the allegation in the petition under s. 980.02 (2) (a), the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment. *The department shall arrange for control, care and treatment of the person in the least restrictive manner* consistent with the requirements of the person and in accordance with the court's commitment order. (Emphasis added.)

This statutory language requires the court, in its order for commitment, to "specify either institutional care in a secure mental health unit or facility, as provided under s. 980.065, or other facility or supervised release." *Id.*

[1] Bush relies on the quoted language found in § 980.06(2)(b), STATS., but mistakenly cites the section as § 980.06(1)(b), STATS.

It is not the court's statutory duty to arrange for treatment in the least restrictive manner; rather, "it is the *department's* statutory duty to 'arrange for control, care and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the court's commitment order.'" *State v. Keding*, 214 Wis.2d 362, 369-70, 571 N.W.2d 450, 453 (1997) (quoting § 980.06(2)(b), STATS.) (emphasis in the original).

The record discloses that the trial court correctly discharged its statutory duties. The trial court stated that in reaching its decision, it considered not only the testimony presented at the dispositional hearing, but also the testimony at trial. The trial court considered Bush's history of sexual offenses, his previous mental history, his past treatment, his present mental condition, and the risk of re-offending. The court also considered protection of public safety. In light of these factors, it concluded that at this time placement on supervised release was inappropriate. The court reasonably exercised its discretionary function of considering interrelated statutory factors and provided a rational basis for its decision. *See id.* at 366, 571 N.W.2d at 452. As a result, we do not disturb it on appeal.[2]

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[2] In a one-sentence argument, Bush challenges the constitutionality of § 980.06(2)(b), STATS. His entire argument is as follows:

> If, in fact, it is the interpretation of this court that the least restrictive alternative analysis is not proper for rendering a commitment decision, the respondent maintains that the failure to so require denies him equal protection and due process of law when §980 is compared to Chap. 51 and 55 of the Wisconsin statutes.

He cites the "Fifth, Fourteenth, Sixth Amendments to the United States Constitution and Article 1, section 8 of the Wisconsin Constitution." Bush's argument is more of a heading to an argument rather than a reasoned analysis. Because it is not sufficiently developed, this court declines to address it. *State v. Pettit*, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).

Next, Bush argues that § 980.04(2), STATS., is an unconstitutional deprivation of due process because it required the court to hold a probable cause hearing within seventy-two hours. Ironically, the statutory time limit is for the benefit of an accused held in custody.[3] Nonetheless, Bush claims he needed a longer time frame to obtain defense expert testimony. We reject his due process claim for two independently dispositive reasons. Bush fails to demonstrate that he preserved any claim of error by requesting waiver of the seventy-two-hour time limit. Moreover, we perceive the probable cause hearing under § 980.04(2), STATS., to be a summary proceeding[4] in the nature of a preliminary examination under § 970.03, STATS. Thus, if there is evidence at the hearing that plausibly demonstrates the respondent is probably a sexually violent person, the ch. 980 matter must proceed, even in the face of equally plausible evidence to the contrary. *Cf. State v. Dunn*, 121 Wis.2d 389, 398, 359 N.W.2d 151, 155 (1984) (probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the alleged charge).

Bush further argues that ch. 980, STATS., is unconstitutional because it (1) is an ex post facto law; (2) denies due process because it permits mental commitment without a showing that the individual is mentally ill or amenable to

---

[3] Section 980.04(2), STATS., provides:

> Whenever a petition is filed under s. 980.02, the court shall hold a hearing to determine whether there is probable cause to believe that the person named in the petition is a sexually violent person. If the person named in the petition is in custody, the court shall hold the probable cause hearing within 72 hours after the petition is filed, excluding Saturdays, Sundays and legal holidays. If the person named in the petition is not in custody, the court shall hold the probable cause hearing within a reasonable time after the filing of the petition.

[4] *See State v. Richer*, 174 Wis.2d 231, 243, 496 N.W.2d 66, 70 (1993).

treatment; (3) permits publication of his past medical records; (3) is arbitrary and capricious; (4) is void for vagueness; (5) violates double jeopardy protections; (5) violates equal protection rights; and (6) it is a prohibited bill of attainder.

Bush concedes that "[i]n large measure these arguments have been previously addressed and rejected in State v. Carpenter, 197 W2d 252 (1995) and State v. Post, 197 W2d 279 (1995)," but nevertheless raises the issues to preserve for further appeal. In lieu of his concession and because he fails to distinguish his arguments from the holdings in *Carpenter* and *Post*, we decline to address them. We are bound by supreme court precedent. *McCaffrey v. Shanks*, 124 Wis.2d 216, 221, 369 N.W.2d 743, 747 (Ct. App. 1985).

Next, Bush argues that the trial court improperly denied his request for a closed hearing in violation of his equal protection, due process and privacy rights as guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution and art. I, §§ 1 and 8 of the Wisconsin Constitution. Bush concedes that ch. 980, STATS., is silent with respect to a request for a closed hearing. Nonetheless, he contends that the trial court erroneously exercised its discretion to close the hearing under its inherent powers. He argues that the trial court was required to hold a fact-finding hearing on the issue of closure.

Prior to trial, Bush requested that the hearing be closed by analogizing to a civil commitment hearing under § 51.20(5), STATS. The trial court explained that because there is no statutory right under ch 980, STATS., to close the hearing, the requester must show some reason beyond that it is a mental commitment that may contain embarrassing information.

The trial court was correct. *State ex rel. Wisconsin State Journal v. Circuit Court*, 131 Wis.2d 515, 522, 389 N.W.2d 73, 76 (1986), discussed the

presumption that proceedings be open and observed that the circumstances justifying closure must be "unusually compelling. A courtroom should be closed only when not to do so would defeat the very purpose of the proceedings or would subvert the 'overwhelming public values connected with the administration of justice.'" Bush offered no special compelling reason to warrant closure. We therefore reject his argument.

Finally, we do not believe it would be of assistance to the trial court for us to address Bush's challenges to evidentiary rulings because these issues are generally addressed to the trial court's discretion, and the scope of our review is limited to the context in which the evidence is offered and objection raised. *See State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983); *see also* § 901.03(1), STATS.

By the Court.—Judgment reversed and cause remanded for a new trial.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

Unit 6

PLEASE POST

Tommy G. Thompson
Governor

Joe Leean
Secretary

State of Wisconsin
Department of Health and Family Services

DIVISION OF CARE AND TREATMENT FACILITIES
WISCONSIN RESOURCE CENTER
BOX 16
WINNEBAGO WI 54985-0016
(414) 426-4310

EXHIBIT B

NOTICE TO ALL WRC PATIENTS

June 1, 1999

COST OF CARE AND TREATMENT

Effective July 1, 1999, and every month thereafter, each patient will be responsible for the costs of the care and treatment provided to him. This is in accordance with State Statutes: 980.12 Department Duties; Costs; 20.435(2)(a)(bm) Health and Family Services, Department of; and 46.10 Cost of Care and Maintenance, Liability; Collection and Deportation Counsel; Collections; Court Actions; Recovery. These statutes provide that certain family members of patients may also be liable for the cost of care and treatment provided.

WRC will notify each patient of the amount of the cost of care and treatment provided to him in the form of a patient billing each month.

The bill you will receive in August will cover the previous month's costs incurred (i.e. July 1999) and will not be itemized.

You will be billed at the rate of $242.00 per day for Fiscal Year 2000 (July 1, 1999 to July 1, 2000).

Sincerely,

Phillip G. Madrit
Director
WISCONSIN RESOURCE CENTER

PGM:nab

Cc: Executive Management Staff
Patient Accounts
CRS
Registrar
Administrative Assistant
File

MEMORANDUM

To: Members, JCRAR
From: Senator Judith Robson, Co-Chair
Representative Glenn Grothman, Co-Chair
Date: July 13, 1999
Re: Service of Lawsuit

Pursuant to s. 227.40(5), Stats, the Joint Committee for Review of Administrative Rules has been served with notice in the matter of *Wisconsin Education Association Council v. Wisconsin Employment Relations Commission*. The case was filed in Dane County Circuit Court Branch 10 on July 13, 1999, and the case number is 98-CV-1473. A copy of the Petition is attached.

Subchapter III of Chapter 227, Stats, establishes an action for declaratory judgment in the circuit court for Dane County to be the primary means for judicial review in a dispute concerning the validity of an administrative rule. Subject to the approval of the Joint Committee on Legislative Organization, the Joint Committee for Review of Administrative Rules may choose to be made a party to the suit, and thereby be entitled to be heard.

If you are interested in a further pursuit of the rights of the JCRAR under this suit, please forward your request in writing to the offices of the co-chairs of the committee.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 10 DANE COUNTY

MAY 13 REC'D

WISCONSIN EDUCATION ASSOCIATION COUNCIL,

Plaintiff,

v.

Case No. 98-CV-1473
Case Classification Type: 30701

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Defendant.

SECOND AMENDED SUMMONS

THE STATE OF WISCONSIN
To each Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within forty-five days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Clerk of Circuit Court, Dane County Courthouse, City-County Building, 210 Martin Luther King, Jr. Blvd., Madison, Wisconsin 53703, and to Plaintiff's attorneys, Anthony L. Sheehan and Michael J. Van Sistine, Wisconsin Education Association Council, Post Office Box 8003, Madison, Wisconsin 53708-8003. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

If you require the assistance of auxiliary aids or services because of a disability, call 266-4678 (TDD 266-4625) and ask for the Court ADA Coordinator.

Dated July 13th, 1999.

Anthony L. Sheehan

Anthony L. Sheehan, State Bar No. 1019397
Michael J. Van Sistine, State Bar No. 1022334
Wisconsin Education Association Council
33 Nob Hill Drive
Post Office Box 8003
Madison, Wisconsin 53708
608/276-7711
Attorneys for Plaintiffs

DM8466

STATE OF WISCONSIN CIRCUIT COURT BRANCH 10 DANE COUNTY

WISCONSIN EDUCATION ASSOCIATION COUNCIL,

Plaintiff,

v.

Case No. 98-CV-1473
Case Classification Type: 30701

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Defendant.

SECOND AMENDED COMPLAINT

COMES NOW the Plaintiff, Wisconsin Education Association Council, by its attorneys, Anthony L. Sheehan and Michael J. Van Sistine, and pursuant to secs. 227.40 and 806.04, Stats., as a cause of action against the Defendant alleges as follows:

1. Plaintiff Wisconsin Education Association Council (hereinafter WEAC) is a nonprofit organization organized and existing under the laws of the State of Wisconsin, the principal place of business of which is 33 Nob Hill Drive, Post Office Box 8003, Madison, Wisconsin 53708-8003. WEAC primarily exists to represent teachers and other educational employees of public school districts throughout Wisconsin for purposes of collective bargaining pursuant to sec. 111.70, et seq., Stats.

2. (a) All members of WEAC are also members of local associations affiliated with WEAC.

(b) Although WEAC is not the exclusive bargaining agent for most local bargaining units, it frequently assists locals in pursuit of their bargaining objectives.

3. The Defendant, the Wisconsin Employment Relations Commission (hereinafter referred to as "the WERC"), is an administrative agency of the State of Wisconsin. The WERC's offices are located at 18 South Thornton Avenue, Madison, Wisconsin 53703.

4. The Municipal Employment Relations Act (MERA or 111.70, Stats., et seq.) as amended by 1993 Wis. Act 16 and 1995 Wis. Act 27, provides that if a municipal employer makes a qualifying wage and benefit offer in a collective bargaining unit consisting of school district professional employees, economic issues are not subject to interest arbitration.

5. A school district professional employee is defined as a municipal employee who is a professional employee and who is employed to perform services for a school district.

6. WEAC represents approximately 63,000 school district professional employees.

7. Section 111.70(4)(cm)5s provides in relevant part:

> In a collective bargaining unit consisting of school district professional employees, if the municipal employer submits a qualified economic offer applicable to any period beginning on or after July 1, 1993, no economic issues are subject to interest arbitration under subd. 6 for that period.

8. Under sec. 111.70(4)(cm)6, Stats., the WERC upon receipt of a petition to initiate arbitration must make an investigation to determine whether arbitration should be commenced.

9. After closing the investigation and upon certifying the existence of an impasse, the WERC directs the parties at impasse to select an arbitrator and proceed to a hearing before the arbitrator.

10. The arbitration hearing gives both the municipal employer and the union the opportunity to support their final offers with evidence and arguments before the arbitrator. The arbitrator's decision is final and binding and is to be incorporated into the parties' written collective bargaining agreement. Under sec. 111.70(4)(cm)6d, Stats., the arbitrator must adopt, without modification, the single, final offer of one of the parties.

11. Under sec. 111.70(4)cm, Stats., the WERC has a duty to order arbitration to resolve an impasse between a school district and a teachers' labor organization if the school district does not submit a qualified economic offer as defined by sec. 111.70(1)(nc)(1), Stats.

12. Under sec. 111.70(4)(cm)5s, economic issues are not subject to interest arbitration impasse resolution procedures if, and only if, the district has submitted a legitimate qualified economic offer (hereinafter QEO).

13. Due to the Commission's statutory duties described in Paragraphs 8 through 12 above, the Commission must make a QEO determination before it determines whether it has a duty to order arbitration.

14. On or about October 13, 1993, Defendant WERC promulgated emergency rules pursuant to sec. 227.24, Stats. purporting to implement the provisions of 1993 Wisconsin Act 16, which was effective August 12, 1993. Collectively the emergency rules were titled Chapter ERB 33. In December 1994 Chapter ERB 33 was renumbered Chapter ERC 33. A copy of the Rules, Wis. Admin. Code ch. ERC 33 is attached hereto as Exhibit 1.

15. Wis. Admin. Code sec. ERC 33.10(5) provides that after submission of an alleged, but unsubstantiated, QEO, a school district may, after impasse, unilaterally implement its alleged qualified economic offer.

16. Wis. Admin. Code sec. ERC 33.10(6) places on a labor organization representing professional school district employees the burden to file a motion to review implementation when the union believes the salary and fringe benefits have been implemented in a manner inconsistent with Act 16.

17. Wis. Admin. Code sec. ERC 33.10(6) also provides that the pendency of a motion to review implementation does not bar a municipal employer from implementing its qualified economic offer.

18. There is no statute authorizing the WERC to permit a school district the right to unilaterally implement an unsubstantiated QEO thereby denying a teachers' labor organization its statutory right to arbitrate in the absence of a QEO.

19. In promulgating Wis. Admin. Code sec. ERC 33.10, the WERC exceeded the statutory authority conferred upon it in secs. 111.70(4), 111.71(1) and 227.11, Stats.

20. The WERC has taken the position that when it determines that a municipal employer's alleged QEO is deficient, the municipal employer will be allowed to amend the deficient QEO.

21. The WERC has taken the position that when it has determined that a municipal employer has not made a legitimate QEO that the labor organization is barred from interest arbitration of economic issues if the municipal employer has indicated it intends to make a QEO.

22. There is no statute authorizing the WERC to permit a municipal employer to amend a deficient QEO.

23. Under sec. 111.70(1)(nc)(1)(c), Stats., a QEO must provide for an average salary increase in each contract year for all employees in the collective bargaining unit.

24. Under sec. 111.70(4)(cm)8s, Stats., the WERC was ordered to prescribe forms for calculating the cost of a QEO based upon the total compensation and fringe benefits provided on the 90th day prior to the contract expiration date without regard to any change in the number, rank or qualifications of the employees.

25. Applying the statutory requirements explained in Paragraphs 23 and 24 above, the WERC must not make adjustments for changes in number, rank or qualification of the employees when calculating the base year [(111.70(4)(cm)8s, Stats.] but must make such adjustments for each year of the contract that is computed as QEO 1 and QEO 2 [111.70(1)(nc)(1)(c), Stats].

26. Wis. Admin. Code ERC sec. 33.10(3)(b) requires school districts to submit to the union QEO calculations on "Forms A and B" which are appendices to Chapter ERC 33.

27. ERC 33 appendix states in an introductory note that Act 16 does not allow the cost of QEO to be based upon "actual costs" of such an offer but instead requires an assumption that the employee complement is fixed.

28. ERC 33 appendix in Form A, step number 4, directs employers not to assume any change in: (1) the identity of employees, (2) the level of service the employees provide, or (3) the fringe benefits, but directs the employer to assume any cost increase incurred at any time during the year to be in effect for the entire year.

29. There is no statute authorizing the WERC to declare that the QEO is not to be computed by using actual costs.

30. There is no statutory requirement that each year of the QEO calculations be based on a "fixed employee complement."

31. Sec. 111.70(4)(cn), Stats. provides that collective bargaining agreements for school district professional employees shall be for a term of 2 years expiring on June 30 of the odd-numbered year.

32. The collective bargaining agreements for all the professional school district employees represented by WEAC expired on June 30, 1999. The majority of these employees do not have collective bargaining agreements for the 1999-01 term.

33. A number of school district professional employees retired at the end of the 1998-99 school year and a number will retire at the end of the 1999-00 school year.

34. Under a proper application of sec. 111.70(1)(nc)(1)(c), Stats., cost savings realized by the retirements would be reflected in employees' salaries if a District imposed a QEO. However, any costs savings generated by these retirements will not be reflected in the salary schedule if a QEO is imposed because Wis. Admin. Code sec. ERC 33 Appendix A requires that costing be calculated as if the retirees are still employed by the District.

35. Wis. Admin. Code sec. ERC 33 Appendix A and its threatened application to WEAC members interferes with and impairs their legal right to proceed to interest arbitration in the absence of a legitimate QEO.

36. WEAC members have been adversely affected by the WERC's unauthorized and illegal implementation of its rules in numerous ways, set forth above, including but not

limited to self-restricting proposals made in the course of negotiations, accepting otherwise unacceptable proposals during negotiations, and entering into otherwise unacceptable bargaining agreements in order to avoid protracted litigation and labor strife due to the improper bargaining advantages garnered by school districts as a result of the WERC's interpretation of 1993 Wisconsin Act 16 and 1995 Wisconsin Act 27 and its implementation of ERC 33.10(5) and (6).

WHEREFORE, Plaintiff requests a judgment declaring Wis. Admin. Code rules secs. ERC 33.10(5) and (6) to be invalid and directing the WERC to order school districts. Plaintiff further requests a judgment declaring Wis. Admin. Code sec. ERC 33.10(3)(b) and ERC 33 appendix to be invalid and directing the WERC to order school districts to use actual costs when calculating a qualified economic offer.

Plaintiff further requests a judgment enjoining the WERC from applying Wis. Admin. Code ERC 33.10 and ERC 33 appendix to any contract disputes between school districts and school district professional employee collective bargaining units.

Dated this 13th day of July, 1999.

Anthony L. Sheehan, State Bar No. 1019397
Michael J. Van Sistine, State Bar No. 1022334
Wisconsin Education Association Council
33 Nob Hill Drive, Post Office Box 8003
Madison, Wisconsin 53708
608/276-7711
Attorneys for Plaintiff

DM8466

Chapter ERC 33

COLLECTIVE BARGAINING AND INTEREST ARBITRATION IN DISPUTES RELATING TO COLLECTIVE BARGAINING AGREEMENTS ENTERED INTO ON OR AFTER AUGUST 12, 1993 AFFECTING SCHOOL DISTRICT PROFESSIONAL EMPLOYES

Note: Chapter ERB 33 was created as an emergency rule effective October 13, 1993. Chapter ERB 33 was renumbered chapter ERC 33 under s. 13.93 (2m) (b) 1, Stats., Register, December, 1994, No. 468.

ERC 33.01 Scope. This chapter governs the procedure relating to collective bargaining and interest arbitration pursuant to s. 111.70 (4) (cm), Stats., for collective bargaining agreements entered into on or after August 12, 1993 affecting school district professional employes, except for agreements entered into pursuant to an arbitration award as to which the investigation was closed before August 12, 1993.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.02 Policy. The policy of the state and of this chapter is to encourage voluntary settlement of labor disputes in municipal employment through the procedures of collective bargaining. If the procedures fail, the parties should have available to them a fair, speedy, effective and above all, peaceful procedure for settlement, including, where a deadlock exists after negotiations, and after mediation by the commission, a procedure for the resolution of disputes by arbitration as limited by s. 111.70 (4) (cm) 5s, Stats.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.03 Content of collective bargaining agreements. A collective bargaining agreement entered into on or after August 12, 1993 which covers any period of time prior to July 1, 1995 shall have an expiration date of June 30, 1995. If compliance with the requirement of a June 30, 1995 expiration date would require that the parties enter into an agreement with a term in excess of 3 years, the agreement shall have an expiration date of June 30, 1993, and any successor agreement shall have an expiration date of June 30, 1995. The successor agreement to a collective bargaining agreement expiring on June 30, 1995 shall have an expiration date of June 30, 1997. A collective bargaining agreement may contain provisions to reopen negotiations as to any period of any agreement whose expiration date is consistent with this subsection. A collective bargaining agreement shall not alter the salary range structure, number of steps or requirements for attaining a step or assignment of a position to a salary range for any professional school district employes who were assigned to salary ranges with steps that determined the level of progression within each salary range. A collective bargaining agreement may create or modify provisions requiring longevity or other payments which do not alter any existing salary range with steps that determine the level of progression within each salary range.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.04 Notice of commencement of negotiations. (1) WHO MUST FILE. Whenever a labor organization representing professional school district employes or a municipal employer requests to reopen negotiations under a binding collective bargaining agreement, or the parties otherwise commence negotiations if no agreement exists, the party requesting negotiations shall immediately notify the commission in writing of the request and a copy shall be served on the other party. If the requesting party fails to file the notice, the other party may notify the commission.

(2) CONTENTS. The notice shall be on a form provided by the commission, or on a facsimile and shall contain the following:

(a) The date on which one party notified the other party of its intent to either reopen negotiations under a binding collective bargaining agreement or to commence negotiations, where no agreement exists.

(b) The name of the municipal employer, as well as the name, title, address and phone number of its principal representative.

(c) The name of the labor organization, or other representative, as well as the name, title, address and phone number of its principal agent.

Exhibit 1

(d) A general description of the collective bargaining unit involved and the approximate number of employes affected.

(e) The effective date and termination date of the existing collective bargaining agreement, if any, and the date on which notice to open negotiations must be served on the other party.

(f) A statement indicating whether the parties have agreed to a voluntary impasse resolution procedure.

(g) The identity of the party filing the notice, as well as the signature and title of the individual signing the notice, and the date the notice was executed.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.05 Voluntary impasse resolution procedure. (1) WHO MUST FILE. Whenever a municipal employer and a labor organization agree in writing to a dispute settlement procedure for the resolution of an impasse in their negotiations leading to a collective bargaining agreement, as provided in s. 111.70 (4) (cm) 5, Stats., a copy shall be filed by the parties with the commission.

(2) TIME FOR FILING. If the agreement is executed prior to the notice of commencement of negotiations required to be filed in s. ERC 33.04, such an agreement shall be filed at the time the notice of commencement of negotiations is filed with the commission. If such an agreement is executed after the filing of the notice of commencement of negotiations, it must be filed immediately after the execution.

(3) SCOPE. The provisions of s. 111.70 (4) (cm) 8m and 8p, Stats., and section 9120 (2xg) of 1993 Wis. Act 16 may not be superseded by any provision of a collective bargaining agreement resulting from a voluntary impasse resolution procedure. If the parties agree to any form of binding interest arbitration, the arbitrator shall give weight to the factors enumerated under s. 111.70 (4) (cm) 7, Stats.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; correction in (2) made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.06 Petition to initiate arbitration. (1) WHO MAY FILE. A petition to initiate arbitration may be filed by a municipal employer, a collective bargaining representative of municipal employes, or by anyone authorized to act on their behalf.

(2) FORM, NUMBER OF COPIES AND FILING. The petition shall be prepared on a form provided by the commission, or a facsimile. The original and 2 copies shall be filed with the commission at its office, and a copy shall, at the same time, be served on the other party involved by registered or certified mail.

(3) CONTENTS. The petition shall include:

(a) The name and address of the municipal employer and the name and telephone number of its principal representative.

(b) A general description of the collective bargaining unit and the approximate number of employes affected.

(c) A statement that the parties are deadlocked after a reasonable period of negotiation and after mediation by the commission, if any, and other settlement procedures, if any, established by the parties have been exhausted, with respect to a dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement.

(d) The date that notice was served to open negotiations and the identity of the party serving the notice.

(e) The date or dates that proposals were exchanged in open meeting.

(f) The number of negotiation meetings prior to mediation, if any, by the commission.

(g) The dates that mediation, if any, was conducted and the identity of the commission mediator.

(h) The termination date of the existing collective bargaining agreement, if any.

(i) The identity of the party filing the petition, as well as the signature and title of the individual signing the petition, and the date the petition was executed.

(j) The petitioning party's preliminary final offer containing its latest proposals on all issues in dispute.

(4) RESPONSIVE PRELIMINARY FINAL OFFER. Within 14 calendar days of the date the commission receives the petitioning party's preliminary final offer, the other party shall submit in writing its preliminary final offer on all disputed issues to the petitioning party and the commission.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.07 Stipulation to initiate arbitration. (1) WHO MAY FILE. A stipulation to initiate arbitration may be filed by a municipal employer and a collective bargaining representative of municipal employes or by anyone authorized to act on their behalf.

(2) FORM, NUMBER OF COPIES AND FILING. The stipulation shall be prepared on a form provided by the commission, or on a facsimile. The original and 2 copies shall be filed with the commission.

(3) CONTENTS. The contents of the stipulation shall contain the same information which is required under s. ERC 33.06 (3), except that the stipulation shall be signed by representatives of both parties and shall contain both parties' preliminary final offers on all issues in dispute which the parties shall exchange in writing before or at the time they submit the stipulation.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; correction in (3) made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.08 Withdrawal of petition or stipulation. A petition may be withdrawn by the petitioner, and a stipulation may be withdrawn by the parties executing same, with the consent of the commission under such conditions as the commission may impose to effectuate the intent of s. 111.70 (4) (cm), Stats.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.09 Pre-investigation procedure. After a petition or stipulation has been filed, the commission shall appoint a staff investigator, who shall set a date, time and place for the conduct of an informal investigation or for the conduct of a formal hearing on the petition or stipulation.