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Details: Complaints.
(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2009-10
(session year)

Joint
(Assembly, Senate or Joint)

Committee for Review of Administrative Rules ...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)

JERREL R. SELSOR #184143
NEW LISBON CORRECTIONAL INST.
P.O. BOX 4000
NEW LISBON, WI 53950-4000

Joint Legislative Council
P.O.Box 2536
1 East Main Street, Suite 401
Madison, WI 53701-2536

March 4, 2010

RE: Absence of statutory authority (**Rule 3.01(3)1.**) to promulgate rule(s);
EmR0940, CR 09-119, Earned Release Review Commission;

> **PAC 1.04 Purpose of release consideration**.; §**(1)** Depreciation of the seriousness of the offense resulting from early release; And
>
> **PAC 1.06(16)**; §**(b)** The inmate has served sufficient time so that release would not depreciate the seriousness of the offense; And
>
> **PAC 1.06(16)**; §**(h)** The inmate has reached a point at which the commission concludes that release would not pose an unreasonable risk to the public and would be in the interest of justice.

SEE **Rule 3.03(2)(f) 1**. An absence of adequate statutory authority, **3.** Failure to comply with legislative intent, **4.** Being contrary to state law. *See also* **Rule 3.05 (1)(a)**.

I wish for clarification as to the proposed rules' statutory authority in light of my submitted complaints? I believe the Parole Commission has been acting outside the scope of their authority.

I have included for reference a copy of submitted objections to Kathryn R. Anderson, DOC, concerning the promulgation of these administrative codes.(exhibits omitted).Please forward to the proper reviewing authorities. I wish to receive notice of which standing committees were given the file?

AND;
I wish to receive the record of any public objections and/or any agency responses. *SEE* Rule **3.02(2)(em).**

AND;
I wish to receive any *clearinghouse report*s filed or recorded by this Legislative Council under Rule **3.02(2)(g);(h)** concerning **EmR0940, CR 09-119;**

THANK YOU, _____#184143

CC:
>Senate Chief Clerk, Room B20 Southeast, State Capitol, Jeff Renk
>Assembly Chief Clerk, 17 West Main Street, Room 401, Kay Inabne
>Joint Committee For Review of Administrative Rules
Senator Holperin, Room 409 South, State Capitol, P.O. Box 7882, Madison WI 53708-7882

JERREL R. SELSOR #184143
NEW LISBON CORRECTIONAL INST.
P.O. BOX 4000
NEW LISBON, WI 53950-4000

RE: EmR0940, CR 09-119; (Submission of written comments)

Kathryn R. Anderson, DOC
P.O. Box 7925
Madison, WI 53707-7925

> " The current criterion used by the Commission is too subjective and does not give inmates or their families a tangible measurement of the steps an inmate needs to take in order to achieve parole status. Presently, the Parole Commission lacks a tangible, comprehensive, systemic tool that aids and assists Commissioners in determining whether or not qualified inmates are released on parole. Too many inmates are simply told "not enough time served as punishment" as the reason for their denial."
> **-Tamara Grigsby**, State Representative, 18th Assembly District, April 23, 2007, MEMO

It should be made clear within the administrative rules that the Parole Commission can not deny parole release as a stated intent to punish the individual or as a retributive intent refuse to exercise its discretion and release an individual to parole. As the rules are written or proposed for promulgation, the Parole Commission could indefinitely deny parole release based on its own retroactive opinion > of what should be a ***sufficient*** term of incarceration or punishment, > as to not ***depreciate*** its own view of the *severity of the crime* without more.

Allowing an administrative agency, for other than professionally defined, and individualized rehabilitative need, power to determine punitive sanctions or to set the *actual* term of incarceration based on its own opinion of what would be beneficial for society, or on the public's opinion or by political will alone, notwithstanding mandatory release, would risk subjecting the individual to **repeated reviews** of the judicial reasons for incarceration and possibly expose the individual to an ever increasing degree of criminal culpability without due process protection. It appears the rules would allow the Parole Commission to reopen questions of fact. (Mandatory release occurs without consideration of rehabilitative successes and may only be extended for bad behavior.).

Consequently, the Parole Commission could determine that any and all rehabilitation that occurs during incarceration may never outweigh the *severity of the crime*. The Parole Commission could determine that the *severity of the crime* always outweighs any **rehabilitative progress** and thus could deny parole release indefinitely without further cause. At each subsequent parole hearing the Parole Commission could continuously redefine the seriousness of the crime or find some evidence to elevate the individual's degree of culpability in a never endingly manner.

If no level of rehabilitation could ever outweigh the *severity of the crime,* then the possibility of parole release does not exist for certain classes of individuals as would be determined by the Parole Commission. And the Legislature's parole provision and the sentencing court's efforts in setting a parole eligibility date would seem pointless and seem as a cruel illusion for the imprisoned. The rules appear to give the Parole Commission criminal sanctioning powers once reserved for the Judicial Branch and a power that would run counter to Wisconsin's historical objective of an indeterminate sentence and raise serious Constitutional questions concerning separation of powers and/or double jeopardy.

The Sentencing Court did not announce or qualify the parole eligibility date as holding true only if the Parole Authority determines the *severity of the crime* does not warrant more punishment and thus continuing incarceration as a stated intent to punish or by simply not exercising their discretion and forego making a rehabilitative decision. The proposed rules do not, nor do any legislative provisions given such an allowance or distinguish such a *dual* or extenuated use of the *severity of the crime*.

The Sentencing Court in addressing a need for punishment fully considered and weighed the *severity of the crime* factor in its justification for incarceration in the first place. Incarceration was the punishment as to not depreciative the *severity of the crime* as determined by the sentencing court. The severity factor, though possibly given the greatest of weight at sentencing, would have been judicially balanced and embedded into the fabric of an individualized indeterminate sentence. And a second consideration of the *severity of the crime* would seem to invite double jeopardy or risk usurping the sentencing court's authority.

> "The parole eligibility date determination is dependant upon the length of the sentence imposed by the sentencing court. The sentence imposed in each case should recognize the minimum amount of custody or confinement that is consistent with the need to protect the public, the gravity of the offense and the rehabilitative needs of the convicted defendant. McCleary v. State, 49 Wis.2d 263, 276, 182 N.W.2d 512 (1971). REF: SM-34 SENTENCING PROCEDURE, STANDARDS, AND SPECIAL ISSUES, WIS JI-CRIMINAL, 1991, Regents Univ. of Wis. (Rel.No. 28-12/91).

A question of punishment always requires due process protections, and the Parole Commission's rules do not provide adequate due process provisions or adversarial protections once enjoyed at the sentencing hearing. The incarcerated person has already gone through an adversarial hearing process formally protected by due process and has been sentenced to a term of incarceration as punishment balanced with an opportunity for parole release and/or eventual early discharge from the sentence itself. To be exposed to a never-ending evaluation of the severity of the crime or of the individual's degree of culpability would seem to require due process protection.

If the Sentencing Court has already evaluated and weighed the *severity of the crime*, as well as all relevant factors, in order to justify incarceration in the first place and relied upon this factor to deliberately set the 25% parole eligibility date and the mandatory release date as being "sufficient" as to not depreciate the severity of the crime, then how is the Parole Commission allowed to use the very same severity factor to deny parole release? Did the Sentencing Court set the 25% eligibility date just to allow an administrative authority at that 25% mark to reconsider the same *severity of offense* facts and thus as a stated intent to punishment deny parole release without more? Reasoning suggests, as the mandatory release date implies, the parole hearing is solely a question of rehabilitation, and is not a allowance for a new review of punishment for the sake of punishment or for a new view of the crime. By what standard does the Parole Commission determine a necessity to continue incarceration for other than a rehabilitative need? From what Legislative **Authority** does the Parole Commission receive its power to determine "sufficient punishment" in relation to the "severity of the crime?"

"The basic premise of the indeterminate sentence is the relatively modern conception that individualized rehabilitation is the paramount goal in sentencing. The idea is to avoid the Procrustean mold of uniform sentences to fit crimes in the abstract and focus upon the progress over time of the particular individual so as to determine when it may be safe for society, and good for him, to set him free, at least within the limits of parole supervision." Pg. 87, Marvin E. Frankel, CRIMINAL SENTENCES: *Law Without Order* (1973).

Hearing Purpose

"As of 1975, every state in the country had an indeterminate system of sentencing, based on "universally accepted" principles. (n.14, Tonry and Hatlestad, 1996, p. 6; Wisconsin Center for Public Policy (1979). *Felony Sentencing in Wisconsin*, p.25 [hereafter *Felony Sentencing in Wisconsin*]). Criminal justice policy makers nationwide subscribed to the tenets of what Greenberg (1977) called the "treatment model" of corrections: that offenders were suffering "from some physical, psychological, or social-environmental affliction;" that the goal of corrections was to rehabilitate offenders by remodeling those afflictions; and that the sentencing system should be designed to befit those rehabilitative goals." (n.15, In *Felony Sentencing in Wisconsin*, p.25. Also known as the "medical model."). With its emphasis on individualized decision-making and its allowance of parole and corrections officials to adjust sentences, the indeterminate sentencing system was "at the very core" of the treatment model. (n.16, *General Sentencing: Indeterminate versus Determine Sentence*, p. 8-9. From the archives of the Wisconsin Council on Criminal Justice at the Wisconsin Historical Society.).

* * *

"Wisconsin officials were among the leading proponents of rehabilitation nationwide. The National Institute of Justice (1985), for instance, was later to praise officials in its Department of Corrections and then-parent Department of Health and Social Services for their "well thought-out defense of the possibilities of rehabilitation." (n.18, Shane-DuBow, Sandra Brown, Alice P. and Erik Olsen (1985). Sentencing Reform in the United States: History, Content, and Effect. Washington, DC: National Institute of Justice, p. 268. [omitted]." p. 6, **WISCONSIN SENTENING COMMISSION**: *Sentencing Policy in Wisconsin*,1975-2005, August 2007, Joe Fontaine, Policy Analyst.

The parole hearing was supposed to address a non-punitive question. In Wisconsin, Parole was an indeterminate step on the road to rehabilitation and not just an alternative form of imprisonment. The Parole Commission determines "suitability" not eligibility. The Parole Commission's purpose was to evaluate the rehabilitative changes of individuals in its custody and determine if they may be "suitable" for release as a rehabilitative question, not a punitive one. What was the historical **purpose** of an indeterminate sentence but to review subsequent behavior and release an individual from unnecessary forms of custodial restraint; Thus the State's historical interest in rehabilitating the criminally convicted. *Ref.* Wis. Stat. §46.001 (1986). ***SEE Attached***, pages 4-6, Parole in Wisconsin, June 1992, Volume 5, No.3.

The *severity of the crime* may be considered by the Parole Commission, but their own administrative fact-finding should only be used to help aid treatment professionals in determining the rehabilitative needs of the individual in question; and should not be used as to achieve its own punitive objective or as a means to impose self determined "sufficient" terms of incarceration. If an individual is not rehabilitated at the time of the parole hearing as determined through professional evaluation then reintegration into society should be deemed unwarranted and parole should be denied; whereby the punishment that was imposed by the sentencing court would continue. The Commission should then provide the individual with identifiable and/or attainable avenues of treatment so the individual can work towards achieving parole release and eventual discharge. And at the very least a projected or tentative release date should be set at the first parole hearing. (If the Parole Commission reasons insufficient time, than it must have in mind, even if relatively, a known quantity).

Though the incarcerated in Wisconsin do not have a Federally recognized Constitutional right to parole, they do have a right to a fair hearing where the hearing should be conducted with recognizable standards and purposes; Yet to deny parole release as a administratively stated intent to punish despite an otherwise exemplary treatment or rehabilitation record seems to defeat the very purpose of an indeterminate sentence and parole release.

Additional References in support; *SEE* Appendix, Other State Court Case Law, Media Reports, and Law Reviews: (Attached).

1. In November 2009, I requested from the Legislative Council Staff, the "rule-making file" associated with the Parole Commission's promulgation of its rules and analysis under **Cr. Register, April, 1981, No.304, eff. 5-1-81**; As of this date I have yet to receive the record for review.

2. Many Legislative leaders* have previously raised concerns about political influences on the Parole Commission's decision and specifically about the use of the *severity of the crime* criteria to repeatedly deny parole;

3. Additional writings on subject concerning other State parole hearings; ***Attached***

4. The Parole Commission's decision is being based on unlegislated standards such as;

   a). *sufficient* punishment as to *not depreciate* the severity of the crime; for who???

   b). retroactive views of the *severity of the crime* ; incarceration benefits who???

5. When I entered the Wisconsin State Prison System, A&E, with a parole member committee member, set out an Individualized Plan for my rehabilitative goals. I was not given notice during A&E, nor at any subsequent PRC hearing, nor prior to my parole hearing that the "severity of offense" alone may preclude parole release no matter how much rehabilitation I may achieve. Ref. Adm. Code DOC ch.302.02(5); 302.18(2)(1986-87; And Appendix, NOTE 302.

Jerrel R.Selsor #184143

APPENDIX

Other State Court Case Law, Media Reports, and Law Reviews:

California (Media Report citing relevant case law).

1>*California Appellate Court Grants Writ*, Reverses Governor, Reinstates PLN Writer's Grant of Parole, by Marvin Mentor, March 2009, Page 44-45, Prison Legal News.

2>*Federal Court Finds California Murder Paroles Blocked by Illegal "No-Parole" Policy*, by Marvin Mentor, January 2006, page 33, Prison Legal News.

Michigan

3>*Granholm, lawmakers endorse parole changes*, 1-24-09, LANSING (AP) (Governor Granhom of Michigan and the Council of State Governments).

4>*Report Finds Increase in Michigan Prison Population Attributable to Political Policy Changes, Not Crime Increase*, By David M. Reutter, March 2009, page 46-47, Prison Legal News (Citizens Research Council of Michigan).

5>*Cumulative Tightening of Michigan Lifers' Parole Eligibility Rules Held Ex Post Facto*, by John R. Dannenberg, February 2008, page 20-21, Prison Legal News.

New York

6>*King v. New York State Div. of Parole*, 190 A.D.2d 423, 598 N.Y.S.2d 245, 1993 N.Y. App. Div. LEXIS 5474 (1993) (Supreme Court of New York)

7>*Cappiello v. New York State Board of Parole*, 2004 NY Slip OP 51762U, 6 Misc. 3d 1010A; 800 N.Y.S. 2d 343, 2004 N.Y. Misc. LEXIS 2920 (Supreme Court of New York)

8>59 N.Y.U. L. Rev 482, 533 to 543

Ohio

9>*Office of the Ohio Public Defender*, Press Release, April 1, 2005 (Parole Authority fails to provide meaningful consideration).

Utah

10>*Labrum v. State Board of Pardons*, 870 P.2d 902 (1993) (Utah State Supreme Court) (**The concept of parole in America theory and practice**).

>Washington Supreme Court, 92 Wash.2d 555

Wisconsin

11> *Parole in Wisconsin*, Policy Research Institute Report, June 1992, Volume 5, No.3, pages 4-6.

12>Tommy Thompson, Wisconsin Governor, April 28, 1994, MEMO

13>Michael J. Sullivan, (DOC) Secretary, April 28, 1994, MEMO

14> *Drug-Dealer No-Parole Rule*, page 12, (("DOC") reacting to a Joint Finance Committee Directive), Wisconsin Defender, January 1997.

15> *Inmates can't expect early prison exit*, by Richard P. Jones, February 7, 2000, (Milw.J.S).

16>Eric M. Peterson, Legislative Director, Senate Committee on Judiciary, Corrections, and Housing, April 17, 2008 ("Secretary Sullivan complied with the Governor's order and paroles were significantly reduced.")

17>Brian Kinstler, MEMO to Marty Kohler, March 12, 2002

18>Frank Lasee, State Representative, 2nd Assembly, August 1, 2002, MEMO ("You are correct in that the parole board made a policy change to have all prisoners spend 2/3rd of their time in prison.")

19>Tamara Grigsby, State Representative, 18th Assembly District, April 23, 2007, MEMO (" The current criterion used by the Commission is too subjective and does not give inmates or their families a tangible measurement of the steps an inmate needs to take in order to achieve parole status. Presently, the Parole Commission lacks a tangible, comprehensive, systemic tool that aids and assists Commissioners in determining whether or not qualified inmates are released on parole. Too many inmates are simply told "not enough time served as punishment" as the reason for their denial.")

20>JB Van Hollen, Tuesday, May 16, 2006, MEMO, *Outrageous Parole of Cop Killers Must Not Go Unchallenged.*

21>*Throwing away the key, Doyle's parole chief defends tough tack on releases*, by Jason Shepard, August 24, 2007, ISTHMUS, Thedailypage.com

22>*Educator advises adults*, October 27, 2008, Milwaukee Journal Sentinel, ("I saw people who I wanted to help, and the system would not allow me to help.")

24> Lena C. Taylor, Wisconsin State Senator, 4th District, March 24th, 2008 MEMO; ("I am acutely aware of the history, motivations, and purposes of this letter, Secretary Sullivan's corresponding directives, and the impact has had on the corrections system in Wisconsin.")

25> Lena C. Taylor, Wisconsin State Senator, 4th District, November 12, 2008 MEMO;("I understand that programs have been hard to access, a problem that came about as a result of a disconnect between the Parole Board and the PRC.)

26> Lena C. Taylor, Wisconsin State Senator, 4th District, April 2, 2009, MEMO; ("I am dialoguing with Parole Commission Chairman Alfonso Graham…").

27> Change Behavior, 3. Create Sentencing Option to Reduce Risk Prior to Release, *Analyses & Policy Options to Reduce Spending on Corrections and Increase Public Safety*, page 3, 9, Justice Reinvestment in Wisconsin.

MISC References:

Reference: Parolability Range, Fred W. Hinickle, August 1981 and;
Overview of Release Experience of Lifers in Wisconsin Institutions (1967-81)

WISCONSIN LAW REVIEW(WLR), Jeffrey Kassel, 1985:195.

Article: *The Promise and Problems of Rulemaking in Corrections: The Wisconsin Experience*, Walter Dickey, 1983 Wis. L. Rev. 285.

SENTENCING PROCEDURE, STANDARDS, AND SPECIAL ISSUES, WIS JI-CRIMINAL, 1991, Regents Univ. of Wis. (Rel.No. 28-12/91).
ISTHMUS, JUNE 7, 2002, DailyPage.com.
Wisconsin, BLUEBOOK, page 560, Agency Responsibility, Sentencing Commission. (1983 Wis.Act 371).

Reference: Living In Prison, A History Of The Correctional System With An Insider's View

David J. Rothman

CONSCIENCE AND CONVENIENCE: The Asylum and its Alternatives in Progressive America, David J. Rothman, 1980, ISBN 0-316-757756. David J. Rothman, Professor of History at Columbia University and Senior Research Associate at the Center for Policy Research. He Graduated from Columbia College(1958) and received his Ph.D. from Harvard University(1964). In 1980, Rothman was serving on the board of directors of the New York Civil Liberties Union and the Mental Health Law Project and as co-director of the Project on Community Alternatives. See also: Warren F. Spaulding, "Principles and Purpose of Probation," National Prison Association, Proceedings...1906, 87-89; O.F.Lewis, "When the Prisoner Returns," North American Review 195 (1912) and; Attorney General Survey of Release Procedures, Files, (Washington, D.C., 1939, ch.1, (Vol.2 Probation, Vol.4 Parole.).

"The design of the indeterminate sentence law is to reform criminals and convert bad citizens into good citizens." See: Miller v. State, 149 Indiana 608, 615-616(1898); Peters v. State, 43 O.S. 646 (1885); People v. Cook, 147 Michigan 132 (1907); People v. Cummings, 88 Michigan 254 (1891). See also Geo. v. the People, 167 Illinois 458 (1891). People v. Illinois, State Reformatory, 151 Illinois 421(1984). Cited in CONSCIENCE AND CONVENIENCE, by David J. Rothman, 1980, at 76, ISBN 0-316-757756.

An "inmates' 'destiny is placed largely in his own hands.' He learns that 'liberty can never come except through himself.' In short, with this (sentence) 'the prisoner becomes the arbiter of his own fate. He carries the key to the prison in his own pocket.' " Warren Spaulding, "The Treatment of Crime," Journal of Criminal Law and Criminology(JCLC) 3 (1912-13), 378, 381; Frederick Wines, "The Indeterminate Sentence," National Prison Association, Proceedings...1910, 280-281. Cited in CONSCIENCE AND CONVENIENCE, By David J. Rothman, 1980, ISBN 0-316-757756.


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March 17, 2010

Via Hand Delivery

Senator Jim Holperin
State Capitol, Room 409 South
P. O. Box 7882
Madison, WI 53707-7882

Re: Oatey Company v. Wisconsin Department of Commerce
Dane Co. Case No. 10-CV-1411

Dear Senator Holperin:

As Co-Chair for the Joint Committee for Review of Administrative Rules, we are enclosing an authenticated copy of a Summons and Complaint for review.

Sincerely,

Boardman, Suhr, Curry & Field LLP
By

Richard L. Bolton

RLB/rgs
Enclosures

cc: Joseph R. Thomas, Esq.
Chief Legal Counsel & Custodian of Records
Wisconsin Department of Commerce

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JOHN C. ALBERT
CIRCUIT COURT BR 3

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

2010 MAR 16 PM 3:30

DANE COUNTY, WI

OATEY COMPANY
4700 W. 160th Street
Cleveland, Ohio 44135,

Plaintiff,

Case No. 10CV1411
Case Codes: 30701, 30952

v.

WISCONSIN DEPARTMENT OF COMMERCE
201 W. Washington Avenue
Madison, Wisconsin 53703,

Defendant.

[illegible] THE ADOPTED COPY OF THE [illegible] DOCUMENT FILED WITH THE DANE [illegible] CLERK OF CIRCUIT COURT.

SUMMONS

CARLO ESQUEDA
CLERK OF CIRCUIT COURT

THE STATE OF WISCONSIN

To each person named above as a 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 (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 215 South Hamilton Street, Madison, WI 53703, and to Richard L. Bolton, plaintiff's attorney, whose address is One South Pinckney Street, P. O. Box 927, Madison, WI 53701-0927. You may have an attorney help or represent you.

If you do not provide a proper answer within forty five (45) days, the Court may grant judgment against you for the relief requested in the Complaint, and you may lose your right to object to the allegations in the Complaint. A judgment may be enforced as provided by law.

Dated this 15th day of March, 2010.

BOARDMAN, SUHR, CURRY & FIELD, LLP
By:

Richard L. Bolton, State Bar No. 1012552
Attorneys for Plaintiff
One S. Pinckney Street, 4th Floor
P. O. Box 927
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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

2010 MAR 16 PM 3:30

DANE COUNTY, WI

OATEY COMPANY
4700 W. 160th Street
Cleveland, Ohio 44135,

Plaintiff,

Case No. 10CV1411
Case Codes: 30701, 30952

v.

WISCONSIN DEPARTMENT OF COMMERCE
201 W. Washington Avenue
Madison, Wisconsin 53703,

Defendant.

A TRUE AND AUTHENTICATED COPY OF THE ORIGINAL DOCUMENT FILED WITH THE DANE COUNTY CLERK OF CIRCUIT COURT.

CARLO ESQUEDA
CLERK OF CIRCUIT COURT

COMPLAINT

The plaintiff alleges as its complaint as follows:

1. The plaintiff, Oatey Company, is a duly organized corporation authorized to do business in the State of Wisconsin.

2. Plaintiff's corporate address is 4700 W. 160th Street, Cleveland, Ohio 44135.

3. The defendant, Wisconsin Department of Commerce, is a duly organized agency of the State of Wisconsin.

4. The defendant's principal address is 201 W. Washington Avenue, Madison, Wisconsin 53703.

5. The plaintiff is in the business of manufacturing and selling quality products for the plumbing industry throughout the United States, including in Wisconsin.

6. The plaintiff distributes and sells Air Admittance Valves (AAV's) in Wisconsin, and throughout the United States.

7. An AAV is a plumbing product that is installed in sanitary drainage systems in buildings to maintain water trap seals and to prevent sewer gas from escaping.

8. AAV's are used in lieu of pipes which vent to the outside air and which must be installed through the roof; AAV's are designed to allow air into a drainage system while not allowing sewer gases to leak into the building.

9. AAV's have been approved for use by the International Plumbing Code since 1995.

10. AAV's are approved for use in Wisconsin under alternate approval licenses.

11. The defendant first granted alternate approval licenses for AAV's on January 1, 2001, following an extensive four year review.

12. The defendant's initial alternate approvals for AAV's were granted to Studor, Inc., followed shortly thereafter in 2001 by alternate approvals for plaintiff's AAV's.

13. The plaintiff's original AAV approvals have been subsequently renewed by the defendant.

14. The plaintiff has sold more than 70,000 AAV's in Wisconsin since 2004, as well as thousands more in other states throughout the United States, with no instance of ever having caused any health or safety problems.

15. The defendant, nonetheless, in 2007, decided to revoke the approvals already granted to the plaintiff for AAV's; the defendant's plan to revoke alternate approvals for AAV's also targeted other manufacturers selling in Wisconsin, including Studor.

16. In January of 2008, the defendant officially notified the plaintiff and other licensed AAV manufacturers that their Alternate Approvals would be revoked and changed to the completely different classification applicable to "experimental" new products.

17. The plaintiff and Studor objected to the defendant's attempt to summarily revoke their Alternate Approval Licenses for AAV's, which resulted in a lengthy trial before an administrative law judge, employed by the Department of Commerce, Steven Wickland; the defendant initially refused to provide any hearing, until sued in court.

18. Judge Wickland concluded from the evidence that the plaintiff met its burden to prove that the defendant improperly revoked its Alternate Approval Licenses for AAV's.

19. Judge Wickland specifically found as a proven fact that the plaintiff's AAV's do not have an unacceptable failure rate and that they do not present a public health and safety risk.

20. The defendant consciously decided not to appeal Judge Wickland's decision, and adopted the decision as its own on June 24, 2009, and the decision became final and binding on the defendant after the period for appeal passed without any objection; in fact, the defendant stipulated and agreed to accept as final and binding the Final Decision in the administrative hearing.

21. Judge Wickland's decision, issued less than one year ago, therefore, has binding and preclusive effect on the defendant.

22. The defendant, however, immediately undertook the planning and implementation of a way to avoid compliance with Judge Wickland's decision, including by attempting to again terminate the Department's prior approval of AAV's in Wisconsin.

23. The defendant's plan includes the claim that it has no authority to renew alternate approval licenses for AAV's, including renewal applications by the plaintiff and other manufacturers.

24. The defendant's "holy cow" discovery of its supposed lack of authority to renew AAV licenses stands in stark contrast to its own prior consideration and approval of renewal licenses for AAV's.

25. The defendant has effectively adopted a de facto rule by refusing to any longer consider renewal applications for AAV licenses, which rule was adopted without any notice or opportunity for comment, and without complying with any of the statutory requirements for Agency rulemaking.

26. The defendant's rule denying renewal of AAV licenses was adopted to circumvent the legal roadblock caused by Judge Wickland's decision.

27. The defendant's purpose in adopting a rule precluding renewal of AAV licenses was to avoid compliance with Judge Wickland's findings that AAV's are reliable and do not jeopardize public health and safety.

28. The defendant has advised the plaintiff that the process for initial approval of AAV's must be commenced all over again, and as to such "virgin applications," the defendant does not intend to ever grant them as alternate approvals in their current form.

29. The defendant's actions, in disregard of Judge Wickland's decision, have been undertaken despite the absence of any evidence of injury to public health and safety in Wisconsin -- or anywhere else.

30. The defendant's actions are intended to stop the plaintiff from further selling AAV's in Wisconsin, without notice or opportunity to challenge the defendant's decision; the plaintiff has requested a hearing to determine its right to renewal, but the defendant has refused such a hearing.

31. The defendant's actions will cause the plaintiff immediate and irreparable harm.

32. The defendant, in fact, intends imminently to advise the plumbing industry in Wisconsin that plaintiff's AAV's can no longer be legally installed as before, which notice is intended to discourage and prevent plumbers in Wisconsin from buying and installing plaintiff's AAV's.

33. The plaintiff, however, has a due process interest in having its AAV licenses considered for renewal, just as those licenses have been previously considered for renewal.

34. The defendant's refusal to consider renewal of alternative approvals, lacks any identifiable standards or justification, other than the objective to discourage and prevent sales of AAV's for use in Wisconsin.

35. The defendant's actions violate the plaintiff's constitutional rights.

36. The plaintiff has a clear right to have its approvals to sell AAV's considered for renewal, without an arbitrary and disingenuous interpretation by the defendant of its authority.

37. The defendant, for its part, has a positive and plain duty to consider renewing the plaintiff's AAV approvals, pursuant to a standard that does not give the defendant unfettered and uncontrolled discretion.

38. In the meantime, the plaintiff's AAV licenses do not expire, pursuant to §227.51(2), Wis. Stats., unless and until the defendant finally acts upon the plaintiff's request for renewal and/or if the plaintiff's applications are deemed to be denied, then plaintiff's approvals continue until at least the last day for seeking review of the defendant's decision, and after providing contested case hearing rights.

39. The plaintiff's purported rule refusing to consider applications for AAV license renewals is invalid because not properly adopted pursuant to the rule-making procedures of Chapter 227, Wis. Stats.

40. The plaintiff, therefore, is entitled to a judgment declaring the invalidity of the defendant's actions, including the defendant's purported rule refusing to consider renewal of AAV approvals, which rule was promulgated without compliance with statutory rule-making procedures, and which rule interferes with and impairs the legal rights and privileges of the plaintiff.

41. The defendant has exceeded its authority by purporting to adopt a rule that precludes consideration of renewal applications for AAV's, which unwritten rule purporting to distinguish between supposedly renewable and unrenewable approvals is arbitrary and capricious.

42. The plaintiff further is entitled to a declaratory judgment rejecting the defendant's claim that it no longer has authority to consider renewal applications for AAV's.

43. The defendant previously has considered and granted renewal applications for AAV's, just as it has consistently done in cases of other alternate approvals that have come up for renewal, and the defendant's sudden claim to lack such authority is a deliberate procedural sham.

44. The defendant has deliberately reconstrued its authority by denying that it has the power to consider renewal applications for AAV's, an unprecedented and mischievous claim of self-abnegation intended to prevent continuation of plaintiff's alternate approvals pending a renewal process that would provide legal fairness.

45. The plaintiff, in fact, is entitled to renewal of its AAV licenses, under the standard for approval that the defendant has consistently applied in the past for renewals.

46. The plaintiff's AAV's, as a matter of established adjudicatory fact, have not failed to perform, nor have they caused any harm to public health and safety, which facts have been proven to be true.

47. The defendant has denied the plaintiff its constitutional right to due process, and the defendant has acted under color of law in doing so, thereby violating 42 USC §1983.

48. The plaintiff seeks prospective injunctive relief against the defendant as to the plaintiff's rights enforceable under § 1983.

49. The defendant's actions also violate §1983 by denying the plaintiff the equal protection of the law, including by discriminatorily adopting and enforcing a special rule precluding renewal of AAV licenses.

50. The defendant has acted in wanton circumvention of the plaintiff's rights, thereby causing continuing and irreparable detriment to the plaintiff.

WHEREFORE, the plaintiff demands judgment as follows:

1. Ordering the defendant by writ of mandamus to take immediate action to consider renewal of plaintiff's AAV approvals;

2. Declaring that the defendant's unwritten policy precluding renewal of AAV approvals is invalid because it exceeds the scope of the defendant's authority and is arbitrary and capricious, and because the rule violates the plaintiff's constitutional rights, and because the rule has not been properly and openly adopted;

3. Declaring that the defendant's actions violate the plaintiff's constitutional rights, and that said violations have occurred under color of law, and ordering that such violations be preliminarily and permanently enjoined pursuant to 42 USC § 1983; and

4. For such further relief as the Court deems just and equitable.

Dated this 15th day of March, 2010.

BOARDMAN, SUHR, CURRY & FIELD, LLP

By:

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FORWARD
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MADISON, WISCONSIN 53701-1664
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SENDER'S E-MAIL: dougwitte@mellilaw.com

SENDER'S DIRECT LINE: (608) 310-3616

March 26, 2010

HAND DELIVERED
Mr. Josh Zepnick
Co-Chair JCRAR
Room 219, North State Capitol
P.O. Box 8953
Madison, WI 53708

Mr. Jim Holperin
Co-Chair JCRAR
Room 409, South State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Re: *Associated Builders and Contractors of Wisconsin, Inc., et al. v. Department Of Workforce Development, et al.*
Case No. 10-CV-496

Gentlemen:

As co-chairs of the Joint Committee for Administrative Rules, we are hereby serving you each with a copy of the referenced lawsuit. The Attorney General's office is representing the defendants in this matter.

Very truly yours,

Douglas E. Witte

DEW/mjj

Enclosure

STATE OF WISCONSIN | CIRCUIT COURT BRANCH _____ | DANE COUNTY

ASSOCIATED BUILDERS AND
CONTRACTORS OF WISCONSIN, INC.
A Wisconsin corporation
5330 Wall Street
Madison, WI 53718,

REESMAN'S EXCAVATING & GRADING, INC.
A Wisconsin corporation
28815 Bushnell Road
Burlington, WI 53105,

WONDRA CONSTRUCTION, INC.
A Wisconsin corporation
W. 2874 Graylog Road
Iron Ridge, WI 53035,

and

CARROLL ELECTRIC, INC.
A Wisconsin corporation
1312 Barberry Drive, Suite 110
Janesville, WI 53545,

Plaintiffs,

vs.

DEPARTMENT OF WORKFORCE DEVELOPMENT
An Agency of the State of Wisconsin
201 E. Washington Avenue
Madison, WI 53703,

and

ROBERTA GASSMAN, SECRETARY
Department of Workforce Development
201 E. Washington Avenue
Madison, WI 53703,

Defendants.

Case No. **10CV0496**
Code No. 30701, 30704

DECLARATORY JUDGMENT
INJUNCTIVE RELIEF

SUMMONS

THE STATE OF WISCONSIN

To the above-named Defendants:

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

Within forty-five (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, 215 S. Hamilton Street, Room 1000, Madison, Wisconsin 53703, and to Melli Law, S.C., Plaintiffs' attorneys, whose address is Ten East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664. You may have an attorney to help or represent you.

If you do not provide a proper answer within forty-five (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 this 20th day of January, 2010.

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Attorneys for Plaintiffs

STATE OF WISCONSIN CIRCUIT COURT BRANCH ___ DANE COUNTY

CIRCUIT COURT
2010 JAN 29 PM 2:39
DANE COUNTY, WI

ASSOCIATED BUILDERS AND
CONTRACTORS OF WISCONSIN, INC.
A Wisconsin corporation
5330 Wall Street
Madison, WI 53718,

REESMAN'S EXCAVATING & GRADING, INC.
A Wisconsin corporation
28815 Bushnell Road
Burlington, WI 53105,

WONDRA CONSTRUCTION, INC.
A Wisconsin corporation
W. 2874 Graylog Road
Iron Ridge, WI 53035,

and

CARROLL ELECTRIC, INC.
A Wisconsin corporation
1312 Barberry Drive, Suite 110
Janesville, WI 53545,

Plaintiffs,

vs.

DEPARTMENT OF WORKFORCE DEVELOPMENT
An Agency of the State of Wisconsin
201 E. Washington Avenue
Madison, WI 53703,

and

ROBERTA GASSMAN, SECRETARY
Department of Workforce Development
201 E. Washington Avenue
Madison, WI 53703,

Defendants.

10CV0496

Case No. _____
Code No. 30701, 30704

DECLARATORY JUDGMENT
INJUNCTIVE RELIEF

COMPLAINT

Plaintiffs, Associated Builders and Contractors of Wisconsin, Inc., Reesman's Excavating & Grading, Inc., Wondra Construction, Inc., and Carroll Electric, Inc., by their attorneys, Melli Law, S.C., as and for its Complaint against Defendants allege the following:

1. Plaintiff Associated Builders and Contractors of Wisconsin, Inc. ("ABC of Wisconsin") is a Wisconsin corporation with its principal place of business located at 5330 Wall Street, Madison, Wisconsin 53718. ABC of Wisconsin includes approximately 800 member businesses throughout the state of Wisconsin. Approximately 350 to 400 members perform prevailing wage work from time to time. ABC of Wisconsin serves as an advocate for these businesses to encourage business development, capital investment and job creation. ABC of Wisconsin also exists to protect its member employers and the Wisconsin business community against legislative and administrative actions that violate their rights under state and federal law through informational meetings, community and public relations, political action and advocacy, and litigation if necessary. This assistance and protection is directly germane to the purpose of ABC of Wisconsin.

2. Plaintiff Reesman's Excavating & Grading, Inc. (Reesman's) is a Wisconsin corporation with its principal place of business located at 28815 Bushnell Road, Burlington, Wisconsin 53105.

3. Reesman's is in the business of providing excavating and grading services to public and private entities throughout the state of Wisconsin.

4. Reesman's frequently performs work on prevailing wage projects in the state of Wisconsin.

5. Wondra Construction, Inc. ("Wondra") is a Wisconsin corporation with its principal place of business at W. 2874 Graylog Road, Iron Ridge, Wisconsin 53035.

6. Wondra is in the business of providing general construction and construction services to public and private entities in the state of Wisconsin.

7. Wondra frequently performs work on projects subject to the prevailing wage statutes in Wisconsin.

8. Carroll Electric, Inc. ("Carroll") is a Wisconsin corporation with its principal place of business at 1312 Barberry Drive, Suite 110, Janesville, Wisconsin 53545.

9. Carroll is in the business of providing general construction and construction services to public and private entities in the state of Wisconsin.

10. Carroll frequently performs work on projects subject to the prevailing wage statutes in Wisconsin.

11. Defendant Department of Workforce Development is a state agency of the State of Wisconsin with its principal place of business located at 201 E. Washington Avenue, Madison, Wisconsin 53703.

12. Defendant Roberta Gassman, is the secretary of the Department of Workforce Development whose office is located at 201 E. Washington Avenue, Madison, Wisconsin 53703.

13. This court has jurisdiction over the matters alleged herein. Additionally, venue is proper in this judicial district as provided for in Section 227.40, Wis. Stats.

14. 2009 Wisconsin Act 28 (The Budget Bill) was enacted in June of 2009.

15. The Department of Workforce Development is responsible for, among other things, administering and enforcing certain of the prevailing wage laws in Wisconsin including §§ 66.0903, *et. seq.*, (municipal), 66.0904, *et. seq.*, (publicly funded private construction) and 103.49 *et. seq.* (state).

16. Section 1483f of 2009 Wisconsin Act 28 created § 66.0903(10)(am) of the statutes which creates a reporting requirement for municipal prevailing wage projects and reads as follows:

> 1. Except as provided in this subdivision, by no later than the end of the first week of a month following a month in which a contractor, subcontractor, or contractor's or subcontractor's agent performs work on a project of public works that is subject to this section, the contractor, subcontractor, or agent shall submit to the department in an electronic format a certified record of the information specified in par. (a) for that preceding month. This requirement does not apply to a contractor, subcontractor, or agent if all persons employed by the contractor, subcontractor, or agent who are performing the work described in sub. (4) are covered under a collective bargaining agreement and the wage rates for those persons under the collective bargaining agreement are not less than the prevailing wage rate. In that case, the contractor, subcontractor, or agent shall submit to the department in an electronic format a copy of all collective bargaining agreements that are pertinent to the project of public works by no later than the end of the first week of the first month in which the contractor, subcontractor, or agent performs work on the project of public works.
>
> 2. The department shall post on its Internet site all certified records and collective bargaining agreements submitted to the department under subd. 1., except that the department may not post on that site the name of or any other personally identifiable information relating to any employee of a contractor, subcontractor, or agent that submits information to the department under subd. 1. In this subdivision, "personally identifiable information" does not include an employee's trade or occupation, his or her hours of work, or the wages paid for those hours worked.

17. Section 1487 of 2009 Wisconsin Act 28 creates the same reporting requirement set forth in paragraph 19 for publicly funded private construction projects in § 66.0904(8)(am).

18. Section 2191f of 2009 Wisconsin Act 28 creates the same reporting requirement set forth in paragraph 19 for state prevailing wage projects in § 103.49(5)(am).

19. Section 9456 of 2009 Wisconsin Act 28 provides the effective date of §§ 66.0903(10)(am), 66.0904(8)(am), and 103.49(5)(am) as January 1, 2010.

20. Neither §§ 66.0903(10)(am), 66.0904(8)(am), 103.49(5)(am) nor any other provision of 2009 Wisconsin Act 28, specifically authorizes the Department of Workforce Development to prescribe forms or procedures specifying what the certified record should be.

21. Section 66.0903(10)(a) of Wis. Stats. provides as follows:

> Each contractor, subcontractor, or contractor's or subcontractor's agent performing work on a project of public works that is subject to this section shall keep full and accurate records clearly indicating the name and trade or occupation of every person performing the work described in sub. (4) and an accurate record of the number of hours worked by each of those persons and the actual wages paid for the hours worked.

22. On or about January 22, 2010 the Department of Workforce Development ("DWD") posted on its website information concerning the "Certified Payroll Reports," it was going to require in order for contractors to be in compliance with the reporting requirements set forth in §§ 66.0903(10)(am), 66.0904(8)(am), 103.49(5)(am), Wis. Stats.

23. DWD's website specified three methods contractors could use to satisfy DWD's "Certified Payroll Reports" reporting requirements. Each of those methods relies on an Excel spreadsheet format or requires contractors to fill in 50 separate fields of information for each employee for each week for each project.

24. DWD has stated that the forms or electronic format will be available on February 1, 2010 for use by companies subject to the reporting requirements of §§ 66.0903(10)(am), 66.0904(8)(am), 103.49(5)(am) Wis. Stats.

25. Prior to issuing the "Certified Payroll Reports" form and system DWD did not go through any rule-making process pursuant to Chapter 227, Wis. Stats.

26. Section 227.01(13), Wis. Stats. defines a rule, in part, as follows:

"Rule" means a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which:

(q) Is a form the content or substantive requirements of which are prescribed by a rule or a statute.

27. Section 227.11, Wis. Stats. provides, in part, as follows:

Extent to which chapter confers rule-making authority.
(1) Except as expressly provided, this chapter does not confer rule-making authority upon or augment the rule-making authority of any agency.
(2) Rule-making authority is expressly conferred as follows:
(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation.
(b) Each agency may prescribe forms and procedures in connection with any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but this paragraph does not authorize the imposition of a substantive requirement in connection with a form or procedure.

28. Section 227.23, Wis. Stats. provides as follows:

Forms. A form imposing a requirement which meets the definition of a rule shall be treated as a rule for the purposes of this chapter, except that:
(1) Its promulgation need not be preceded by notice and public hearing.
(2) It need not be promulgated by the board or officer charged with ultimate rule–making authority but may be promulgated by any employee of the agency authorized by the board or officer.
(3) It need not be published in the code and register in its entirety, but may be listed by title or description together with a statement as to how it may be obtained.

29. DWD did not list or describe the "Certified Payroll Reports" form or system in the Administrative Register prior to issuing the form and system.

30. By requiring the information in the 50 fields of data set forth on the Department's "Certified Payroll Reports" form and system the Department has imposed a substantive requirement not authorized by the enabling statute. Such substantive requirements include:

a. employee social security number;

b. the job code [as opposed to the trade or occupation] and whether an employee is an apprentice or subjourneyperson;

c. the [payroll] week starting and ending date;

d. a daily breakdown of the straight time and overtime hours worked on the prevailing wage project;

e. the weekly straight time and overtime hours worked on other projects by the employee;

f. the project basic straight time, fringe straight time, and total straight time rates of pay;

g. the project basic overtime, fringe overtime and total overtime rates of pay;

h. the other project weekly total wage amount;

i. the weekly gross wage amount; and

j. the check number

31. With respect to contractors, subcontractors or agents whose employees perform work under a collective bargaining agreement where the wage rates for those persons are not less than the prevailing wage rate on the project the Department has indicated that it will require those contractors to file a "Wage Allocation Sheet" instead of the collective bargaining agreements as specified in the statute.

32. The Department has also indicated that for contractors covered under a collective agreement that it will collect additional information including employees' names and trade or occupation and require full reporting on all apprentices.

33. Prior to making that determination in paragraphs 31-32 the Department did not engage in any rule-making process.

34. By not requiring the full collective bargaining agreements to be submitted the Department has changed a substantive requirement not found in the enabling statute.

35. By requiring the additional information in paragraph 32 the Department has imposed a substantive requirement not found in the enabling statute.

36. The three named Plaintiffs in the case along with ABC of Wisconsin members and all other contractors throughout the state who perform prevailing wage work will be required to comply with the Department's "Certified Payroll Reports" form and system if they perform prevailing wage work.

37. Plaintiffs are directly and adversely affected by the "Certified Payroll Reports" form and system because they will be required to comply with the form or system or face sanctions, including debarment from the Department.

38. The Department's actions in creating this "Certified Payroll Reports" form and system which imposes substantive requirements and not going through the rule-making process violates Section 227.04, Wis. Stats.

39. Plaintiffs will be will be injured by the Department's actions by having to comply with an improper rule. The Department's actions are contrary to the public interest and violate the rule-making process set forth in the statutes.

40. Reporting under the Department's "Certified Payroll Reports" form and system has not yet begun but is expected to begin on February 1, 2010.

41. Plaintiffs are entitled to a declaratory judgment, pursuant to Wis. Stats. Sections 806.04 and 227.40 to determine the validity of the "Certified Payroll Reports" form and system and specifically to obtain a declaration that the "Certified Payroll Reports" form and system is invalid because the "Certified Payroll Reports" form and system exceeds the Department's authority.

42. Unless the "Certified Payroll Reports" form and system is restrained and enjoined from being launched and enforced on February 1, 2010 Plaintiffs will be forced to comply with the system or face sanctions under the prevailing wage laws. If Plaintiffs are forced to comply with the system they will be irreparably harmed because they will be required to submit information not required by the statute.

43. Plaintiffs have no adequate remedy at law because an action for monetary damages cannot be maintained against the Department under these circumstances.

44. Plaintiffs actual and threatened injuries include, but are not limited to the cost of developing a payroll program to comply with DWD's "Certified Payroll Reports" form and system or the time spent by Plaintiffs' employees entering a burdensome amount of data not required by the statute.

45. Plaintiffs and the public in the state of Wisconsin will be injured if contractors with employees covered by collective bargaining agreements are not required to submit their full collective bargaining agreements because they will be unable to determine the terms and conditions under which the covered contractors' employees are employed.

46. Because the "Certified Payroll Report" form and system was not properly enacted either as a rule or as a form which does not add to or delete substantive requirements, the "Certified Payroll Report" form and system is invalid and the Department must be temporarily and permanently enjoined from enforcing the "Certified Payroll Report" form and system as currently designed.

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare the "Certified Payroll Report" form and system as designed by DWD invalid because it exceeds the Department's powers under Chapter 227.
2. Issue a temporary and permanent injunction enjoining the Department from enforcing the "Certified Payroll Report" form and system until it is designed to comply with the statutory requirements.
3. Grant such other legal and equitable relief as the Court deems just and proper.

Dated this 24th day of January, 2010.

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Attorneys for Plaintiffs


FORWARD
E PLURIBUS UNUM

STATE OF WISCONSIN | CIRCUIT COURT BRANCH VI | DANE COUNTY

STATE OF WISCONSIN EX REL.
JEFFREY HOLZEMER,

PETITIONER,

v. Case No. 10-CV-3616

DEPARTMENT OF CORRECTIONS,
RICHARD RAEMISCH,
AND WILLIAM J. GROSSHANS,

RESPONDENTS.

PETITIONER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS, INTERROGATORIES, AND ADMISSIONS

Pursuant to § 804.08 and § 804.09, § 804.11, Wis. Stats., petitioner, Jeffrey Holzemer, hereby serves his first set of document, interrogatory, and admission requests. Respondents are hereby requested to respond to the following document, interrogatory, and admission requests within thirty (30) days.

INSTRUCTIONS

¶1 In responding to these document, interrogatory, and admission requests, you are to use due diligence in securing the requested materials and information. Responding will require you to search past and present records and retrieval of information in your possession, from yourself and predecessors in office, employees, and other persons associated with the above respondents in their official capacities.

¶2 You are to answer each interrogatory separately and fully in writing and under oath. If you cannot answer an interrogatory in full, you should state that fact, after exercising due diligence in securing the information, and provide an answer to the extent possible.

¶3 For purposes of these document, interrogatory, and admission requests, you are to respond to facts pertaining to DAI Policies 309.20.03(X)(C)(14) and 309.20.03(I)(D)(13) which impinge on mail / property rules at issue in this suit. Interrogatory responses that do not specify a particular institution will be understood as applicable to all the department's adult institutions.

¶4 If you object to production of a particular document within the scope of this request, identify the nature of your objection and indicate the type of document (*e.g.*, letter, memorandum, report, e-mail, minute, agenda, *etc.*), its date, location, and subject matter with sufficient detail for plaintiff to identify for a subpoena *duces tecum* in a motion to compel discovery.

¶5 If you object in any way to a particular document request, you are requested to provide all other

documents reasonably identifiable as responsive to this request and not covered by your objection.

¶6 You are requested to produce these "documents" in a timely and orderly fashion. If you choose to redact any of these "public documents" herein requested, please provide a copy of them un-redacted for *in camera* inspection, by the Honorable Shelley Gaylord, of those documents.

DEFINITIONS

¶1. The term "***document***" has the broadest possible meaning under § 809.09, Wis. Stats., and includes everything reduced to writing, including originals and drafts, and shall include without limitation: letters, memorandum, notes, e-mails, complete meeting agenda and minutes, contracts, policy statements, directives, guidelines, criteria, forms, notation or summaries of telephone calls, bulletins, and "document" should also be defined to include any document open to public inspection of a state agency through the Open Records and Meetings Laws.

¶2. References such as "***Department, DAI, or DOC***" refer to the Division of Adult Institutions and/or the Wisconsin Department of Corrections and involves documents/instruments created by, received by, or in the constructive custody of, the respondents, their predecessors, employees, representatives, attorneys, or other persons associated with the Wisconsin Department of Corrections Division of Adult Institutions.

¶3. References to "***DAI Policy 309.20.03(X)(C)(14)***" refers to the DOC rule prohibiting inmates' receipt of commercially published photographs.

¶4. References to "***DAI Policy 309.20.03(I)(D)(13)***" refers to the DOC rule limiting inmates' receipt of calendars.

DOCUMENT REQUESTS

¶1. All "***documents***" pertaining to the creation, implementation, and execution of DAI Policies 309.20.03(I)(D)(13) and 309.20.03(X)(C)(14), including minutes, agendas, notes, or any other "documents" describing or summarizing any statements made or discussed at: **a)** meetings or conversations of wardens from the DAI, including, but not limited to, meetings between wardens and central office staff from the DAI; and **b)** meetings or conversations of any committee created to evaluate revisions to department rules, including any subcommittee created to evaluate possible changes in the rules governing the receipt of commercially published photographs and calendars.

¶2. All "***documents***" relating to the creation, implementation, and execution of the Wisconsin DOC "Inmate Vendor Catalog System."

¶3. State the name for each department employee, their job titles, position descriptions (to include DOC forms DER-DCC-84, DER-PERS-10, OSER-DMRS-11, *etc.*), and tasks performed; include all persons, including drafters and individuals in and outside of the Department of Corrections involved in the creation, development, implementation, execution, and promulgation of DAI Policies **a)** 309.20.03(X)(C)(14); and **b)** 309.20.03(I)(D)(13) pursuant to chapter 227, Wis. Stats.

¶4. State all penological objectives you contend are served by DAI Policies 309.20.03(X)(C)(14) and 309.20.03(I)(D)(13).

¶5. If not fully set forth in "***documents***" being produced in response to the above requests, please explain in detail the department's protocols, procedures, and practices, limiting or guiding official

discretion of Department of Corrections mailroom staff, for the allowance or disallowance of inmate(s) receipt of commercially published photographs, personal photographs, and calendars.

INTERROGATORIES

¶1. Explain, in detail, why it became necessary for the Department to establish a ban on commercially published photographs and calendars?

¶2. What guidelines (*or criteria*) does the DOC apply in determining what is or is not a commercially published photograph?

¶3. What application, pursuant to ¶2 above, distinguishes a commercially published photograph from a personal photographs?

¶4. Why are all commercially published photographs being denied, pursuant to DAI Policy 309.20.03(X)(C)(14), even when those photographs are in compliance with DOC § 309.02(14), Wis. Adm. Code, in not showing "human male or female genitals or pubic area with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state?"

¶5. What motivation, and whose inspiration, brought about and caused commercially published photographs to be singled out for denial, even when allowed per Wis. Adm. Code?

¶6. When an inmate receives a commercially published photograph through the U.S. Mail, what Wisconsin Statute, Wisconsin Administrative Code, DOC/DAI rule or policy, is used to deny the delivery of that commercially published photograph to the inmate?

¶7. How much staff time is actually spent on screening and processing photographs, whether commercial or personal?

¶8. What differences are there in the screening processes for "commercially published photographs" compared to "personal photographs"?

¶9. Why does the DOC maintain that only commercially published photographs may be stolen, traded, or purchased from other inmates when so too could personal photographs?

¶10. Why did the DOC create the encumbrance of requiring property receipts for all photographs?

¶11. Why, after making the rule requiring receipts, does the DOC then complain that it takes so much staff time to screen and process photographs when they themselves created the encumbrance of requiring receipts for photographs in the first place?

¶12. Why did the DOC then rescind the rule requiring property receipts for all photographs after they banned commercially published photographs?

¶13. How many DOC employees are assigned to an institution mailroom: **a)** before; and **b)** after; the banning of commercially published photographs?

¶14. How many DOC staff are posted to an institution's mailroom: **a)** for the day; and **b)** for the entire shift; and when are additional staff posted to an institution's mailroom to assist in the screening

and processing of photographs?

¶15. What Wisconsin State Statute, and/or Wisconsin Administrative Code, permits the DOC implementation of an "Inmate Vendor Catalog System" that utilizes companies located outside the state of Wisconsin *[Access, Jack L. Marcus, Walkenhorsts, and Union Supply Direct]*, and allows them to charge and collect Wisconsin State Sales Tax?

ADMISSIONS

¶1. When there is a clear contradiction between Wisconsin Administrative Code, Internal Management Procedure, and Division of Adult Institution Policy, you must adhere to, and follow, the Wisconsin Administrative Code over the Internal Management Procedure or Division of Adult Institution Policy.

¶2. DAI Policy # 309.20.03 cross-references Wis. Admin. Code sections: 303.10 - Seizure and disposition of contraband; 309.04 - Inmate Mail; 309.05 - Publications; 309.20 - Personal Property; 309.40 - Clothing; 309.02(16) - Pornography; 309 IMP 50 - Pornography. These Wis. Admin. Code sections create detailed guidelines for inmate's incoming and outgoing mail and property but do not authorize an addition to the rule by administrative directive such as DAI Policies

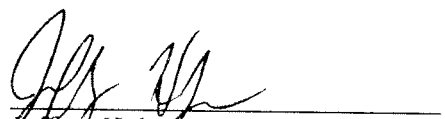
¶3. When there is a clear contradiction between what is stated in Wis. Admin. Code § DOC 309 and what is stated in DAI Policies 309.20.03(I)(D)(13) and 309.20.03(X)(C)(14), you must adhere to what is stated in the Wis. Admin. Code.

¶4. DAI Policies 309.20.03(I)(D)(13) and 309.20.03(X)(C)(14) were not promulgated pursuant to Wis. Stat. § 227.11(2).

¶5. Your duty is to monitor and ensure that all WDOC institutions are in compliance with Wis. Admin. Code § 309.02(14), wherein it is stated that: "***Nudity***" for commercially published material means the showing of human male or female genitals or pubic area with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state. "***Nudity***" for purposes of a personal photographs means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state.

¶6. Wisconsin Department of Corrections Internal Management Procedure DOC 309, IMP 50 states that ***Commercially produced*** postcards, ***calendars***, and greeting cards ***are considered publications***.

Dated this 23rd day of September, 2010.



Jeffrey Holzemer - Petitioner
New Lisbon Correctional Institution
P.O. Box 4000
New Lisbon, Wisconsin 53950

CERTIFICATE OF MAILING

I, Jeffrey Holzemer, declare that I am the petitioner in the above entitled action and that on this 23rd day of September, 2010, I deposited the foregoing "*PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS, INTERROGATORIES, and ADMISSIONS*" into the prisoner's mailbox at the New Lisbon Correctional Institution, to be mailed by First Class U. S. Mail to:

1 Dane County Clerk of Circuit Court
% Carlo Esqueda
215 S. Hamilton Street
Madison, Wisconsin 53703-3285

2 **A.A.G. John J. Glinski**
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

3 J.C.R.A.R
% Chairperson Senator Jim Holperin
Room 409 South, State Capitol
P.O. Box 7882
Madison, Wisconsin 53707-7882

4 J.C.R.A.R
% Chairperson Representative Josh Zepnick
Room 219 North, State Capitol
P.O. Box 8953
Madison, Wisconsin 53708

Jeffrey Holzemer - Petitioner